FIFTY YEARS LATER

BROWN V. BOARD OF EDUCATION AND HOUSING OPPORTUNITY

The NIMBY Report

September 2004

This report is made possible through the generosity of:

Washington Mutual Foundation

National Low Income Housing Coalition

FIFTY YEARS LATER
Brown v. Board of Education
and Housing Opportunity

September 2004

TABLE OF CONTENTS

[this page intentionally left blank]

About This Issue

This issue of *The NIMBY Report* joins many other publications, symposia and events commemorating the fiftieth anniversary of the Supreme Court decision in *Brown v. Board of Education*. The anniversary provides the opportunity to reexamine the nation's progress in racial integration and equality, not just in schools but in communities as a whole.

Despite the promise of *Brown*, there remains *de facto* segregation of schools nationwide because neighborhoods are segregated on the basis of race and economics, with economics often serving as a convenient proxy for racial bias and discrimination. This *NIMBY Report* looks at how the aspirations embodied in *Brown* have influenced efforts to overcome the legacy of residential segregation and to pursue equal housing and educational opportunity.

In the opening article, Philip Tegeler, of the Poverty & Race Research Action Council, describes *Brown*'s role in paving the way for the enactment, 14 years later, of the Fair Housing Act (FHA). But the scope of the FHA and its ability "affirmatively to further" fair housing, especially across the urban-suburban divide, is being tested around the country. Mr. Tegeler also encourages fair housing advocates to look to international law and faith-based coalitions as opportunities to reinvigorate housing desegregation efforts.

John Relman, a civil rights attorney, recaps the history of the FHA and its enforcement, explaining how the 1988 amendments to the FHA increased the law's reach and effectiveness. While noting progress since the enactment of the amendments, Mr. Relman lays out the shortcomings in enforcement and suggests how to bring the FHA closer to fulfilling the *Brown*'s promise of integration.

Yonkers, New York was the site of a protracted legal fight over the integration of both public housing and public schools. Jonathan Feldman, a legal services attorney, had a lively discussion with Judge Leonard B. Sand, who presided over the complicated case, *U.S. v. Yonkers Board of Education*. After much pushing and prodding by Judge Sand, the case culminated in the development of scattered-site housing and the integration of schools, a bit of *Brown* fulfilled.

An article on inclusionary zoning by David Rusk, an urban policy consultant, opens with a description of the passage, 30 years ago, of the Moderate Priced Dwelling Unit ordinance in Montgomery County, Maryland. This law, which requires low income affordability for a percentage of new housing developed in a community, has served as a model for inclusionary zoning legislation elsewhere. Today, over 130 jurisdictions around the country have inclusionary zoning laws. Mr. Rusk explains their typical characteristics and impact.

Two major federal housing programs, Housing Choice Vouchers and the Low Income Housing Tax Credit, are failing to maximize housing opportunity and integration. Reed Colfax, a civil rights lawyer and a member of *The NIMBY Report* Advisory Board, examines how discrimination limits vouchers' effectiveness in furthering integration. He also discusses efforts to counter such discrimination by using the FHA and state and local laws. Ken Zimmerman, of the New Jersey Institute for Social Justice, writes from the vantage point of serving as co-counsel to "friends of the court" in the ongoing litigation in New Jersey over the allocation of low income housing tax credits. Mr. Zimmerman's clients, four statewide non-profits, maintain that the state housing agency should be required to apply the FHA's integration mandate, along with New Jersey's *Mt. Laurel* doctrine, in its allocation of tax credits.

Rounding out the issue with a more direct focus on education, Scott Goldstein and Robin Snyderman, with Chicago's Metropolitan Planning Council, describe how residential segregation and the lack of affordable housing intersect with inequitable school funding mechanisms in Illinois, to the detriment of school quality in poor communities. Housing advocates are beginning to join with education advocates in Illinois to address these issues of school quality and funding equity.

Some Lessons from *Brown* for the Fair Housing Movement

Philip Tegeler

The trends are disturbing. Fifty years after *Brown v. Board of Education* (1954), schools are becoming increasingly segregated by race and income. A recent study by the Harvard Civil Rights Project found school segregation levels in 2001 at their highest levels since 1968 (Orfield & Lee, 2004). This trend is partly attributable to the abandonment of desegregation orders in many southern districts, but it is also a function of continuing residential segregation in the Northeast and Midwest. Since the Supreme Court, in the mid-1970s, backed away from the problem of metropolitan-wide segregation in northern schools, residential poverty concentration has become increasingly severe, peaking in the 1980s, and now continuing to consolidate and spread across wider areas, even as it declines in the most poverty-concentrated census tracts (Kingsley & Pettit, 2003). In most metropolitan areas, there continue to be dual housing markets in separate school systems, one for the suburban middle class and one for the urban poor, fostered in part by federal and state housing programs.

As researchers, we strive to understand the underlying causes and consequences of racial segregation and poverty concentration. As advocates, we have developed strategies for attacking the systems that continue to promote segregation. As proponents of progressive fair housing policies, we know that there are government interventions that can work to reverse these trends. In this anniversary year, part of the *Brown* spotlight reflects on the fair housing movement, leading us to ask, what more can we do? Some answers can be found within the *Brown* decision itself.

Brown as a History Lesson

The legal system attacked in *Brown v. Board of Education* was one of *de jure*, or legally mandated, school segregation throughout the South, beginning after Reconstruction and continuing through 1954 and beyond. *Brown* also reminds us of the state-sponsored history of housing segregation in this country. Both before and after *Brown*, this system of state-sponsored segregation was replicated in federal, state and local housing policy.

The history of state-sponsored housing segregation is not as well known as the history of *Brown*. But it was well understood in 1966 by Dr. King as he marched in Chicago, and it was recognized by the Kerner Commission and the drafters of the Fair Housing Act, who understood that the ghetto was never a naturally occurring phenomenon. Rather, it was state-created and state-supported and was perpetuated by federal and state policy.[1]

This history is not taught in our schools today and it is not routinely discussed in the media. But the historical perspective is necessary to justify remedial steps and to mobilize public support for desegregation (Roisman, 2002).

