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Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners*

Part Two of Two Articles: Obtaining Data, Formulating Claims and Anticipating Objections

The poor are not the cause [of distressed neighborhoods]. The real cause is the poverty, the unemployment, and also the lack of concern by [people responsible for] their condition. So [the poor] are the victims.

So I would like to say that I totally disagree with the suggestion to relocate the poor out of the cities. Doing that is to attack unwholesome problems by looking at only one side of it and it will merely bring trouble from one place to another. Where can the poor move to and how and why? This solution will only perpetuate the same discordance, frustration, and so forth, which now exists in the cities.

Are we going to spend the same expenses to build new houses for the poor as we plan to do for the high income in the city? Are we going to build new, good hospitals, new, good facilities, new, good public institutions in those areas for the poor?¹

Introduction: HUD's Role

Part One² of this two-part series of articles was an overview of federal fair housing law relating to discriminatory effect liability and the affirmative fair housing duties of public housing authorities (PHAs) and the owners of federally assisted, multifamily housing developments. Part Two will outline the sources of demographic statistical data and other related information available on the Internet to support claims, describe

*This series of articles is an extension of an article written by David Bryson on the fair housing duties of HUD regarding the loss of federally assisted housing. See *HUD's Fair Housing Duties and the Loss of Public and Assisted Units*, 29 HOUS. L. BULL. 1 (Jan. 1999)(available online at www.nhlp.org/hlb/199/199fairhsg.htm). NHLP extends its special thanks to Henry Korman, formerly of Cambridge and Somerville Legal Services and Professor Duncan Kennedy of Harvard Law School for their generous assistance in the preparation of this article.

¹Nho Trong Nguyen, Vietnamese-Buddhist Association of America, *Testimony before the Committee on Banking, Currency and Housing, House of Representatives*, 94th Cong., 2d. Sess., 234 (Sept. 20-24, 1976)(cited in John Calmore, *Fair Housing v. Fair Housing*, 14 CLEARINGHOUSE REV. 7, 18 (1980)).

²See *Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners*, 31 HOUS. L. BULL. 73 (Apr. 2001)(Part One).

how to approach the formulation discriminatory effect theories³ in situations involving the loss of public housing and federally assisted multifamily housing,⁴ and discuss the anticipated objections to the imposition of discriminatory effect liability against PHAs and project owners.

The duties the Department of Housing and Urban Development (HUD) will not be addressed in detail, largely because they have been addressed at length elsewhere.⁵ However, any claim brought against a PHA or project owner to challenge the loss of housing they administer should often also involve HUD as a defendant. HUD has fair housing duties under Title VIII of the *Civil Rights Act of 1968*, the *Fair Housing Act*,⁶ as extensive as those of PHAs and project owners, including the affirmative duty to further fair housing.⁷ Despite this, HUD has long been inattentive to its fair housing duties, making little or no effort to assess the civil rights effects of its decisions in the administration of the federal housing programs.⁸ In addition, HUD will nearly always be involved in the demolition or conversion process—for example, approving and funding public housing demolitions and proposing (or failing to propose) new subsidy levels for affordable developments subject to project-based Section 8 subsidy contracts—which usually means that HUD’s inclusion in a suit will be necessary to obtain full relief and to preserve the housing that is the subject of the suit.

Obtaining Demographic Data about Developments, Neighborhoods, and Regional Housing Needs

The first step in assessing the fair housing effects of the threatened loss of a federally assisted housing development is to assemble a demographic profile of the development and of the wider community. Fortunately, a large amount of detailed information is now publicly available on the Internet. With this information, it is possible to determine the demographic characteristics of particular housing developments and the census tracts in which these developments are located and how housing needs may vary according to racial and ethnic groups in cities, counties, and metropolitan areas. With a little more effort, it is also possible to determine how Section 8 voucher

utilization patterns may vary according to race, national origin, and other categories, in particular, geographic areas.⁹

The Picture of Subsidized Households

In 1996, 1997, and 1998, the HUD Office of Policy Development and Research published a two-part data set, the *Picture of Subsidized Households (Picture)*.¹⁰ Organized by state, the *Picture* data sets report demographic information on households participating in federally assisted housing programs for individual public housing and multifamily assisted housing developments and census tracts.¹¹ The information provided is extensive and includes: the number of units in each development or the number of tenant-based Section 8 households per census tract, the percentage of households of color, the percentage of households with children present, and the percentages of households including persons with disabilities, average household income, and average length of tenure, in addition to other information.¹²

The data in the *Picture* is several years old¹³ and not always complete,¹⁴ but provides, nonetheless, a very readily accessible and detailed demographic snapshot of a federally assisted development or patterns of tenant-based Section 8 utilization in a geographic area.¹⁵ The ready availability of the *Picture* online and the ease with which the detailed data it contains may be analyzed electronically makes it a very powerful resource, especially when paired with some of the other sources of information described below.

⁹The following discussion is intended to guide an initial assessment of the viability of discriminatory effect claims. Even though the uses of data described below are fairly simple and straightforward, actual presentation of a demographic analysis at trial is probably best done through an expert witness. See generally ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* (“SCHWEMM”) at § 32.3(6) (1996).

¹⁰Available online at www.huduser.org/datasets/assthsq/statedata98/index.html (1998); www.huduser.org/datasets/assthsq/statedata97/index.html (1997); and www.huduser.org/datasets/assthsq/statedata96/index.htm (1996). HUD’s sources for the *Picture* are 1990 census data and HUD-50058 and HUD-50059 forms submitted by PHAs and project owners. In addition to the *Picture*, a more limited report of 1994 PIH data is available at: www.huduser.org/publications/pubasst/famdat.html.

¹¹Aggregate information for a PHA’s public housing, tenant-based Section 8, and Section 8 Moderate Rehabilitation developments are also included in the *Picture*.

¹²There are approximately three dozen data fields of family demographic data, in addition to development-specific information such as address, numbers of bedrooms per unit, and latitude and longitude. Some of household demographic data is presented in more than one data field—e.g., presence of children in a household, which is presented as percentage of households with children with one spouse present and percentage of households with children with both spouses present.

¹³In addition to data specific to assisted families, the *Picture* also includes 1990 tract-level census data on the percentage of households of color, poverty levels, and percentages of homeownership for the tracts in which developments are located.

¹⁴The census tract data set contains far more gaps than the development and PHA data set. HUD appears to have censored information for those census tracts containing fewer than 14 tenant-based Section 8 households.

¹⁵Recognizing that the data are not complete, see *id.*, the census tract *Picture* data set can be imported into a spreadsheet application fairly easily. The data can then be analyzed to determine trends at least for those census tracts in a geographic area that have the highest concentrations of households renting housing with tenant-based Section 8 assistance.

³As with *Part One*, this discussion will focus on federal housing law as it related to race and national origin. Title VIII provides protection on the basis of a number of other classifications as well. See *Part One*, 31 HOUS. L. BULL. 76, n. 24.

⁴For the purposes of this discussion, these will be referred to collectively as “federally assisted housing.”

⁵See *HUD’s Fair Housing Duties and the Loss of Public and Assisted Units*, 29 HOUS. L. BULL. 1 (Jan. 1999)(*HUD’s Fair Housing Duties*).

⁶42 U.S.C. §§ 3601, *et seq.*

⁷See *Part One*, 31 HOUS. L. BULL. 84.

⁸See *HUD’s Fair Housing Duties*, 29 HOUS. L. BULL. 7 (citing *Morton v. Mancari*, 417 U.S. 535, 549 (1974) and the *Report on Minority Group Considerations* requirement imposed on HUD as a result of criticism over the its urban renewal programs).

The American Factfinder

Data from the 2000 census is gradually¹⁶ becoming available on the Census Bureau Web site. Currently, some race, age, and national origin data are accessible on-line through the new and user-friendly American Factfinder data system.¹⁷ As more data is added to the Factfinder data system, it will become an increasingly valuable resource. In the meantime, a large amount of 1990 data, including income and housing data, is available through the 1990 Census Lookup data system.¹⁸ Until more 2000 data is released, 1990 data will often be the most recent data available.

Public Housing Agency Plans

In addition to being an early warning system for possible public housing demolition, disposition, or revitalization activities by PHAs,¹⁹ PHA Annual Plans and Five-Year plans²⁰ often provide demographic data about the families in PHAs' jurisdictions.²¹ In particular, annual plans often include demographic data about the composition of public housing and Section 8 voucher waiting lists by categories such as race, national origin, and disability. Five-year plans are supposed to include a statement of "Housing Needs of Families in the [PHA's] Jurisdiction by Family Type" that compares the housing needs²² of families of various demographic and income groups.

The Housing Needs Table

Approximately six years ago, HUD commissioned a special tabulation of 1990 Census data for use by Community Development Block Grant (CDBG) recipients in the Consolidated Planning (ConPlan) process. This tabulation has been published in an online Housing Needs Table data system.²³ The data system allows a user to compare, fairly easily, the needs for affordable housing of renter and other households by race and national origin²⁴ in specific states, counties, or census places throughout the country. The data system produces reports showing the percentage of households of different types that have "housing problems," meaning for these purposes that households pay more than 30 percent of

¹⁶See U.S. Census Bureau, *Census 2000 Release Schedule* (Jun. 7, 2001)(available online at factfinder.census.gov/home/en/releaseschedule.html).

¹⁷See factfinder.census.gov/servlet/BasicFactsServlet. Data is available by state, county, metropolitan area and census place. Some data is also available by census tract.

¹⁸See venus.census.gov/cdrom/lookup.

¹⁹See, e.g., 24 C.F.R. 903.7(h)(2000) (requiring PHAs to authorize demolition and disposition activities in their public housing agency annual plans).

²⁰These will be referred to generally as "PHA plans."

²¹Approved PHA plans without supporting documents are available online in pdf format at: www.hud.gov/pih/pha/plans/phaps-approvedplans.html.

²²Seven categories of needs: "Overall," "Affordability," "Supply," "Quality," "Accessibility," "Size," and "Location" are ranked on a five-point scale for each family type.

²³See webprod.aspensys.com/housing/chas/state.asp.

²⁴The data system is limited in this regard, offering four choices for generating reports: "All Households," "White, Non-Hispanic Households," "Black, Non-Hispanic Households," and "Hispanic Households."

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income for housing costs. While the underlying census data is dated, the Housing Needs Table data system provides the most recent information currently available. It is very useful in assessing the potential qualitative disparities²⁵ of impact by race or national origin of a loss of low-income housing opportunities in a particular geographic area. For example, with the Housing Needs Table data system, it is possible to determine what percentage of African American renter households of 0 to 80 percent of area median income (AMI) have housing affordability problems in a specific census area.

The American Housing Survey

HUD and the Census Bureau collect housing and demographic data on 46 metropolitan areas throughout the country as part of the American Housing Survey (AHS). AHS data is collected on each of the areas on a rotating basis approximately every four years.²⁶ Of all the data sources described here, AHS reports are by far the most detailed and include household demographic and income information, tenure, and housing amenities, configurations, and defects.

The Multifamily Tenant Characteristics System

HUD maintains an online data system of demographic data for households participating in its housing programs, the Multifamily Tenant Characteristics System (MTCS). Unlike the other data sources described above, MTCS is currently available to the public on a restricted basis only.²⁷ Via public access, MTCS provides demographic and income information about households participating in HUD housing programs, but only at the state, national, or PHA-level. Information about individual projects or census tracts is not accessible to the public.

HUD personnel and PHAs have much wider access to MTCS and have the ability to generate more detailed and specially tailored reports, including project-specific reports and analyses of Section 8 voucher geographic concentrations.²⁸ Even though many MTCS reports are not publicly accessible on HUD's Web site, it should be possible to obtain these reports from HUD through the *Freedom of Information Act*²⁹ or from PHAs through state *sunshine laws*. HUD is in

the process of implementing a second-generation data system, MTCS 2000.³⁰

Other Sources of Information

The sources described above are probably the most readily available, but the list is not exhaustive. In situations involving the loss of public housing, PHAs' demolition, disposition, and revitalization applications³¹ are essential documents that are usually not available online. A jurisdiction's ConPlan and Analysis of Impediments to Fair Housing, requirements of the CDBG program, can also provide useful information. However, these documents are typically not available online in complete form.³² In addition to ConPlans, local and state governmental agencies sometimes produce reports on affordable housing and housing needs,³³ as do housing rights organizations.³⁴ Finally, HUD has produced a software package, Community 2020, which can generate maps depicting housing data, including data on HUD housing programs, and demographic data.³⁵

Fortunately, a large amount of detailed information is now publicly available on the Internet.

Evaluating the Applicability of Discriminatory Effect Theories in Situations Involving the Loss of Federally Assisted Housing

Different data, from the sources described above or from other sources, will be relevant depending on the form of discriminatory effect being examined,³⁶ the means by which the housing is threatened, and the type of housing involved. Public housing and multifamily assisted housing will be addressed separately.

²⁵See *Part One*, 31 HOUS. L. BULL. 79, n.74.

²⁶See www.census.gov/hhes/www/housing/ahs/ahsdescr.html (*Description—American Housing Survey*). AHS reports from 1993 to 1999 are available in pdf format from the Census Bureau Web site at www.census.gov/mp/www/pub/con/mscho22a.html.

²⁷Public access to MTCS is available through the MTCS Guest Login page at www.hud.gov/mtcs/public/guest.cfm.

²⁸For a complete description of the reports that can be generated through MTCS, see *MTCS Web Reports Guide* (Sept. 1999)(available online at www.hud.gov:80/pih/systems/mtcs/webusr/webusr.html).

²⁹5 U.S.C.A. § 552 (West 2000). HUD has recently promulgated new *Freedom of Information Act* regulations clarifying procedures for obtaining electronic documents. Under the new regulations, electronic reports should be available even if they have not been previously generated. See 66 Fed. Reg. 6,964 (*Revision of Freedom of Information Act Regulations; Final Rule*).

³⁰See www.hud.gov:80/pih/systems/pic/mtcs2000/index.html.

³¹These applications typically include numerous attachments (project budgets, affordability targets, relocation projections, etc.) that often are even more informative than the text of the application itself.

³²Executive summaries of ConPlans are available online at www.hud.gov/library/bookshelf18/archivedsum.cfm. Complete ConPlans should be available from HUD through the Freedom of Information process or from local agencies through state sunshine statutes.

³³See, e.g., Florida Affordable Housing Study Commission, *The Affordable Housing Study Commission Final Report 1999* (available online at www.dca.state.fl.us/fdcp/DCP/Resources/publications/AH2000ver1revised.pdf).

³⁴See, e.g., Housing Comes First, *Still Vouchered Up and Nowhere to Go II* (Nov. 1999)(study of subsidized housing programs in Missouri); Minnesota Housing Partnership, *Vouchers to Nowhere: The Ever Shrinking Market for Section 8 Vouchers in Suburban Hennepin County, Minnesota* (Oct. 2000) (available online at www.mhponline.org/aff%20hsg%20info/sect8/sect8/homeline00/report.htm).

³⁵See generally www.hud.gov/cio/c2020.

³⁶*i.e.*, disparate impact or non-intentional perpetuation of segregation, see *Part One*, 31 HOUS. L. BULL. 77, n. 43, 78.

The Loss of Public Housing

Public housing units are lost when they are no longer operated as public housing. As described in Part One, units may be lost through the HOPE VI revitalization and demolition process or through the “demolition-disposition” (demo/dispo) process authorized by Section 18 of the *U.S. Housing Act*.³⁷ In addition, under new QHWRRA provisions, in the near to intermediate future, units may be lost again by being “vouchered out” or “converted;” a process by which a PHA’s public housing funding for a particular development is converted into tenant-based voucher funding on either a mandatory or voluntary basis.³⁸ HUD has not yet issued a complete set of final conversion regulations.³⁹

Disparate Impact and the Loss of Public Housing

The best way to approach a disparate impact analysis of the threatened loss of a public housing development is first to identify the groups that will be adversely affected and to identify the different actions and practices of the PHA related to the loss of the development that affect these groups.⁴⁰ The loss of a public housing development will always involve a series of actions, rather than any single act.⁴¹ Different groups will be affected by different actions. For example, in addition to the removal of physical structures, the demolition of a public housing development will usually involve the displacement of current residents. This displacement clearly affects these residents, but generally does not affect families on the admission waiting list for the development.

Data from the sources above or other sources can be examined to determine the ways in which members of protected classes in the affected groups are disparately affected by a PHA’s actions in removing a public housing development. For disparate impact purposes, three main

groups will be directly affected by the loss of a public housing development: current residents, families on the admission waiting list for the development, and other eligible families in the jurisdiction. This list is not exhaustive. Other groups also may be affected depending on the factual circumstances of particular cases. For example, fair housing organizations also may be affected by the loss of a public housing development to the extent that organizations must divert resources to address the fair housing effects of the loss of the development.⁴²

The loss of a public housing development will always involve a series of actions, rather than any single act. Different groups will be affected by different actions.

Effect on Current Residents

When a public housing development stands to be demolished, disposed of, or “revitalized,” current residents may be adversely affected in at least two ways. First, residents will usually be displaced from their homes. If no replacement housing is planned, the injury is fairly straightforward.⁴³ If replacement housing is planned, this should be examined. Courts are likely to examine replacement components at some stage in assessing the overall discriminatory effect of the PHA’s actions.⁴⁴ However, replacement does not by any means automatically foreclose a disparate impact claim. A PHA may plan to replace fewer units than the number of occupied units it plans to demolish. In addition, residents may end up being largely excluded from the new housing that the PHA plans to construct.⁴⁵ The best source for information on replacement housing, assuming (as usually will be the case) that the redevelopment planned is a part of a HOPE VI grant, is the PHA’s HOPE VI application. HUD’s HOPE VI application forms specifically require PHAs to report the estimated number of original households to return to the HOPE VI site, as well as the number of these residents who will be housed in newly constructed units.⁴⁶

⁴²See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); SCHWEMM at § 12.2(4).

⁴³See, e.g., *McNeil v. New York City Hous. Auth.*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989); *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 363 (1st Cir. 1985); *Johnson v. United States Dept. of Agric.*, 734 F.2d 774, 789 (11th Cir. 1984); *Edwards v. Habib*, 366 F.2d 628, 630 (D.C. Cir. 1965).

⁴⁴See, e.g., *Project B.A.S.I.C. v. Kemp*, 721 F.Supp. 1501, 1517 (D.R.I. 1989) (While minorities constituted 66 percent of the PHA’s tenants, challenge to demolition was without merit because replacement was planned).

⁴⁵For example, PHAs may target replacement housing to be affordable to income levels significantly higher than those of current residents. PHAs may also institute special admissions criteria for the replacement housing that will exclude current residents.

⁴⁶See *Application Data Form: Relocation, Income, and Non-Dwelling Structures* (Att. 22 of FY 2001 HOPE VI application form, available online at www.hud.gov/pih/programs/ph/hope6/Forms20-26.xls). These data forms include extensive demographic information about the public housing site pre and post-redevelopment. Race and national origin data, however, is not included.