Brown and the Problem of Intent

We need to come to terms with the reasons for *Brown*'s failure to achieve its own aspirations and the implications of that failure for federal housing and civil rights policy. One important element is the legal system's insistence on a standard of intent to define constitutional liability for structural racism. In the first two decades after *Brown*, as the cases moved from the South to equally segregated northern cities lacking a written legal code of segregation, some courts were open to finding *de facto* segregation unconstitutional, even where there was no direct evidence of intentional creation of segregation. These courts reasoned that the harms of segregation were the same, regardless of the cause, and that the state bore responsibility as the overseer of the system of student assignment.

But the Supreme Court put an end to this logical extension of *Brown* in decisions in 1972 and 1976 demanding proof of discriminatory intent by public

[1] The story of government involvement in the creation of the suburbs after World War II, the development of segregated public housing programs, urban renewal, and racially exclusionary FHA mortgage programs has been convincingly described in works like Jackson's *Crabgrass Frontier* (1985) and Massey and Denton's *American Apartheid* (1994). Recent studies sponsored by the Poverty and Race Research Action Council and supported by the Ford Foundation, grouped under the topic of "Housing and School Segregation: Government Culpability, Government Remedies," have taken a closer look at the step-by-step development of some of these policies (see Freund, 2004; Hirsch, 2004; Mohl, 2002).

officials before a constitutional violation could be found. This standard led to increasingly expensive and sometimes futile searches for the "smoking gun" in school districting, housing and zoning decisions spanning decades. But the result was the same whether or not the smoking gun could be found. In the absence of carefully planned school districting and assignment decisions, segregated neighborhoods create segregated schools.

In contrast to this increasingly strict standard of proof in federal cases, federal civil rights statutes adopted during the first two decades after *Brown*, such as the Fair Housing Act (FHA), reflected the sense that discriminatory impact could be a basis for liability in housing, employment, and certain government programs, and this continues to be the legal standard. But this standard is increasingly threatened by conservative courts, which have already stripped Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) of much of its enforcement power (*Alexander v. Sandoval*, 2002) and by an executive branch that is increasingly reluctant to prosecute discriminatory impact claims in housing.[2] In light of this history, it is crucial that fair housing law continue to permit a finding of liability where facially neutral housing policies have the effect of perpetuating segregation.

The structures of segregation are deeply rooted and can only be eliminated through affirmative government measures, not simply policies of non-discrimination.

Brown and Jurisdictional Fragmentation

Brown's ultimate demise in the North was not just about the Supreme Court's requirement of a finding of intentional segregation. It was about the Court's reluctance to extend liability to independent suburban jurisdictions outside the segregated central city. This problem is well known to fair housing advocates and its legal origins can be traced in part to the 1974 decision of the Supreme Court in the Detroit schools case, *Milliken v. Bradley*. That case held that, unless a finding of discrimination could be made against each suburban school district participating in a segregated regional system of education, those suburbs could not be ordered to desegregate. This decision had the effect of privileging suburban white flight and set the bar for meaningful school desegregation so high that it has rarely been hurdled since.[3]

Although the Supreme Court, in Chicago's *Gautreaux* (1976) case, ultimately stopped short of applying this restrictive principle directly to housing desegregation litigation, jurisdictional fragmentation remains a key barrier to meaningful fair housing enforcement. The delegation of land use, zoning, and public housing administration to small local jurisdictions is one of the basic building blocks of segregation in this country (Tegeler, 1994). As we move forward from this *Brown* anniversary year, we must find housing solutions that successfully overcome or transcend these jurisdictional barriers.

Brown and the Duty to Affirmatively Further Fair Housing

The history of *Brown*'s implementation in the South underscores the need to affirmatively dismantle segregation, not simply to remove discriminatory practices. In the initial decade after *Brown*, when *de jure* segregation was eliminated throughout the South, little true desegregation was actually achieved. In many areas, "freedom of choice" plans were adopted that replicated segregation almost perfectly. It was not until the *Swann* (1968) and *Green* (1971) cases fifteen years later that the courts recognized the need to eliminate segregation "root and branch" and take sweeping remedial steps to disestablish segregation and affirmatively promote integration using the full remedial power of the federal courts.

The Fair Housing Act's mandate that federal and state agencies act "affirmatively to further" fair housing recognizes this reality (42 U.S.C. § 3608(d)). The structures of segregation are deeply rooted and can only be eliminated through affirmative government measures, not simply policies of non-discrimination. The scope of the mandate to affirmatively further fair housing is now being tested in Baltimore's public housing desegregation case, in challenges to state administration of the Low

[2] For example, at a press conference on April 7, 2004, Shanna Smith, executive director of the National Fair Housing Alliance, stated that, at the start of the new Administration, "[the U.S. Department of] Justice staff notified HUD's enforcement staff that it would not consider disparate impact cases" (p. 2).

[3] One exception is Connecticut's *Sheff* (1996) litigation, which relied on the state constitution's guarantee of equal educational opportunity to obtain a finding of liability involving regional *de facto* segregation.

Income Housing Tax Credit Program in New Jersey (Zimmerman, 2004) and Connecticut, and in public housing demolition and relocation cases in Chicago and elsewhere (*Thompson,* 2004; *In re Adoption of 2003 Low Income Housing Tax Credit,* 2004; *Asylum Hill Problem Solving Revitalization Association,* 2004; *Wallace,* 2004). As the school desegregation cases have shown us, without this additional affirmative duty to promote integration, it is unlikely that the effects of decades of segregating government policies can be undone.

Brown and International Law

It has often been observed that the *Brown* decision had a great deal to do with the Cold War, when America needed to appear true to its own announced principles of liberty and equality in its global moral and strategic competition with the Soviet Union.[4] Today, international human rights standards could once again be a powerful potential tool to influence United States policy, even though U.S. courts and policy makers resist the notion of being bound by outside legal standards, and the Senate routinely places unnecessary "reservations" on international human rights accords that come before it.