³⁷See *id.* at 76-7.

³⁸See 42 U.S.C.A. § 1437t (West Supp. 2000)(voluntary conversion); *id.* § 1437z-5 (mandatory conversion).

³⁹See 64 Fed. Reg. 40,232 (Jul. 23, 1999)(*Required Conversion of Developments From Public Housing Stock; Proposed Rule*); 64 Fed. Reg. 40,240 (Jul. 23, 1999)(*Voluntary Conversion of Developments From Public Housing Stock; Proposed Rule*); 66 Fed. Reg. 33,616 (Jun. 22, 2001)(*Voluntary Conversion of Developments From Public Housing Stock; Required Initial Assessments*).

⁴⁰Not only does this approach make it easier to conceptualize and assess the disparate impact of a defendant’s actions, specificity of this kind is probably a required element of the disparate impact plaintiff’s case. See *Watson v. Fort Worth Bank & Trust* (“*Watson*”), 487 U.S. 977, 994 (1988) (“[W]e note that the [Title VII] plaintiff’s burden in establishing a prima facie case [of disparate impact in employment] goes beyond the need to show that there are statistical disparities in the employer’s work force. The plaintiff must begin by identifying the specific employment practice that is challenged.”).

⁴¹The Fifth Circuit has distinguished a “single act or decision” from a “a policy, procedure, or practice,” finding that a single act or decision is not a sufficient basis for a disparate impact complaint. See *Simms v. First Gibraltar Bank* (“*Simms*”), 83 F.3d 1546, 1555 (5th Cir. 1996). This decision is in tension with the disparate impact zoning decisions cases, such as *Huntington Branch, NAACP v. Town of Huntington* (“*Huntington*”), 844 F.2d 926, 934 (2nd Cir. 1988) and *Metropolitan Housing. Dev. Corp. v. Village of Arlington Heights* (“*Arlington II*”), 558 F.2d 1283, 1289-90 (7th Cir. 1977). See SCHWEMM at § 10.4(2)(b).

Second, residents may be forced to relocate to more distant, more poorly served, or more impacted areas.⁴⁷ When a PHA displaces public housing residents, it must first have a relocation plan in place.⁴⁸ As a practical matter, these relocation plans are often cursory.⁴⁹ To the extent that plans identify where residents will be relocated, census tract data can be obtained from online sources to determine the characteristics, including poverty levels, of the areas into which displaced residents will move. If a PHA plans to relocate residents with Section 8 vouchers, the jurisdiction's voucher utilization patterns can be analyzed. The *Picture* reports the location of each PHA's voucher households by census tract. In addition, PHAs will often circulate lists of properties participating in the voucher program. Data about the census tracts in which these properties are located from the Census data systems can also be examined.

Families on a PHA's public housing waiting list will be harmed by the loss of public housing units insofar as their opportunities for guaranteed affordable housing will be reduced and they will be forced to endure a longer wait for public housing units.

Possible racial disparities in these effects can be measured in several ways.⁵⁰ The basic idea in every approach is to determine whether people of color will become worse off, on a disproportionate basis, because of a PHA's plans. One, taking data from the *Picture*, the population of households of

color can be compared to the overall population of the development. Where households of color comprise a majority of the households adversely affected, this may constitute a racially disparate impact.⁵¹ Two, taking data from the *Picture* and the MTCS data system, the racial composition of the development can be compared to the racial composition of the PHA's total public housing stock or its combined public housing stock and Section 8 voucher program. A third possibility is to compare the racial composition of the development to the general population, probably the income-eligible renter household⁵² population. This data is available from the *Picture*, the Census data systems, and the Housing Needs Table data system. In the second and third approaches, there would be a disparate impact if the population of affected resident households includes a significantly greater percentage of families of color than does the population against which the affected population is compared.

Effect on Families on the Public Housing Admission Waiting List

Families on a PHA's public housing waiting list will be harmed by the loss of public housing units insofar as their opportunities for guaranteed affordable housing will be reduced and they will be forced to endure a longer wait for public housing units.⁵³ The possible racial disparities of these harms can be measured in the following ways. These are suggestions and are not intended to be exhaustive. One, the number of families of color on the PHA's waiting list, which should be reported in the PHA's Annual Plan, can be compared to the overall racial composition of the list. Where

⁴⁷See, e.g., *Jones v. Mayer Co.*, 392 U.S. 409, 442–43 (1968). Related issues regarding the perpetuation of segregation are discussed below.

⁴⁸Relocation pursuant to a HOPE VI plan is subject to the *Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act* ("URA"), 42 U.S.C. §§ 4601, *et seq.* The URA requires a relocation plan that minimizes the adverse impacts on displaced persons. See *id.* § 4625(a). After amendments of QHWRRA, Pub. L. No. 105-276 (Oct. 21 1998), relocation of residents due to the demolition or disposition of a public housing development pursuant to Section 18 of the *U.S. Housing Act of 1937*, 42 U.S.C.A. § 1437p (West 2000), is not subject to the URA and instead is subject to requirements included in Section 18 itself. See *Congress' New Public Housing and Voucher Programs*, 28 HOUS. L. BULL. 1 (Oct. 1998) (comprehensive discussion of QHWRRA amendments; available online at: www.nhlp.org/html/hlb/1098/1098congress.htm). HUD's notice regarding implementation of the amended Section 18 requires PHAs to have a relocation plan in place. See PIH 99-19, ¶6.F. (expiration date extended by PIH 2000-16).

⁴⁹See, e.g., HUD Special Application Center Relocation Plan template (applies to Section 18 demolition and disposition; available online at: www.hud.gov/pih/sac/ddreloc.pdf).

⁵⁰While *Wards Cove Packing Co. v. Atonio* ("Wards Cove"), 490 U.S. 642 (1989) imposed addition requirements, the Supreme Court has never provided comprehensive guidance on how disparity of impact should be measured even in the employment context. See *Part One*, 31 HOUS. L. BULL. 79. See also Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 420 (1998).

⁵¹See *Betsey v. Turtle Creek Assocs.* ("Betsey"), 736 F.2d 983, 988 (4th Cir. 1984); *In re Malone* ("Malone"), 592 F.Supp. 1135 (E.D.Mo. 1984). Using the total population of a development as the population against which to contrast is probably most appropriate where residents of a development stand to be affected in different ways. For example, a portion of the development might stand to be demolished—the racial composition of that portion could be compared to the entire development. Or, if the development of replacement housing is planned, the population of the former resident households who are estimated to return could be compared to the population of excluded households. As discussed in n. 46, *supra*, race and national origin data is not reported in HOPE VI data forms, but other demographic information, such as numbers of children and numbers of persons living with disabilities, is reported. Numbers of bedrooms per unit of replacement housing is also reported in HOPE VI data forms. A reduction in the number of multi-bedroom units can be expected disparately to affect families with children. See *Part One*, 31 HOUS. L. BULL. 76, n. 24.

⁵²See *id.* at 79.

⁵³See *U.S. v. Charlottesville Redevelopment and Housing Authority* ("Charlottesville"), 718 F.Supp. 461, 463 (W.D.Va. 1989) ("[F]or the purposes of assessing whether there has been a violation of 42 U.S.C. § 3604(a)-(c) [Title VIII], being made to wait longer because of race than is justified for public housing is functionally equivalent to being denied public housing."). On average, families must wait almost a year for a public housing unit; in larger metropolitan areas, public housing waits range from almost three to eight years. See HUD, *Waiting in Vain: Update on America's Rental Housing Crisis* (Mar. 1999). From 1998 to 1999, the number of families on waiting lists that were not closed due to their overwhelming size increased between 10 and 25 percent. See *id.* Already lengthy waits may further be compounded if a PHA decreases admissions from its list in order to hold open vacancies into which to relocate families displaced by a demolition or redevelopment.

families of color comprise a majority of the list, there may be a disparate impact.⁵⁴ Two, the percentage of families of color on the waiting list can be compared to the racial composition of the area's general population.⁵⁵ There may be a disparate impact if the percentage of families of color on the waiting list is significantly greater than the percentage of the area's general population that are families of color. Three, if the development that is the subject of the PHA's plans has a site-based waiting list, the racial composition of this site-based list can be compared to the racial composition of other waiting lists maintained by the PHA.⁵⁶

Effect on Families Eligible for Public Housing in the Region

Renter households eligible for public housing by reason of their income in a region will have their affordable housing opportunities reduced by the loss of public housing units. The effect on eligible families is especially significant in those jurisdictions where PHAs have closed their lists since waiting lists will almost never reflect the full demand for public housing in these jurisdictions. Racial disparities, if they exist, may be shown by comparing the racial composition of the area's general population to that of the population of public housing-eligible households. If households of color are disproportionately eligible for public housing, the loss of such housing may disparately impact them.⁵⁷ In addition, the comparative need for affordable housing among households eligible for public housing in a region should also be examined. With figures from the Housing Needs Table data system, it is possible to calculate the percentage of African American and Latino households eligible for public housing who have housing affordability problems.⁵⁸ This percentage can then be compared to the overall percentage of housing affordability problems for eligible households in the relevant county or census place. If eligible African American or Latino households have a higher percentage of housing affordability problems than the overall eligible population, the loss of guaranteed af-

fordable housing may threaten disproportionate harm to them that could constitute the basis of a disparate impact claim.⁵⁹

Perpetuation of Segregation and the Loss of Public Housing

Actions that reduce opportunities for "interracial association" and the "important benefits" enjoyed by people living in ethnically and racially diverse areas may also be the basis of a Title VIII discriminatory effect claim.⁶⁰ Both residents of federally assisted developments and other members of the surrounding community, of potentially any racial or ethnic affiliation,⁶¹ may have perpetuation-of-segregation claims relating to the loss of a development, depending on the factual circumstances. As with actions that cause disproportionate harm to persons of color, discriminatory purpose is not required for a PHA to be liable for actions that frustrate opportunities for interracial association through the "perpetuation of segregation" in housing.

Renter households eligible for public housing by reason of their income in a region will have their affordable housing opportunities reduced by the loss of public housing units.

A perpetuation of segregation claim will not be available in every situation involving the loss of public housing units, just as a disparate impact claim will not necessarily be available in every situation. Whether such a claim is available depends on whether a PHA's plans will reduce opportunities for interracial association among the people affected by these plans. At least two groups of people can be expected to be affected: residents of the threatened development and other residents of the area in which the development is located.⁶²

Effect on Residents of a Threatened Development

Residents of a development will have their right to an integrated living environment affected to the extent that they stand to be displaced to less racially and ethnically diverse

⁵⁴See n. 51, *supra*. See also *Resident Advisory Board v. Rizzo* ("Rizzo"), 564 F.2d 126, 143 (3rd Cir. 1977).

⁵⁵As described in the discussion of the effect on current residents above, this general population should probably be limited to the income-eligible renter household population of some area such as the PHA's jurisdiction.

⁵⁶The loss of a development with a site-based waiting list may cause special harm to families on the site-based list. These families may have their opportunity to secure a public housing unit by virtue of their place on the list extinguished altogether.

⁵⁷See *Arlington II*, 558 F.2d at 1288 (finding disparate impact on the basis of race in the denial of low-income housing opportunities since people of color were more likely to satisfy income eligibility requirements); *Huntington*, 844 F.2d at 938 (2nd Cir. 1988).

⁵⁸"Housing Needs of Families in the Jurisdiction by Family Type" are also included in PHA Annual Plans. This information is less detailed as to housing affordability problems than is the Housing Needs Table data system, but it also reports information, albeit quite minimal, about supply, quality, size, and other needs not included in the Housing Needs Table data system.

⁵⁹See *U.S. v. City of Black Jack* ("Black Jack"), 508 F.2d 1179, 1184-85 (8th Cir. 1974); *Part One*, 31 HOUS. L. BULL. 79, n.74. A similar type of disparate impact analysis—*i.e.*, one that contrasts harms qualitatively in light of varying needs rather than contrasting the number or percentages of persons of different racial or ethnic affiliations affected—could be performed for families on a public housing waiting list. The main difficulty is that descriptions of the housing affordability problems of waiting-list families are not included in PHA Annual Plans.

⁶⁰See *id.* at 79-80.

⁶¹See *Trafficante v. Metro. Life Ins. Co.* ("Trafficante"), 409 U.S. 205, 209-10 (1972)(White residents living in a "white ghetto" because of a landlord's discriminatory leasing practices had standing to seek relief under Title VIII.).

⁶²Other groups may also be affected, depending on the specific factual circumstances, as may fair housing organizations that have diverted resources to address civil rights consequences of the loss of units. See n. 42 and accompanying text, *supra*.

neighborhoods.⁶³ The type of analysis required to determine whether this will occur will depend on the means by which a PHA plans to relocate residents of the threatened development. If residents will be relocated to another public housing development,⁶⁴ the racial composition of that development's census tract can be compared to the composition of the threatened development's census tract, using data from the *Picture* or the Census data systems.

If the PHA plans to relocate residents with Section 8 vouchers, the racial composition of the census tracts in which residents will use their vouchers can be compared to the composition of the tract in which the threatened development is located. Information about the tracts to which families are expected to relocate with vouchers may be provided in the PHA's relocation plan.⁶⁵ If it is not, the *Picture* lists the specific tracts in which vouchers administered by the PHA are used and 1990 census data about the composition of these tracts.⁶⁶ It would be reasonable to assume that displaced residents will feed into the PHA's existing geographic voucher utilization patterns. If those show a pattern of racially segregated voucher utilization, a perpetuation-of-segregation claim may exist. More recent Census data is available through the FactFinder. In addition, the PHA may make lists of properties accepting Section 8 vouchers to voucher recipients. The composition of the tracts in which these properties are located may be compared to the tract in which the threatened development is located, using information from the Census data systems.

Effect on Other Area Residents

Other residents of an area threatened with the loss of a public housing development will have their fair housing rights affected if the loss of the development will reduce the racial and ethnic diversity of their community. This is likely to occur if the displacement of public housing residents will

reduce the overall racial and ethnic diversity of an area.⁶⁷ The demographic composition of the development, using data obtained from the *Picture*, can be compared to the demographic composition of a larger geographic area,⁶⁸ such as one or more census tracts,⁶⁹ or census block groups or a municipality as a whole, using information from the Census data systems, to determine the extent to which the development contributes to the overall diversity of the area.

Other residents of an area threatened with the loss of a public housing development will have their fair housing rights affected if the loss of the development will reduce the racial and ethnic diversity of their community.

If the demolition is part of a redevelopment plan that involves the construction of replacement housing on-site or at a nearby site, the effect of this replacement housing on the diversity of the neighborhood must also be considered. Depending on the amount of replacement housing and the population expected to reside in it, the replacement housing may either lessen or exacerbate the effects of a demolition and displacement of residents.⁷⁰ Assuming that more detailed information is not provided in a redevelopment plan, one way to assess the fair housing effects of replacement housing is to correlate the income eligibility and affordability targets of the replacement housing with the segments of the local population that would meet these criteria, using CHAS data on income and tenure or information from the AHS or Census data systems.⁷¹

⁶³This discussion assumes that all residents of a development will be treated in the same manner and will be provided the same relocation options. This may not always be the case. For example, leaving aside the *Uniform Relocation Act* and other issues for the moment, a PHA may plan to relocate most residents of a Development X it plans to demolish to Development Y, except for large households in X, which cannot be accommodated in Y because it contains only 2 and 3 bedroom units. These large households will be relocated to Development Z, which contains more multi-bedroom units. The fair housing rights of large households may be differently affected than other households of Development X depending on how the diversity (and other features) of neighborhoods Y and Z each compare to X. This different effect could also support a disparate impact claim on the basis of familial status in addition to race and other classifications.

⁶⁴The development into which a PHA plans to relocate residents may or may not be named in the PHA's relocation plan or other documents. Even if a development is not identified by name, it may still be possible to identify it because of the level of vacancy the PHA would have to maintain in it to accommodate the residents it intends to relocate.

⁶⁵See n. 48, *supra*.

⁶⁶Because the *Picture* usually provides demographic information about voucher households in those tracts containing 14 or more voucher households, it is also possible to determine which tracts households of color most commonly use their vouchers.

⁶⁷One example that would involve fair housing effects would be the loss of a development that is home to a substantial number of families of color in an area that is predominantly non-minority.

⁶⁸The term "area" is intentionally open-ended. Affected areas for perpetuation of segregation purposes can be as small as individual housing developments, *see, e.g., Trafficante*, 409 U.S. 205 (1972), or entire towns, *see, e.g., Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

⁶⁹A census tract is comprised of approximately 1,500 households. Depending on the particular circumstances, for large developments, it may make sense to compare the composition of a development not only to the composition of the census tract in which the development is located, but also to adjacent census tracts. Adjacent census tracts may be determined by generating census tract maps through the FactFinder data system.

⁷⁰The type of analysis required here is very similar to the (unsuccessful) arguments about "bottom line" effects that disparate impact defendants sometimes raise. *See Part One*, 31 HOUS. L. BULL. 81-82.

⁷¹For example, assume that a PHA is planning to demolish 250 units of family rental public housing and to replace them with 100 units of rental housing targeted to be affordable to households at 80 percent of AMI. Also assume that 70 percent of the renter households at 80 percent of AMI are non-minority. If no information to the contrary is available, it would be reasonable therefore to estimate that 70 percent of the households to occupy the replacement housing would be non-minority. *See, e.g., Huntington*, 844 F.2d at 938 (2nd Cir. 1988); *Arthur v. City of Toledo* ("*Arthur*"), 782 F.2d 565, 576 (6th Cir.1986); *Arlington II*, 558 F.2d at 1286, 1291 (7th Cir. 1977).

“The Deconcentration of Poverty”—The PHA’s Rebuttal or Justification for the Removal of Public Housing Units

Even if a PHA’s plan to remove a public housing development from the federal inventory will have a discriminatory effect, the PHA may escape liability if it is able to put forth a sufficient rebuttal or justification for its plan. The federal circuits apply different rules of decision in Title VIII discriminatory effect cases.⁷² Under each set of rules, the discriminatory effect shown by the plaintiff is measured to some degree against the interest of the defendant in pursuing the course of action that is the basis for the plaintiff’s complaint. This is sometimes referred to as the defendant’s “legitimate interest” under the pure effects framework or the defendant’s “interest in taking the action complained of” under the three and four-factor tests.⁷³

Historically, the demolition or disposition of public housing has often involved questionable motives. Some local governments have demolished projects over concerns about “image” and property values or have sold developments to receive one-time infusions of cash from the sale of public housing assets.⁷⁴ Analyses of the viability of projects and local needs for affordable housing have sometimes been based on outdated data or exaggerated estimates.⁷⁵ If for no other reason than history, the interests put forth by PHAs should be closely scrutinized.⁷⁶

Whatever a PHA’s actual motives, chances are the “deconcentration” or “de-densification” of poverty or assisted households will be invoked as a justification in its rebuttal or in the presentation of its interest in pursuing plans to remove public housing units. “Deconcentration” has been for some years a federal priority.⁷⁷ It has been identified as a means to reduce crime, to increase educational opportunities, and to promote family self-sufficiency through work. On the whole, it may in fact produce these positive effects. However, it may not necessarily have these benefits in every situation or in every community. PHAs should not be permitted to rely only on the unsupported assertion that a plan to “deconcentrate poverty” is legitimate because of the positive effects that are expected to accrue from it. Such hypothetical benefits are insufficient to overcome adverse fair housing impacts.