International human rights standards could once again be a powerful potential tool to influence United States policy.

Several standards adopted by the United Nations (and ratified, in part, by the U.S.) speak directly to American housing and school segregation. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) holds that its signing countries "particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction" (1969, art. 3). CERD further requires signing countries to "…take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists" (art. 2).

In testimony last fall to the Inter-American Commission on Human Rights, former Under Secretary and General Counsel of the U.S. Department of Education Judith Winston stated:

> Today racial discrimination in the public schools is a vestige of the legally sanctioned racial apartheid that existed prior to the landmark Supreme Court decision in 1954—*Brown v. Board of Education*. The existence and continuation of racial segregation in our schools is also a stark indication that the deeply ingrained negative racial stereotypes and racial prejudices that were at the core of 19th and 20th century racism affect the treatment and quality of education students of color receive in 21st century U.S. public schools.This modern day discrimination, however, is not often exhibited as intentional racial animus but is more deeply hidden in institutional racism that defies the traditional legally enforceable means of eradication (Winston, 2003).

Fair housing advocates need to take advantage of these forums in a more proactive way in the coming years, to focus international attention on state-sponsored segregation here in the U.S. Such attention could impose additional pressure on policy makers to take action to eliminate remaining elements of institutional racism that result in school and residential desegregation.

Brown as a Faith-Based Initiative

In his new book, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* (2004), David Chappell reminds us of the religious foundations of *Brown* and the ways in which religion sustained and helped to define the civil rights movement in the 1960s. Similarly, one of the greatest sources of hope for today's fair housing movement comes from the new, ecumenical coalitions that are again forming around regional equity, smart growth and educational equity issues, bringing together inner city and suburban congregations effectively for perhaps the first time since the 1970s. Some of the leading examples of these coalitions have joined together in a network sponsored by the Chicago-based Gamaliel Foundation.[5]

Conclusion

The fair housing movement stands somewhat outside

[4] For two eloquent examples, see Baldwin (1963) and Bell (1980).

[5] See www.gamaliel.org.

of the spotlight during this anniversary year of the *Brown* decision. And we stand here knowing that it is largely the disconnect between housing and school policy, and our collective failure to dismantle housing segregation, that have placed our society in such jeopardy. We know today, even more clearly than in 1954, the human costs of maintaining racially and economically separate and unequal communities. "There is growing evidence that when poverty rates exceed 30 percent, neighborhoods have great difficulty sustaining the economic and civic institutions essential for a healthy community. Poor education, joblessness, teen parenthood, discrimination, and crime all reinforce one another … creating a vicious circle of poverty, inequality, isolation and distress." (Turner & Hayes, as cited in Cashin, 2004).

The harms of concentrated urban poverty are nowhere more starkly presented than in the restriction of poor African American and Latino children to separate, unequal and often failing schools. While we recognize the continuing importance of reinvesting in poor, racially isolated urban communities, we cannot give up on desegregation as a central urban strategy, even though it may be difficult. As we move forward in our housing work, we would do well to always keep schools in mind, and remember these lessons of *Brown.*

Philip Tegeler is the Executive Director of the Poverty & Race Research Action Council (PRRAC), a national civil rights research and advocacy organization that focuses on a racial justice analysis of systems that affect low income families. Mr. Tegeler is also an attorney and has been involved in some of the recent cases mentioned in this essay.

References

42 U.S.C. § 2000d

42 U.S.C. § 3608(d).

Alexander v. Sandoval. (2001). 532 U.S. 275.

Asylum Hill Problem Solving Revitalization Assoc. v. King. (2004, January 5). 2004 WL 113560. Conn. Super. Unpublished opinion.

Baldwin, J. (1995). *The fire next time.* New York, NY: Modern Library. (Original work published 1963).

Bell, D. (1980). *Brown v. Board of Education* and the interest-convergence dilemma. *Harvard Law Review, 93,* 5181.

Brown v. Board of Education. (1954). 347 U.S. 483.

Cashin, S. (2004). *The failures of integration: How race and class are undermining the American dream*. New York, NY: PublicAffairs.

Chappell, D. (2004). *A stone of hope: Prophetic religion and the death of Jim Crow*. Chapel Hill: University of North Carolina Press.

Freund, D. (2004, June 11). *Democracy's unfinished business: Federal policy and the search for fair housing, 1961-1968.* Retrieved from http://www.prrac.org/pdf/freund.pdf.

Green v. School Board of New Kent County. (1968) 391 U.S. 430, p. 438.

Hills v. Gautreaux et al. (1976). 425 U.S. 284.

Hirsch, A. (2004, May 11). *The last and most difficult barrier: Segregation and federal housing policy in the Eisenhower administration*. Retrieved from http://www.prrac.org/pdf/hirsch.pdf.

In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan. (2004). 369 N.J. Super. 2, 848 A.2d 1, 2004 WL 902145 (N.J. Super. A.D.).

Jackson, K. (1985). *Crabgrass frontier: The suburbanization of the United States.* Oxford: Oxford University Press.

Kingsley, G. & Pettit, K. (2003, May). *C*oncentrated poverty: A change in course. *Neighborhood Change in Urban America Series, 2.*

Massey, D. & Denton, N. (1993). *American apartheid: Segregation and the making of the underclass*. Cambridge, MA: Harvard University Press.

Milliken v. Bradley. (1974). 418 U.S. 717.

Mohl, A. (2002). *The interstates and the cities: Highways, housing and the freeway revolt*. Retrieved from http://www.prrac.org/pdf/mohl.pdf.

Orfield, G. & Lee, C. (2004). *Brown at 50: King's dream or Plessy's nightmare?* Cambridge, MA: The Civil Rights Project, Harvard University.

Roisman, F. (2002, Summer). Teaching about inequality, race, and property. *St. Louis Law Journal, 46*, 665.

Sheff v. O'Neil. (1996). 238 Conn. 1.

Smith, S. (2004, April 7). *Statement*. Retrieved from http://www.nationalfairhousing.org/html/trends/trends%202004/Statement%20-%20Shanna%20Smith%204-7-04.pdf.

Swann v. Charlotte-Mecklenburg Board of Education. (1971) 402 U.S. 1, p. 21.

Tegeler, P. (1994). Housing segregation and local discretion. *Journal of Law & Policy, 3,* 209.

United Nations Office of the High Commissioner for Human Rights. (1969). *International convention on the elimination of all forms of racial discrimination.* Retrieved from http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

Thompson v. U.S. Department of Housing and Urban Development. (2004, January 29). 2004 WL 1058100. (D.Md.)

Wallace v. Chicago Housing Authority. (2004, June 16). 2004 WL 1374420. (N.D. Ill.).

Winston, J.A. (2003, October 15). *Testimony on behalf of Global Rights [formerly the International Human Rights Law Group]*. Presented at a hearing on racial discrimination in the K-12 public education system of the United States before the Inter-American Commmission on Human Rights.

Zimmerman, K. (2004, September). The low income housing tax credit program and civil rights law: Updating the fight for residential integration. *The NIMBY Report*, 24.

Fair Housing Enforcement and the Legacy of *Brown*

John P. Relman

Brown, the Fair Housing Act, and the Momentous Spring of 1968

Thirty-six years later, a rapidly shrinking segment of the American public remembers the state of this country's race relations in the spring of 1968. By any outward measure, tensions between white and black America had never been higher in modern times. Prospects for another summer of race riots in America's largest cities were both likely and grim. Earlier that spring, in a report that put in stark and haunting language what all too many knew to be true, the Kerner Commission advised the President that the nation was "moving toward two societies, one white, one black—separate and unequal" (National Advisory Commission on Civil Disorders, 1968, p. 1).

The level of racial polarization and segregation found in America in 1968 was the direct product of a legacy of *de jure* discrimination imposed on a society already living spatially apart since the days of slavery. Aside from sporadic constitutional challenges under the 14th Amendment to government imposed racial discrimination, most legal barriers to full and fair housing opportunity for African Americans and other minorities had gone unopposed for nearly 100 years following the Civil War. And nowhere was this more true than in the private housing market, where landlords, lenders, developers, and real estate companies were essentially free to discriminate as they chose, without recourse or penalty.

Efforts had been made by the Democratic leadership to address the lack of federal fair housing enforcement authority, but all had ended in failure. President Johnson's most recent effort at fair housing legislation, a bill first introduced in Congress in 1966, remained mired in the Senate, with little prospect of passage. All that would change in March of 1968, when two powerful events converged to spur Congress into action.

The first was the report of the Kerner Commission, whose findings would shake the public and policy makers alike. The second occurred on April 4, 1968, when a gunshot ended the life of Martin Luther King, Jr., transforming the civil rights movement and the country in a single moment, much as another gunshot had upended the American and world political landscape so dramatically only five years earlier. Within three weeks of Dr. King's death, Congress had enacted a comprehensive federal fair housing law, reaching discrimination in the private housing market across the country for the first time.

The Fair Housing Act of 1968 (FHA) was one of the strongest civil rights laws enacted to date. The statute made it illegal to discriminate on the basis of race, national origin, and religion not just in the rental and sales markets, but in a wide range of real estate related industries that greatly affect the availability of housing. Equally important, it created a crucial enforcement role for the federal government—primarily the U.S. Department of Justice—while still allowing discrimination victims to pursue their own claims in state or federal court.

For those concerned about the growing racial polarization in America's cities, enactment of this important law breathed new life into the move toward integration. Central to the legislative purpose behind the Fair Housing Act was the conviction that eradication of legal barriers to housing for America's minority groups would inevitably lead to more racially and ethnically integrated communities. In this sense, the goal was no different than that which lay behind *Brown.* Attending school together was not simply a matter of equality, but an opportunity to break down racial stereotypes that had kept us apart in all spheres of life.

Assessing the legacy of *Brown* 50 years later, many civil rights advocates are not in a celebratory mood. In one sense their pessimism is justified. The demographic and statistical evidence tells us that after significant progress toward integration in the 1960s, 1970s and early 1980s, public school student populations are now becoming re-segregated at an alarming rate. This trend is the result of court decisions that have ended long standing desegregation orders and the continuing political unpopularity of busing as a desegregation remedy. There is, however, another means by which to take stock of

Brown at 50. That involves focusing on fair housing enforcement efforts.

Resistance to busing and other desegregation remedies need not lead to re-segregation of America's schools if our neighborhoods are steadily growing more integrated. To the extent that the Fair Housing Act has resulted in less spatial separation between races, the promise of *Brown* remains bright. It was the same dream, Dr. King's dream of one America, that infused the spirit of those who argued *Brown* and those who struggled for passage of the Fair Housing Act. Looking back on *Brown* on this anniversary, we sometimes forget that one important measure of *Brown*'s legacy requires assessing not just our schools, but our success in enforcing the Fair Housing Act.

Early Successes and the 1988 Amendments

The years immediately following enactment of the 1968 law were marked by early successes and important indications of progress in the struggle to achieve the twin goals of non-discrimination and integration. In great northern metropolises like Chicago and small southern towns, a reinvigorated Department of Justice used its new pattern and practice enforcement authority to win important legal precedents that helped establish the parameters of the new fair housing law.

Central to the legislative purpose behind the Fair Housing Act was the conviction that eradication of legal barriers to housing for America's minority groups would inevitably lead to more racially and ethnically integrated communities.

Private practitioners followed on the heels of these victories, working closely with private fair housing agencies and their teams of undercover civil rights testers, to file cases in jurisdictions not reached by government litigators. By the end of the 1970s—a mere ten years after passage of the FHA—private fair housing lawyers and organizations had successfully challenged a vast array of discriminatory real-estate related practices that had long been considered off limits to the legal process because they involved the conduct of private companies.