When plaintiffs, such as families residing in a development or families in need of affordable housing, establish a showing of significant discriminatory effect, a PHA should be required to show how forcing residents from their homes and reducing needed housing opportunities will serve the public good. PHAs are subject to special affirmative fair housing duties under *Executive Order 11063* (1962), QHWRA, and

perhaps Title VIII as well.⁷⁸ At a minimum, these duties require PHAs to gather and analyze information about the racial and socioeconomic effects of their decisions in administering the federal housing programs before they make their decisions. Platitudes about deconcentration are insufficient. A PHA must act in accordance with a reasoned analysis supported by actual data.⁷⁹ If it fails to do so, it has not articulated a legitimate interest.

Further, assuming that a PHA demonstrates that deconcentration would have positive effects, it must still show that its demolition or redevelopment plan will actually result in deconcentration in the first instance. If a PHA plans to relocate residents to other public housing developments with characteristics similar to the development it plans to remove, it is difficult to see how any meaningful deconcentration has been accomplished.

Similar problems may exist if the PHA plans to relocate residents with tenant-based voucher assistance. The private market is heavily segregated with respect to race and income.⁸⁰ There is no reason to think that displaced families will be treated any differently than others in the private market. Displaced families, for example, may be expected to face discrimination on the basis of race, level of income, and their status as voucher holders and former public housing residents.⁸¹ A possible, perhaps likely, result is not the deconcentration of poverty but the reconcentration of low-income families in other areas through the voucher program.⁸²

⁷⁸See *Part One*, 31 HOUS. L. BULL. 85-86. Receipt of CDBG funding, which may be involved in a PHA’s redevelopment plans, also imposes affirmative fair housing duties. See 42 U.S.C.A. § 5304(b)(2)(West 2001)(CDBG recipient must certify that “the grant will be conducted and administered in conformity with the *Civil Rights Act of 1964* [42 U.S.C. §§ 2000a *et seq.*] and the *Fair Housing Act* [42 U.S.C. §§ 3601 *et seq.*], and the grantee will affirmatively further fair housing.”).

⁷⁹See, e.g., *Shannon v. United States Department of HUD* (“Shannon”), 436 F.2d 809, 819 (3rd Cir. 1970) (Addressing HUD’s affirmative fair housing duties: “We agree that broad discretion may be exercised [by the department]. But that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing, 42 U.S.C. § 2000d, and in favor of fair housing. *Id.* § 3601.”).

⁸⁰See, e.g., The Civil Rights Project, Harvard University, *Census 2000 Confirms Persistent Segregation, Need for Civil Rights Priorities in the New Century* (Apr. 3, 2001) available at www.law.harvard.edu/civilrights/publications/pressrelease.html.

⁸¹See, e.g., Mark A. Malaspina, Note, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 YALE L. & POL’Y REV. 287, 288, 311 (1996) (noting that Section 8 recipients often cannot find desirable apartments because many landlords refuse to rent to such individuals and that low landlord participation is a serious, if not the most serious, problem with the Section 8 program; cited in *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, 725 A.2d 1104 (1999)); Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act’s New Frontier*, 31 HARV. C.R.—C.L. REV. 155, 162 (1996) (“Possession of a Section 8 subsidy marks its holder as a low-income person, a status that carries with it a multitude of negative stereotypes.”).

⁸²See *Cuomo Expands Rental Opportunity for Hundreds of Thousands of Low-Income Families*, HUD No. 00-223 (Sept. 12, 2000)(identifying 39 metropolitan areas across the country with severe geographic concentrations of tenant-based voucher holders), available at www.hud.gov/pressrel/pr00-223.html.

⁷²See *Part One*, 31 HOUS. L. BULL. 80-84.

⁷³*Id.*

⁷⁴See NHLP, *PUBLIC HOUSING IN PERIL: A REPORT ON THE DEMOLITION AND SALE OF PUBLIC HOUSING PROJECTS* (“PUBLIC HOUSING IN PERIL”), 43-68. (1990).

⁷⁵See *id.*

⁷⁶In other words, PHAs’ justifications might be attacked as less than “bona fide” under the pure effects test.

⁷⁷See, e.g., 42 U.S.C.A. § 1437v(a)(3)(West Supp 2001).

A Note on Racial Motives and Preferences

PHAs may go one step further and point to racial desegregation as a justification for its plan to remove units.⁸³ This is a racial motive. It is unfair and illegal to seek to desegregate housing at the expense of families of color who will be displaced from their homes or denied the chance to occupy public housing.⁸⁴ If a PHA denies housing opportunities to current residents or families on the waiting list on the basis of a racially conscious motive, it has violated Title VIII.⁸⁵

The Loss of Assisted Multifamily Developments

Units are lost⁸⁶ from the assisted multifamily inventory when the owners of assisted developments prepay their federally subsidized mortgages or decline to renew (also known as “opting-out”) their project-based Section 8 subsidy contracts and are thereby no longer subject to use restrictions that require their developments⁸⁷ to be operated as affordable low income housing.⁸⁸

Discriminatory Effect and the Loss of Assisted Multifamily Housing

The same types of disparate impact and perpetuation of segregation claims that are available against PHAs for the loss of public housing discussed above are available against

project owners for the loss of assisted multifamily units. However, nature and effect of these claims are significantly affected by differences in the public housing and assisted multifamily housing programs.

The Effect of Enhanced Voucher Protections on Discriminatory Effect Claims

The most significant difference between the public housing and multifamily housing programs for discriminatory effect purposes is the role of special anti-displacement in the multifamily housing context. In most cases involving the withdrawal of units from the assisted multifamily inventory, assisted residents living in the development at the time of the conversion should be eligible for special “enhanced vouchers,” informally known as “sticky vouchers,” that will allow them the right to remain in their current units with no increase in the amount they pay towards rent.⁸⁹ Even though some uncertainty with regard to the extent of enhanced voucher protections persists,⁹⁰ if enhanced vouchers work as they should,⁹¹ current residents should not be displaced from their homes or be forced to pay more towards rent. Because HUD has not taken all steps necessary to ensure that current residents of expired properties will not be harmed by conversion and will receive the full benefit of enhanced vouchers, the protection of these residents through enhanced vouchers should not be taken for granted.⁹² However, if current residents are fully protected, they will generally not have disparate impact claims against project owners since the withdrawal of the property will not leave residents any worse off than they would have been had the development remained subject to project-based use restrictions and subsidies.

In contrast, families on the development’s admission waiting list are not eligible for enhanced vouchers.⁹³ Waiting-list families face significant harm from the withdrawal of a development from the federal project-based assistance programs. The harm faced by these families is actually

⁸³It might not be unreasonable to suspect that “poverty” in the context of the “deconcentration of poverty” is often a code or proxy for race.

⁸⁴See John Calmore, *Fair Housing v. Fair Housing*, 14 CLEARINGHOUSE REV. 7 (1980). In *Charlottesville*, the district court recognized that the *Fair Housing Act’s* twin purposes of eliminating discrimination in housing and furthering integration in housing are both important, but may occasionally be incompatible:

The legislative history of the Fair Housing Act suggests to this court that the prime focus or the ‘quickening’ force behind that legislation is prohibition of discrimination in the provision of housing, but also that integration was seen by the creators of that legislation as a prominent goal and a value of great worth. From the perspective of over two decades, it is perhaps excusable to find the unexamined assumption in the Act’s legislative history that the principles of nondiscrimination and integration will always necessarily go hand in hand. With our later perspective, that assumption may be unfounded, but it does not detract from the observation that this legislation was created with both legal (and moral) principles in mind, although primary weight is given to the prohibition of discrimination.

⁸⁵See 42 U.S.C. § 3604(a); *U.S. v. Starrett City Assocs.*, 840 F.2d 1096 (2nd Cir. 1988). Title VIII also prohibits the making or publishing of a statement of racial preference in housing. See 42 U.S.C. § 3604(c). If a PHA includes a description of its motive in its demolition or revitalization application, press release, or other public document, or if it mentions this motive in a presentation or other public meeting, the mere fact that this statement of racial preference was made provides a basis for an independent Title VIII claim.

⁸⁶More accurately, it is the guaranteed affordability for very-low and extremely low-income families that is lost.

⁸⁷In some cases, only a portion of a development or a complex will be subject to a project-based Section 8 contract.

⁸⁸Multifamily units may also be lost when HUD forecloses on a subsidized mortgage or refuses to renew a Section 8 contract because of an owner’s program violations—e.g., substandard or untenable conditions or monetary defaults. In making such decisions, HUD must act in conformity with this affirmative fair housing duties. See *HUD’s Fair Housing Duties*, 29 HOUS. L. BULL. 1.

⁸⁹See 42 U.S.C.A. § 1437f(t)(West 2001). Some tenants in multifamily properties without a project-based Section 8 contract who are paying HUD-controlled below-market rents may experience a rent increase with a voucher.

⁹⁰See generally *HUD Issues Guidance for FY 2000 Enhanced Vouchers*, 30 HOUS. L. BULL. 64 (May 2000)(describing gaps in HUD’s planned administration of the enhanced voucher program that may operate to the disadvantage of residents of expired properties, potentially the largest of which are the re-screening of residents and Housing Quality Standards inspections by the PHA administering residents’ enhanced vouchers).

⁹¹Last year, Congress clarified the “right to remain” feature residents’ enhanced voucher protections. See *FY 2001 Military Construction and FY 2000 Emergency Supplemental Appropriation Act*, Pub. L. No. 106-246, § 2801 (Jul. 13, 2000). HUD has since issued guidance that the resident’s right to remain with an enhanced voucher lasts until the owner has good cause to terminate the tenancy, even beyond the initial lease term. See HUD, Office of Multifamily Housing, *Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts*, § 11-4 (Jan. 19, 2001) available at www.hud.gov/fha/mfh/exp/guide/s8renew.pdf.

⁹²See n. 90, *supra*.

⁹³See 42 U.S.C. § 1437f(t)(1)(A).

greater than the harm that will usually be faced by public housing waiting-list families.⁹⁴ Since each development's waiting list is generally separate from any other, families on assisted multifamily development waiting lists will see their opportunity for an assisted unit entirely extinguished by an opt-out or prepayment.⁹⁵

The harm to waiting-list families may provide the basis of a disparate impact claim if families of color are disproportionately affected by the loss of the development.

The harm to waiting-list families may provide the basis of a disparate impact claim if families of color are disproportionately affected by the loss of the development. Data regarding assisted development waiting lists is less readily available than public housing waiting list data, which is reported in public housing agency plans.⁹⁶ As a rule of thumb, it should be reasonable to assume that the demographics of a development's waiting list reflects the current assisted occupancy of the development. In determining disparity of impact on waiting-list families with respect to race or national origin, the analysis is essentially the same as the analysis performed in the public housing context.⁹⁷

The Effect of Project Site Selection Criteria and Affirmative Fair Housing Marketing Requirements on Discriminatory Effect Claims

Other differences between public housing and multifamily housing are the federal fair housing policies in effect when developments were constructed or designated for participation in subsidy programs. Unlike the public housing stock,

essentially all assisted multifamily developments were constructed after some or all of the contemporary civil rights protections were in place.⁹⁸ As a result, assisted multifamily developments were originally constructed or designated for participation in project-based assistance programs to advance civil rights objectives. In general, assisted multifamily development sites were required to be selected outside of areas of "minority concentration," or if sites in such areas were selected, it was because of a special affordable housing need of families in these areas.⁹⁹ In addition, owners of assisted multifamily developments have continually been subject to affirmative fair housing marketing requirements intended to promote equal access to this housing to all families.¹⁰⁰

If a development was sited to meet the special affordable housing needs of an area of "minority concentration," this fact ought to be able to be used to strengthen a claim of disparate impact relating to the development's withdrawal from the federal housing programs. Alternatively, affirmative fair housing marketing requirements may support a perpetuation-of-segregation claim brought by waiting-list families or other area residents¹⁰¹ who stand to lose an integrated housing opportunity or the benefit of a housing integration resource in their community.¹⁰²

"Marking Up" and the Project Owner's Rebuttal or Justification

Presumably, unlike public agencies and non-profit housing providers, a profit motive is what drives most owners to convert their projects. Owners will seek to convert where they can realize a higher return on their property outside of the federal housing programs. Profit seeking is very likely to be regarded as a legitimate interest and accorded significant weight under any of the discriminatory effect decisional frameworks employed by the federal circuits.

Tenants are not without counter-arguments. First, and most important, owners of Section 8 properties will usually be eligible for subsidy increases and restructuring (known as "Marking Up to Market" ("MU2M")) that will provide them

⁹⁴Except in situations involving site-specific public housing waiting lists, public housing waiting list families will generally be faced with substantial delays in obtaining affordable housing. This delay is a cognizable injury that can provide the basis for a fair housing claim, *see n. 53, supra*.

⁹⁵Other families in the area eligible for Section 8 housing will also face harm from the loss of a development.

⁹⁶*See n. 21, supra*, and accompanying text.

⁹⁷*See n. 53-6, supra*, and accompanying text. Note that because assisted multifamily developments are often formally owned by single-asset mortgagors—essentially "shell" entities that own only one development each—this can complicate attempts to compare the composition of the waiting list of the threatened development with waiting lists of the owner's other developments. This kind of analysis, analogous to contrasting the demographic composition of a threatened public housing development to other public housing developments operated by a PHA, is still potentially fruitful. However, rather than focusing on the single asset mortgagor, it would make more sense to focus on the mortgagor's managing partner (if it is a partnership) or majority stakeholder (if it is a corporation) and to compare the composition of the threatened development's waiting list to the composition of other developments owned by entities in which the managing partner or majority stakeholder also has a controlling interest. As with public housing, comparing the composition of developments is not the only way to approach a discriminatory effect analysis.

⁹⁸Most units constructed prior to the passage of Title VIII in 1968 were nonetheless subject to the antidiscrimination requirements of Title VI (1964) and *Executive Order 11063* (1962).

⁹⁹*See, e.g.*, 24 C.F.R. § 882.404(b)(1984) (Section 221(d)(4) Program "Site and Neighborhood-Performance Requirement[s]"); *Id.* § 200.710, 37 Fed. Reg. 205 (Jan. 7, 1972) ("Project Selection Criteria" for the Section 236 Program).

¹⁰⁰*See, e.g.*, 24 C.F.R. § 880.601(a) (1999) ("Responsibilities of owner" in Section 221(d)(4) Program); *Id.* § 886.321(a), 44 Fed. Reg. 70,365 (Dec. 6, 1979), *as amended* (affirmative fair housing marketing requirements).

¹⁰¹If the development was specifically sited outside of an area of minority concentration, this may also lend support to a perpetuation of segregation claim.

¹⁰²Enhanced vouchers are not necessarily as effective from a housing integration objective. In theory, vouchers should allow recipient families to access a wide range of private rental housing. In practice, this is not always the case. In a significant number of areas throughout the country, vouchers appear to be useable primarily in a small number of neighborhoods, which may also be distressed or impacted. HUD has recently noted serious geographic concentrations of Section 8 voucher families in 39 major metropolitan statistical areas across the country. *See n. 82, supra*.

with an actual market return based on an independent real estate appraisal commissioned by the owner.¹⁰³ Second, project owners are not as free as other private actors to pursue profit motives because project owners are subject to affirmative fair housing duties under their program contracts and agreements with the government.¹⁰⁴ Under HUD regulations implementing *Executive Order 11063* (1962), owners are prohibited from engaging in activities that have a discriminatory effect and are charged with an affirmative obligation to prevent discrimination.¹⁰⁵ Third, while a profit motive will probably be accorded substantial weight, it is not an absolute trumping interest in the context of civil rights. A merchant, for example, is not permitted to engage in purposeful racial discrimination even where he would receive a higher return because of the racial prejudice of his customers.¹⁰⁶ Since policies and practices having a discriminatory effect are the functional equivalent of purposeful discrimination,¹⁰⁷ profit motives ought not justify them in every instance either.

Under HUD regulations implementing Executive Order 11063, owners are prohibited from engaging in activities that have a discriminatory effect and are charged with an affirmative obligation to prevent discrimination.

Possible Limits on the Imposition of the Discriminatory Effect Liability

Courts have left open the question of how widely applicable discriminatory effect theories under Title VIII are. In its earliest discriminatory effects case under Title VIII, the Seventh Circuit “refuse[d] to conclude that every action which produces discriminatory effects is illegal.” Instead, it explained, “the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should

¹⁰³See HUD, Office of Multifamily Housing, *Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts* (Jan. 19, 2001) available at www.hud.gov/fha/mfh/exp/guide/s8renew.pdf. See also *HUD Issues New Section 8 Renewal Policy Guide*, 31 HOUS. L. BULL. 61 (Mar. 2001). Owners not eligible for “mark-up to market” as a matter of right may be eligible for a mark-up to market at HUD’s discretion or a mark up to budget in the case of a nonprofit owner. See *id.*

¹⁰⁴See *Part One*, 31 HOUS. L. BULL. 84-86.

¹⁰⁵*Id.*

¹⁰⁶See, e.g., *Village of Bellwood v. Dwivedi* (“*Dwivedi*”), 895 F.2d 1521, 1530–31 (7th Cir. 1990).

¹⁰⁷See, e.g., *Mountain Side*, 56 F.3d at 1250–51 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (“the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination”)).

be granted under the statute.”¹⁰⁸ In most instances, where a discriminatory effect has been shown, courts will apply one of the three decisional tests. But, this has not always been the case. The Seventh Circuit, for example, ruled that a disparate impact analysis was inapplicable in a real estate “steering” case.¹⁰⁹

Title VIII discriminatory effect defendants may attempt to escape liability by presenting arguments from within the decision frameworks described above. For example, a project owner could challenge the “strength” or “significance” of the discriminatory effect alleged by the plaintiffs. The owner could also attempt to establish a “bona fide and legitimate justification” for the proposed project conversion and thereby rebut the plaintiff’s prima facie showing. However, defendants may also present arguments attacking the applicability of Title VIII discriminatory effect theories against them in the first place. What follows is a discussion of several possible arguments of this type.