The power and reach of the federal fair housing law was enhanced enormously during these early years by three remarkable decisions of the Supreme Court, each of which expanded the rights of plaintiffs to challenge discriminatory practices under the FHA. Two of these cases established the right of individuals who were not in a protected class to challenge sales and rental practices that affected their right to live in an integrated community (*Trafficante*, 1972; *Gladstone*, 1979). The third made clear for the first time that private fair housing organizations and even the undercover testers they employed had legal standing to assert claims as plaintiffs in court against those who violated the fair housing laws (*Havens Realty Corp.*, 1982).

As Ronald Reagan moved into the White House, the measure of progress under the new law appeared for the most part strong. But in certain important respects, frustration was already setting in. For many, the pace of progress was not fast enough; the blame, they felt, rested with gaps in the enforcement process.

The protected classes covered by the FHA excluded two groups that had historically faced significant discriminatory barriers in the private real estate market: families with children and persons with disabilities. The former was a particularly important group, because restrictions on families with children had long been used as a pretext for covert discrimination against families of color.

Equally important, while the FHA permitted fair housing complaints to be filed with HUD by lay persons without the assistance of an attorney, the law failed to provide any mechanism for HUD to investigate the complaints or bring an enforcement action against a defendant where it found cause to believe that the law had been violated. And, as originally drafted, the FHA placed strict limits on both the amount of punitive damages and attorney's fees that a prevailing plaintiff could recover and imposed a short statute of limitations on claims filed with HUD and in court.

At the same time, testing evidence assembled by HUD and private fair housing organizations showed that housing discrimination was still occurring at an alarming rate. In a much quoted report issued in the early 1980s, HUD estimated there to be more than two million largely unreported instances of housing discrimination per year (H. Rep. No. 711, 1988; Knapp, 1985).

Efforts to amend the FHA accelerated as the 1980s progressed. In 1988, the legislative powers aligned in an unusual and unexpected political coalition that saw the National Association of Realtors, a Democratic Congress, civil rights advocates, and a Republican president anxious to shore up support among minority constituencies, come together to support amendments to the Fair Housing Act that would make a powerful civil rights law even stronger.

As enacted, the Fair Housing Amendments Act of 1988 addressed and remedied each of the shortcomings identified by those who believed the law's deficiencies had prevented faster progress toward integration. The amendments added persons with disabilities and families with children as new protected classes; created new affirmative rights drawn from the Americans with Disabilities Act; dramatically strengthened the government enforcement process by giving HUD power for the first time to prosecute fair housing complaints where it found cause to believe the law had been violated; and eliminated the cap on both attorney's fees and punitive damages while simultaneously lengthening the statute of limitations.

Of all these changes, the new enforcement powers afforded the government may have been most important. Upon a finding of "reasonable cause" by a HUD investigator, a complainant for the first time had the right to have a case prosecuted by HUD attorneys before an administrative law judge, or alternatively elect to have the complaint prosecuted in federal court by the Department of Justice. As a practical matter, this meant fair housing violations could be addressed on a scale not possible before—provided, of course, that HUD proved willing and able to make the initial finding of reasonable cause.

As the last decade of the twentieth century approached and the first Democratic president since Jimmy Carter prepared to take office, hope for renewed progress toward Dr. King's dream of one America surged once again.

Measuring our Progress

Sixteen years later, with nearly as much enforcement experience behind us under the new and improved Fair Housing Act as we had under the original version of the law, just how much progress have we made? The results are decidedly mixed, but there is much to suggest that the FHA has been a powerful force for positive change. Recent HUD funded studies using undercover testers have shown significant reductions in the incidence of discriminatory treatment suffered by African American and Latino testers looking for apartments and homes to rent and buy (Turner & Ross, 2003).

Likewise, studies conducted by the Urban Institute indicate that more neighborhoods in metropolitan America are shared by blacks and whites today than a decade ago, and many racially integrated neighborhoods appear reasonably stable. The number of neighborhoods that exclude blacks altogether is shrinking, with black representation rising in a substantial share of neighborhoods that were exclusively white at the start of the 1990s (Rawlings, Harris, Turner, & Padilla, 2004). These developments are clearly good news, and most certainly are attributable to a strengthened FHA and persistent enforcement efforts.

Public surveys show that only a tiny percentage of those who believe they have been discriminated against have bothered to make use of the legal or governmental remedies available under the law.

At the same time there is still cause for concern. Testing studies may show a downward trend, but the level of discriminatory treatment remains unacceptably high. These test results suggest that African Americans and Latinos suffer unfavorable disparate treatment roughly 20 percent of the time in sales and rental transactions, and as much as 50 percent of the time in transactions with lending institutions (Turner & Ross, 2003; Turner, et al., 2002). Spatial segregation may be decreasing, but a large majority of whites still live in neighborhoods that are 90 percent or more white (Rawlings et al., 2004).

Public awareness of the new protections of the FHA has yet to take hold. Compliance with the new accessibility provisions of the law has been disappointing, and public surveys show that relatively few Americans know about the FHA's protections for families with children (Abravenel & Cunningham, 2002). Perhaps most disturbing, public surveys also show that only a tiny percentage of those who believe they have been discriminated against have bothered to make use of the legal or governmental remedies available under the law (Abravanel & Cunningham).

Equally distressing, in recent years the HUD enforcement process has almost entirely broken down. Faced with ever increasing numbers of fair housing complaints, HUD bureaucrats have responded by finding reasonable cause in ever fewer cases. From October 2003 to April 2004, HUD has found cause in less than twenty-odd cases out of several thousand complaints (National Fair Housing Alliance, 2004). The ripple effects of HUD's lackluster enforcement effort have been widespread. Without cause findings, the pipeline of individual cases (as opposed to "pattern or practice" cases) available for prosecution by the Department of Justice has virtually disappeared. Complainants are far less likely to take steps to enforce their rights when they know relief through HUD is rarely available. And private fair housing organizations, which serve as clearinghouses for many complaints of discrimination, have become increasingly wary about referring complaints to HUD.