Partially Unsettled Questions About Discriminatory Effect Liability for Private Project Owners

None of the Circuits have questioned the availability of discriminatory effect claims against public defendants, such as PHAs. Questions have been raised in early opinions by the Second Circuit and at the district level in the District of Columbia about the availability of this theory against private defendants,¹¹⁰ such as project owners. The First, Third, and Eleventh Circuits have yet to address this question, and the Sixth Circuit has addressed it only obliquely in an unpublished opinion.¹¹¹

However, the significance of this question with respect to private project owners should not be overstated. First of all, no federal appellate decision in recent years has questioned the availability of discriminatory effect claims against private defendants. Second, Title VIII was passed by Congress pursuant to its powers under the *Thirteenth Amendment*,¹¹²

¹⁰⁸*Arlington II*, 558 F.2d at 1290 (cited in *Arthur*, 782 F.2d at 575).

¹⁰⁹See *Dwivedi*, 895 F.2d at 1532 (“Some practices lend themselves to the disparate impact method, others not. We cannot imagine the practice (innocent in intent, discriminatory in impact, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971)) on which a disparate impact theory might be based in this case.”).

¹¹⁰See *Brown v. Artery Organization* (“*Brown*”), 654 F. Supp. 1106, 1114-15 (D.C. Dist. Col. 1987); *Boyd v. Lefrak Organization* (“*Boyd*”), 509 F.2d 1110, 1113 (2nd Cir. 1974) (refusing to permit discriminatory effect claim against a private landlord). But see *Huntington*, 844 F.2d at 934 (2nd Cir. 1988) (questioning *Boyd*); *Salute v. Stratford Greens Garden Apartments* (“*Salute*”), 136 F.3d 293, 302 (2nd Cir. 1998) (entertaining, but ultimately denying on the merits, a discriminatory effect claim against a private landlord).

¹¹¹*Blaz v. Barberton Garden Apartment* (“*Blaz*”), 972 F.2d 346, 1992 WL 180,180, *3 (6th Cir. 1992) (“A discriminatory effect or ‘disparate impact’ case involves a facially neutral policy or practice which has the effect of discriminating against a particular protected group”).

¹¹²See *U.S. v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972); *Williams v. Matthews Co.*, 499 F.2d 819, 828 n.11 (8th Cir. 1974) (citing *Jones v. Mayer Co.*, 392 U.S. 409, 442–43 (1968), which construed 42 U.S.C. § 1982: “When racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”). See also *Black Jack*, 508 F.2d at 1184 (8th Cir. 1974); *U.S. v. Bob Lawrence Realty*, 474 F.2d 115, 120-21 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973).

meaning that direct regulation of private conduct is clearly permitted. Third, Title VIII expressly applies to project owners as recipients of federal housing funding.¹¹³ Finally, as discussed above, *Executive Order 11063* regulations apply to project owners as participants in HUD housing programs and as parties to HUD HAP contracts and regulatory agreements.¹¹⁴ While the availability of discriminatory effect claims against project owners is a partially unsettled issue, it is likely to be settled in favor of the availability of such claims.

Discriminatory Effect as Result of Income Disparity and not Racial Disparity

PHAs and project owners attempting to convert projects to higher income use may challenge the applicability of the discriminatory effect claims against them by arguing that the effects in this situation are only discriminatory as to wealth, not as to race. The displaced tenants, the defendant might argue, are free to remain or to return to the project after its renovation, regardless of their race, provided that they are able to pay the higher rent.

While it is true that wealth is not a protected classification for Equal Protection purposes, this is irrelevant to Title VIII discriminatory effect claims

There would appear to be some initial support for this argument. Income is not a suspect classification for Equal Protection purposes, the Supreme Court has held, except in unusual circumstances.¹¹⁵ The Ninth Circuit held in an Equal Protection case that “discrimination against the poor does not become discrimination against a minority because there is a statistical correlation between poverty and ethnic background.”¹¹⁶

However, while it is true that wealth is not a protected classification for Equal Protection purposes, this is irrelevant to Title VIII discriminatory effect claims. Discriminatory effect claims are not permitted under the Constitution. Plaintiffs are only entitled to relief under Equal Protection principles where they are able to show a policy that is discriminatory on its face (*i.e.*, that the policy makes express reference to membership in a protected class) or to show discriminatory purpose on the part of a defendant.¹¹⁷ As Title VIII has been inter-

preted, however, discriminatory purpose is not required for a plaintiff to recover. Where facially neutral policies or practices affecting people on the basis of their income also have a significant adverse racial effect, this ought to be a sufficient initial showing of discriminatory effect for Title VIII purposes.¹¹⁸ To say that adverse effects flowing from the loss of a development affects people on the basis of income rather than race simply means that the loss is the result of facially neutral policies. Any policy that is facially neutral will by definition involve classifications, such as income, that are not protected under the Constitution or the federal civil rights laws.

No Entitlement to Housing, Therefore No Violation of Law

PHAs and project owners displacing families through demolitions or conversions may challenge discriminatory effect liability by arguing that plaintiffs have suffered no injury because they have no entitlement to housing in the first place. The Supreme Court has held that the Constitution does not guarantee a right to access to “adequate housing.”¹¹⁹ The Court has also held that restrictions on the construction of low-income housing do not violate Equal Protection rights, unless the purpose of these restrictions is to harm members of a protected class.¹²⁰ A number of decisions have relied on these holdings to deny constitutional challenges and challenges under Title VI of the *Civil Rights Act of 1964*¹²¹ by low-income people to substandard conditions in public housing,¹²² to restrictive zoning provisions preventing the construction of low-income housing projects,¹²³ and to the refusal of local governments to provide for the construction of low-income housing.¹²⁴

As with the discussion of income disparity above, defendants may not mix constitutional and Title VIII case law so easily. There is no constitutional right to employment, but this does not shield employers from Title VII¹²⁵ disparate impact liability.¹²⁶ As the Fourth Circuit has held, even though a municipality is not required to construct housing, it still “cannot construct housing and then operate it in an illegally

¹¹³See 42 U.S.C.A. § 3602(a)(2)(applying §3604 to recipients of federal housing funding as of Title VIII’s 1968 date of enactment). This fact is not necessarily decisive as the availability of discriminatory effect claims against private defendants because Title VIII does not specify what level of intent is required for liability.

¹¹⁴See *Part One*, 31 HOUS. L. BULL. 84-86.

¹¹⁵See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 20 (1973)(income discrimination will only result in a Equal Protection violation if the result is “absolute deprivation of a meaningful opportunity to enjoy [a] benefit”).

¹¹⁶*Ybarra v. Town of Los Altos Hills* (“*Ybarra*”), 503 F.2d 250 (9th Cir. 1974).

¹¹⁷See *Washington v. Davis*, 426 U.S. 229 (1976).

¹¹⁸See, *e.g.*, *Arlington II*, 558 F.2d at 1288 (drawing a link between income and race in its disparate impact analysis: “Because a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing, the Village’s refusal to permit MHDC to construct the project had a greater impact on black people than on white people.”). See also *Laufman v. Oakley Building & Loan Co.*, 408 F.Supp. 489, 493 (S.D.Ohio 1976) (“[A] denial of financial assistance in connection with a sale of a home would effectively ‘make unavailable or deny’ a ‘dwelling’ “ in violation of § 3604(b).”). But see *Boyd v. Lefrak Organization*, 509 F.2d 1110, 1115 (2nd Cir. 1974), *overruled in Huntington*, 844 F.2d 926 (2nd Cir. 1988).

¹¹⁹*Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

¹²⁰See *James v. Valtierra* 402 U.S. 137, 140 (1971).

¹²¹42 U.S.C.A. §§ 2000d, *et seq.* (West 1999).

¹²²See *Perry v. Housing Authority of the City of Charleston*, 664 F.2d 1210 (4th Cir. 1981).

¹²³See *Ybarra*, 503 F.2d at 254.

¹²⁴See *Acevedo v. Nassau County*, 500 F.2d 1078 (2nd Cir. 1974).

¹²⁵42 U.S.C.A. §§ 2000e, *et seq.* (West 1999).

¹²⁶See, *e.g.*, *Griggs v. Duke Power Co.* (“*Griggs*”), 401 U.S. 424 (1971).

discriminatory manner.¹²⁷ If defendants have undertaken to provide housing, they must do so in a manner consistent with Title VIII.

Interference with the Conversion of Privately Owned Projects as Constitutionally Barred Takings

An owner of an assisted multifamily development may argue that a judicial remedy interfering with its decision to withdraw its development from the federal housing programs would amount to a government taking of the owner's property without just compensation and would therefore violate the owner's *Fifth Amendment* rights. *Takings Doctrine* is another unsettled area of the law, particularly in the area of land use regulation.¹²⁸ Only a brief summary of the issues involved will be presented here, but *Takings Doctrine* should not bar the applicability of Title VIII discriminatory effect theories against project owners.