This unfortunate development has placed more reliance on private fair housing organizations and federal court litigation as the primary means of redress for victims of discrimination. But the relatively small number of lawyers with fair housing expertise cannot begin to handle the flow of housing discrimination complaints that reach HUD each year, and both Congress and HUD have failed to provide adequate funding to private fair housing groups to ensure that they will be able to close the enforcement gap. The complaint filing process that Congress envisioned would be readily accessible to lay persons without financial means cannot be easily replaced by anything other than a government agency committed to effective and efficient enforcement.

These problems are serious, but not insurmountable. The progress we have made toward better integrated neighborhoods and lower levels of discrimination can continue, provided we recognize the problems we face with our fair housing enforcement efforts and take prompt and effective steps to remedy them. But to ensure the progress continues, it is important that we are clear on the steps we need to take going forward, and why those steps matter if we are to fulfill the promise of *Brown*.

The Path from Here

As America reflects on *Brown* at 50, the discussion invariably comes back to a simple focus on the progress, or lack thereof, in integrating America's schools. The meaning of *Brown* goes far beyond the school desegregation debate. *Brown* ushered in a new era of civil rights consciousness in this country. Without *Brown* there would have been no desegregation of lunch counters, no integration of the work place, and no modern era civil rights laws. The revolution that was *Brown*—that separate is inherently unequal—committed America to a path of integration in all walks of life, not just our schools. The concept of one America remains our most important national goal. Without it, any hope that we can pull together to overcome our differences and replace ignorance and harmful stereotypes with tolerance, understanding, and respect will be forever lost.

At the heart of all of these efforts, and at the heart of Dr. King's dream of one America, lies the Fair Housing Act. It stands at the intersection of jobs, access to capital, integrated schools and places of public accommodation, and even voting power. If we can manage to live together, the barriers to integration in all spheres of our communal life will be that much easier to surmount.

The revolution that was *Brown*—that separate is inherently unequal—committed America to a path of integration in all walks of life, not just our schools.

Access to better schools means access to better jobs, loans with better rates, the possibility of wealth building, and genuine voting power. If the FHA is truly working, all of these goals can be accomplished in the long run even if busing battles are lost and desegregation orders reversed. Current statistics about trends toward re-segregation of our schools do not mean the legacy of *Brown* has been lost, provided there is true progress in enforcing the FHA.

So where do we go from here? How do we continue the progress that we have made since 1968, and particularly since 1988, in creating truly integrated communities? Our efforts must stay focused on four areas of immediate concern. First, we must figure out how to break the logjam at HUD. Far too few fair housing complaints are being charged. Not enough cases are finding their way to the Department of Justice for prosecution in federal court. HUD needs to lower the bar for cause findings, impose real time deadlines on their investigations, and overhaul the bureaucracy that is choking the enforcement process envisioned by Congress for the most basic fair housing violations. Real

change is needed at HUD now. If HUD is not up to the job of implementing the FHA, Congress needs to consider whether a new or different agency should be given the job.

Second, the government must allocate more dollars for education and outreach. Far too few individuals understand their fair housing rights, or where to go to enforce those rights. More and better information produces more complaints, more enforcement, and faster progress towards integration. This effort cannot succeed without a private-public partnership. That means that increased funding must also be made available for private fair housing initiatives undertaken by not-for-profit fair housing organizations. More covert civil rights testing is needed, both to help with the investigation of fair housing complaints and to assess where and how discrimination is occurring in our cities and real estate related industries.

Third, the private bar must step up to the plate and demonstrate a willingness to shoulder more responsibility for filing and litigating fair housing cases in state and federal court. These cases are rewarding and remunerative, but too few private attorneys know either how strong the law is or that it provides for attorney's fees. Private fair housing organizations and advocates must redouble their efforts to enlist more of the private bar and its considerable resources in the fair housing enforcement effort.

Finally, progress toward integration will not happen without a fair and open-minded federal bench that is prepared to give due consideration to the history and purpose of the FHA. To date, the road to racial justice since *Brown* has been marked by courageous court decisions that have challenged hateful and destructive practices that have long kept America apart. We must collectively work to ensure that those in power now do not succeed in politicizing the bench for the next generation in a way that creates a roadblock to continued progress.

At its core, the promise of *Brown*'s legacy remains strong. The untapped potential of the Fair Housing Act creates untold opportunities to move America ever closer to truly integrated patterns of living that, with or without busing or desegregation orders, will produce voluntarily integrated classrooms and greater inter-racial understanding. Realizing this goal will require recommitment to enforcement of the nation's fair housing laws, remembering all the while that difficult struggles, like that for racial equality and integration, demand resolve, patience, persistence, and—most important—time.

John P. Relman is the founder and director of Relman & Associates. Since 1986, Mr. Relman has represented scores of plaintiffs and public interest organizations in individual and class action discrimination cases in federal court. Mr. Relman has written and lectured extensively in the areas of fair housing and fair lending law and practice and is the author of the Housing Discrimination Practice Manual, published by the West Group. Mr. Relman teaches housing and employment discrimination law at Georgetown University Law School, where serves as an adjunct professor.

References

Abravenel, M. & Cunningham, M. (2002, April). *How much do we know?—Public awareness of the nation's fair housing laws*. Washington, DC: Office of Policy Development and Research, U.S. Department of Housing and Urban Development.

Gladstone v. Village of Bellwood. (1979). 441 U.S. 91.

Havens Realty Corp. v. Coleman. (1982). 455 U.S. 363.

House Report No. 711, 100th Congress, 2d Sess. 15 (1988).

Knapp, John. J. (1985, November). Testimony. In *Issues in Housing Discrimination, Vol. 2*, 107. Washington, DC: U.S. Commission on Civil Rights.

National Advisory Commission on Civil Disorders. (1968). *Report of the National Advisory Commission on Civil Disorders*. Washington, DC: U.S. Government Printing Office.

National Fair Housing Alliance. (2004, April 7). *2004 Fair housing trends report*. Retrieved from http://www.nationalfairhousing.org.