Takings generally come in two forms: (1) *per se* takings, "[w]here the government authorizes a physical occupation of property (or actually takes title)," and (2) regulatory takings, where the state "deprives the owner of the economic use of [its] property" by regulation in a way that "unfairly single[s] out the property owner to bear a burden that should be borne by the public as a whole."¹²⁹ Nonetheless, the Court has permitted a substantial amount of regulation of landlord-tenant relationships without payment of compensation by governments.¹³⁰ The Court has explained:

When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, see, e.g., [*Pennell v. San Jose*, 485 U.S. 1, 12, n. 6 (1988)], or require the landowner to accept tenants he does not like, see, e.g., [*Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 261 (1964)], without automatically having to pay compensation.¹³¹

The potential to regulate without triggering Fifth Amendment protections is not necessarily unlimited. Landlord-tenant regulations that went substantially further than those at issue in *Pennell* and *Heart of Atlanta Motel*, "effectively limiting land to only one use or requiring an owner to continue a particular use," could constitute *per se* takings.¹³²

Even if interference with project conversion is not determined to be a *per se* taking, it could amount to a regulatory taking—particularly in light of the special protection given to private property interests in land ownership.¹³³ The question

is uncertain because the Supreme Court has expressly acknowledged that a finding of a regulatory taking involves "essentially ad hoc, factual inquiries."¹³⁴ These inquiries are typically pursued with an eye towards the economic impact on the property owner, the regulation's interference with "interest-backed expectations," and the character of the government action¹³⁵—and perhaps the extent to which the property owner's use of its property has created the problem that the government is attempting to address through regulation.¹³⁶

Project owners have invoked the *Takings Clause* to challenge interference with project conversions in the past. Owners a decade ago attacked provisions of the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA),¹³⁷ which limited their right to prepay their federally insured mortgages, a required step for terminating owners' obligations under the regulatory agreements that prevent converting projects to higher income use.¹³⁸ These challenges stalled without the matter being clearly resolved.¹³⁹ Similarly, no case has clearly decided a *Fifth Amendment* challenge to the *Low Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRA).¹⁴⁰

Title VIII discriminatory effect plaintiffs can present a number of counterarguments to any alleged *Fifth Amendment* barriers to liability. First, Title VIII was enacted by Congress pursuant to its broad and special powers under the *Thirteenth Amendment*,¹⁴¹ which may obviate the applicability of the *Takings Clause*.¹⁴² Second, government restrictions

¹³⁴*Penn Central*, 438 U.S. at 124.

¹³⁵See *McUsic*, 92 N.W. L. REV. at 597 (citing *Penn Central*, 438 U.S. at 124).

¹³⁶See *id.*, 92 N.W. L. REV. at 604 (citing *Pennell*, 485 U.S. at 20–21 (Scalia, J., dissenting in part). The district court in *Brown*, 654 F. Supp. at 1116 (D.C. 1987), appears to apply this type of reasoning, although it does not mention *takings* explicitly: "It is an unfortunate fact, for which individual private landowners have no more responsibility than any other member of the community, that the income of a disproportionate number of blacks and members of other minority groups is such that, although they are able to afford low income housing, many cannot afford the rentals being charged for upgraded or luxury housing." (footnote omitted).

¹³⁷Pub. L. No. 100-242, § 202, 101 Stat. 1877 (1987), formerly codified at 12 U.S.C. § 1715l note.

¹³⁸See Howard D. Cohen and Taylor Mattis, *Prepayment Rights: Abrogation by the Low Income Housing Preservation and Resident Homeownership Act of 1990*, 28 REAL PROP. PROB. & TR. J. 1, 5 (1993).

¹³⁹See *id.*, REAL PROP. PROB. & TR. J. at 5, n.18 (citing *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir.1991); *Johnson v. United States Dep't of Hous. & Urban Dev.*, 911 F.2d 1302 (8th Cir.1990); *Thetford Properties v. United States Dep't of Hous. & Urban Dev.*, 907 F.2d 445 (4th Cir.1990)).

¹⁴⁰Pub. L. No. 101-625, Tit. VI, § 601, 104 Stat. 4079, as amended by Pub. L. No. 104-134, § 101(e), Tit. II, 110 Stat. 1321 (1996), codified at 12 U.S.C.A. § 4101. See also HUD HOUSING PROGRAMS AND 1998 SUPPLEMENT, §§ 15.3.1.1, *et seq.*

¹⁴¹See n. 112, *supra*.

¹⁴²See, e.g., *Johns v. Evergreen Presbyterian Ministries*, 826 F.Supp. 1050, 1057, n. 2 (E.D.Tex.,1993) ("[T]he Thirteenth Amendment ... which, confiscating 'property' by abolishing slavery without compensating the slaveowners, represents one of the greatest seizures of 'property' in world history.") (citing Sanford Levinson, *Unnatural Law, The New Republic*, July 19 & 26, 1993, 40-44 (reviewing Cass R. Sunstein, *THE PARTIAL CONSTITUTION* (1993)).

¹²⁷See *Smith v. Town of Clarkton* ("Clarkton"), 682 F.2d 1055, 1068 (4th Cir. 1982). See also *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2nd Cir. 1973); *Citizens Comm. for Faraday Wood v. Lindsay*, 507 F.2d 1065 (2nd Cir. 1974).

¹²⁸See generally Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings* ("McUsic"), 92 N.W. L. REV. 591 (1998).

¹²⁹*Yee v. City of Escondido* ("Yee"), 503 U.S. 519, 522 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.* ("Loretto"), 458 U.S. 419, 426 (1982); *Penn Central Transportation Co. v. New York City* ("Penn Central"), 438 U.S. 104, 123-125 (1978)).

¹³⁰*Yee*, 503 U.S. at 528.

¹³¹*Id.* at 529.

¹³²*McUsic*, 92 N.W. L. REV. at 600 (citing *Yee*, 503 U.S. at 528).

¹³³See *id.*, 92 N.W. L. REV. at 598–602.

on purposeful discrimination are not takings.¹⁴³ Restrictions on policies and practices having discriminatory effects, which are the functional equivalent of purposeful discrimination, ought to be treated in the same way, at least where defendants are unable to put forth sufficient justification for their actions. Third, compliance with Title VIII and *Executive Order 11063* regulations is required of project owners not only because they are binding statutory and regulatory enactments but also because of the provisions included in owners' subsidy contracts and mortgage insurance regulatory agreements.¹⁴⁴ Fourth, even if interference with a project conversion is a taking, this interference is still permissible because owners have consented by contract to the application of fair housing requirements against them and because the mortgage insurance and direct subsidies project owners have already received, and will receive if they continue to participate in the programs, is sufficient just compensation.¹⁴⁵

Conclusion

This article has analyzed the vulnerability of plans to demolish or otherwise withdraw federally assisted housing to discriminatory effect claims under federal fair housing law. While the case law is varied, a showing of significant discriminatory effect under such circumstances, in the absence of adequate justification, would be sufficient basis for the imposition of liability under Title VIII of the *Civil Rights Act of 1968*. Because of the extent to which families of color rely on federal housing programs according to national figures,¹⁴⁶ discriminatory effect claims have a potentially very broad applicability in situations involving the loss of federally assisted developments. ■

HUD Issues Partial Final Rule on the Voluntary Conversion of Public Housing Developments to Vouchers

The Quality Housing and Work Responsibility Act of 1998 (QHWRA) amended and added sections of the *U.S. Housing Act* on the conversion of public housing developments to vouchers. The QHWRA amended Section 22 of the *U.S. Housing Act*,² providing authority to public housing authorities (PHAs) to convert developments on a voluntary basis. It also added a new Section, 33,³ which requires conversion of developments determined to be severely distressed or that fail to meet long-term viability criteria.⁴

In June, the Department of Housing and Urban Development (HUD) issued a partial final rule implementing Section 22, which requires that PHAs submit to HUD initial assessments of their developments' suitability for voluntary conversion.⁵ Pursuant to the QHWRA, the deadline for these submissions is October 1, 2001.⁶ HUD's actions in implementing the conversion provisions of the QHWRA to date and the requirements of the partial final rule are discussed below.

HUD's Previous Steps in Implementing the Conversion Provisions of the QHWRA

In its initial guidance on the QHWRA, HUD has determined that Sections 533 and 537 are not self-implementing and require rulemaking.⁷ Approximately two years ago, HUD

¹Pub. L. No. 105-276 (Oct. 21, 1998).

²Codified at 42 U.S.C.A. § 1437t (West Supp. 2001).

³*Id.* § 1437z-5.

⁴The QHWRA repealed the previous mandatory conversion provision of § 202 of the *Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1996*, codified at 42 U.S.C. 1437l note, but let stand conversion decisions for developments already identified under the 1996 Act. See Pub. L. No. 105-276, § 537(b), (c)(2). *The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1996* was part of the *Omnibus Consolidated Rescissions and Appropriations Act of 1996* ("OCRA"), Pub. L. 104-134 (Apr. 26, 1996).

⁵See 66 Fed. Reg. 33,616 (Jun. 22, 2001) (*Voluntary Conversion of Developments from Public Housing Stock; Required Initial Assessments*). Hereinafter, citations to the regulations will be limited to the affected section of the Code of Federal Regulations. These regulations will be codified in the 2002 volume of the 24 C.F.R.

⁶See 42 U.S.C.A. § 1437f(b)(2)(West. Supp. 2001). However, HUD considers this deadline to be flexible. See n. 26, *infra*.

⁷See 64 Fed. Reg. 8,192, 8,207 (1999) (*Quality Housing and Work Responsibility Act of 1998; Initial Guidance; Notice*).

¹⁴³See *Yee*, 503 U.S. at 529; *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 261 (1964).

¹⁴⁴See *Part One*, 31 HOUS. L. BULL. 84-86.

¹⁴⁵An owner disputing the terms of an agreement it has drawn thousands of dollars of benefits from for decades would appear to be in a fairly weak equitable position, especially if the owner is eligible for a "mark-up" rent increase under a renewed Section 8 contract. In addition, as previously mentioned, HUD has substantial fair housing duties of its own. See *HUD's Fair Housing Duties*, 29 HOUS. L. BULL. 1 (1999). If HUD's withholding of a discretionary subsidy increase threatens the loss of a development, it may also be liable for violation of its affirmative fair housing duties. See *id.*

¹⁴⁶See *Part One*, 31 HOUS. L. BULL. 73-75.