Rawlings, L., Harris, L., Turner, M.A. & Padilla, S. (2004, March). Race and residence: Prospects for stable neighborhood integration. *Neighborhood Change in Urban America Series, 3*.

Turner, M.A. & Ross, S. (2003, May). *Discrimination in metropolitan housing markets: Phase 1—Supplement*. Washington, D.C: Office of Policy Development and Research, U.S. Department of Housing and Urban Development.

Turner, M. Freiberg, F., Godfrey, E., Herbig, C., Levy, D., & Smith, R. (April, 2002) *All other things being equal—A paired testing study of mortgage lending institutions* Washington, D.C.: Office of Policy Development and Research, U.S. Department of Housing and Urban Development.

Desegregating Yonkers: Interview with Judge Leonard B. Sand

Conducted by Jonathan Feldman

Introduction

The federal desegregation case in Yonkers, New York, is perhaps the quintessential NIMBY case. Yonkers is a city of approximately 200,000 residents located just north of the Bronx. Prior to 1980, the vast majority of the city's 6,800 public housing units were located in southwest Yonkers. Over 80 percent of the city's minority residents resided in this section, as well. Such racial isolation was also reflected in the Yonkers public schools. Of the 30 schools located in Yonkers, fully 28 had student populations that were virtually all-white or all-minority.

In response to this racial isolation in both residential and school settings, the U.S. Department of Justice (DOJ) filed suit against the city and its board of education in 1980. The following year, the Yonkers branch of the NAACP intervened as a plaintiff. DOJ and the NAACP charged that Yonkers had intentionally segregated its public housing and public schools, in violation of the Constitution. In 1985, the federal judge assigned to the case, *U.S. v. Yonkers Board of Education*, Judge Leonard B. Sand, found that the City of Yonkers had indeed intentionally segregated its public schools and housing over a 40-year period. He ordered the city to desegregate these institutions.

Faced with the mandate to desegregate both schools and housing, Yonkers's elected officials engaged in massive resistance, responding to the outcry from their white constituents. Judge Sand issued order after order to compel compliance, and levied fines against recalcitrant officials themselves, until Yonkers finally relented. Today, public housing has been built outside of minority neighborhoods and school enrollments are more reflective of the city's overall racial composition. The fact that Yonkers ultimately moved toward desegregation represents a triumph for racial and economic equality, a triumph for reason over irrational NIMBY fears, and a triumph for the rule of law itself.[1]

[1] For an in-depth look at the case, see Belkin (1999). For additional information, including citations to the legal opinions issued by Judge Sand, see Entin (2001).

Interview

Jonathan Feldman: What was the case about?

Judge Leonard B. Sand: What is unique about the Yonkers case is that it was the first case in which housing and school segregation were joined in a single action. Lots of people had spoken about the interrelationship between the two, how one feeds the other—but Yonkers was the first single suit to challenge racial segregation in both housing and education and to deal explicitly with the interrelationship between the two.

Mr. Feldman: How was Yonkers's liability established?

Judge Sand: Segregation in education was caused by school zoning decisions. About half of the major liability opinion is based on the tracing of the school zoning patterns, and finding that they were racially biased. The other aspect of liability was the housing plan, and that was traced over 40 years. That was the era of slum clearance—in minority areas they would bulldoze and put up high-rise public or subsidized housing, which became 90 percent or more minority. And southwest Yonkers was predominantly minority, and the rest of Yonkers was predominantly white.

Efforts were made to counter that, to put up some new housing in majority areas, and those efforts were defeated. So I think both forces—both education policy and housing policy—were working toward the same consequence, which was to further segregation. You also had a population that reflected lots of white flight from places like the Bronx and Queens and Brooklyn, and a lot of it went to Yonkers. When they picketed me, the signs sometimes said, "They're doing it to us *again*."

Mr. Feldman: Focusing on that NIMBY aspect, do you think that the fact that the protesters had moved to Yonkers from places like the Bronx, which themselves had become less middle-class and more poor over time—did that fuel the resistance more than if people had been in Yonkers for generations?

Judge Sand: I think so. The other thing is, and it's very relevant to NIMBY, the political structure of Yonkers caused local homeowners' associations to be a very significant, if not the major political influence, in the town. Nothing would be built in a particular ward without the approval of the ward chairperson, and the homeowners' association in that ward would have extraordinary power, so that NIMBY had a lot of political clout behind it.

Mr. Feldman: Were there any NIMBY forces at work in the education context, in terms of resistance to having minority students entering previous white schools? My understanding is that, in fact, the education portion of the case went more smoothly than the housing portion.

Judge Sand: Yes, that's right—you had a superintendent and a significant number of teachers who *welcomed* the decision, because they were outraged at the efforts to segregate the schools. And the remedy was successful because of a school choice mechanism. Parents would list three school choices, and they could either choose the local school or a magnet school. Because of the attractiveness of the magnet schools, there was almost instant integration in the physical sense. There were some other problems, with respect to the level of financial support for the schools and segregation within the schools themselves, but you did not have the type of organized community opposition in the education context as you did in the housing context.

One of the leaders of the protesters said later publicly, "If I had known the residents were going to be such nice people, and the housing was going to be so attractive, I would never have led the opposition."

Mr. Feldman: What happened regarding housing?

Judge Sand: The City was ordered to build 200 units of public housing, as well as employing other techniques, like developing small-scale housing projects, utilizing existing housing, and fostering new construction by private developers who get tax breaks by agreeing to allocate a certain number of units for subsidized housing.

As to the 200 units of public housing, the City of Yonkers at one point agreed to build this if HUD made the funds available. And they promised this thinking that there was no way the funds would ever be made available. But HUD was made a defendant, HUD wanted to get out of the case, and in its inimitable manner HUD found a pocket of money.

At one point, and it shows the craziness of Yonkers's behavior, Yonkers offered to return all the money from HUD if it didn't have to build the housing. I rejected that.

The success story of Yonkers housing is those 200 units of public housing, because they were well-designed and well-built. One of the leaders of the protesters said later publicly, "If I had known the residents were going to be such nice people, and the housing was going to be so attractive, I would never have led the opposition."

The credit for that goes to Oscar Newman, my then housing advisor, who was an advocate of defensible low-rise, low-density public housing. The initial proposal from DOJ was to put up a couple of high-rises in the predominantly white area. And I think that would have been a terrible mistake. True, it might have led to faster results—instead of taking 20 years, the housing might have been built more quickly. But the history of high-rise public housing has been very bad. In other cities, they've been tearing it down. Oscar Newman's approach was to avoid common hallways and common entrances which can lead to crime. As a result, the Yonkers public housing has been very successful.

Mr. Feldman: If Yonkers residents were aware of Newman's approach, why did they get so worked up about the housing proposals?

Judge Sand: There was a fear that property values would decline. The Yonkers homeowner had scraped two nickels together to buy a house, and the vast bulk of the family wealth was tied up in the house. If you created public housing that was *inferior*, that would drag down property values. And if you created housing that was *superior*, the response would be, "We worked so hard to scrape together the funds to buy our house, and here you're *giving* it to these people." So either way, people would oppose the housing.

But since it has been built, I have not heard any complaints about the quality or the maintenance of the

public housing. I think it has been an inadequately publicized success.

Mr. Feldman: It sounds like the NIMBY fears didn't materialize, in terms of either property values or housing quality?

Judge Sand: I think that's right. You read criticisms of the case's outcome, complaining that while the children are playing together, the adults are not socializing as much as one would like. But that's such a far cry from what the fears had been! And if the children are playing together and living together peacefully, then time will achieve what one would hope it would achieve.

Judge Leonard B. Sand was nominated to the U.S. District Court, Southern District of New York, by President Jimmy Carter in April, 1978 and confirmed by the Senate the following month. He assumed senior status in 1993. Prior to joining the judiciary, Judge Sand spent 20 years in private practice. He also served as an Assistant to the Solicitor General of the United States, as an Assistant U.S. Attorney in the Southern District of New York, as a Law Clerk in the U.S. Department of Justice, and as a U.S. Naval Reserve Ensign.

Jonathan Feldman is a senior attorney with the Public Interest Law Office of Rochester (PILOR). He served as a law clerk to the Honorable James T. Giles, a federal district judge in Philadelphia, and since 1990, he has worked as a public interest lawyer, specializing in education cases and civil rights cases. He joined PILOR in 1997, where he has maintained a full caseload of special education, school residency, and civil rights cases on behalf of individual clients and in class action lawsuits.

References

Belkin, L. (1999). *Show me a hero: A tale of murder, suicide, race and redemption*. New York: Little Brown & Co.

Entin, J. (2001). Learning from Yonkers: On race, class, housing, and courts [Review of the book *Show me a hero*]. *Howard Law Journal, 44,* 375.

U.S. v. Yonkers Board of Education. (1985). 624 F. Supp . 1276 (1985). Relief granted. (1986). 635 F. Supp. 1538 (S.D.N.Y.) (schools) and 635 F. Supp. 1577 (S.D.N.Y) (housing). Affirmed. (1987). 837 F.2d 1181 (2d Cir.). Certiorari denied. (1988). 486 U.S. 1055.

Inclusionary Zoning: Opening up Opportunity-Based Housing

David Rusk

Now approaching midnight, the final public hearing had been long, emotional, and heated. For the last half hour, the nine county council members had been assailed by a succession of residents of Potomac, the wealthiest area of Montgomery County, Maryland.

The county's proposed law was branded "radical," "socialistic," even "communistic." "*Those people* have no right to live in *our* neighborhood," the Potomac bloc angrily declared.

The council president recognized a youngish woman, the evening's final witness. "My name is Ms. Smith," she said quietly, "and I teach third grade at Potomac Elementary School. What I would like the county council to understand is that these previous speakers entrust *me* with the education of *their children*... but they don't want me living in the neighborhood."

Bang! The council president brought down the gavel, as the story is told, called for the question, and the Moderately Priced Dwelling Unit (MPDU) law passed unanimously in 1973.

Enacting the nation's oldest (and still most productive) inclusionary zoning law had not been easy, even in liberal Montgomery County, a major suburb of Washington, D.C. For six years, Suburban Maryland Fair Housing, the League of Women Voters, a coalition of about 30 churches, and other "good government" groups had been campaigning for such a measure.

Advised that the county attorney thought inclusionary zoning was illegal, its advocates recruited the *pro bono* services of one of Washington's top law firms. They gained the critical votes only after an election in which progressive Democrats won all nine council seats and a former League of Women Voters president, Ida Mae Garrott, was elected council president. Councilman Norman Christeller undertook a personal crusade to enact the MPDU law.

Even after that vote, the MPDU law faced more hurdles. The county executive vetoed the bill as unconstitutional. The council overrode his veto unanimously. Some homebuilders threatened suit. "That's certainly your right," the county council, in effect, responded. "Of course, such a suit will cast a cloud over our entire zoning code, so while it's being litigated, the county just won't issue any new building permits." The threatened suit went away.

The new law required that in every new subdivision, townhouse complex, or apartment development of 50 or more units, 15 percent of the units had to be affordable for households with incomes less than 65 percent of area median income. Moreover, to offset builders' potential losses for developing part of their property at less than its market potential, the county offered "density bonuses" that allowed up to 22 percent more housing units to be built.

And to assure that some of the MPDUs would be affordable for very low income workers, the county directed the Housing Opportunities Commission (HOC), the county's public housing authority, to buy or rent one-third of the MPDUs.

MPDU: A Working Partnership

With the new inclusionary rules in hand, county staff developed a working partnership with private, for-profit homebuilders. "MPDU has been good for the county and good for the builders," Eric Larson, the county's MPDU administrator, observed, "and we have to give a lot of credit to the builders for making the program work." Since mid-1976, when the first MPDUs came on the market, for-profit homebuilders have delivered over 11,000 MPDUs as integral parts of market rate neighborhoods. HOC owns over 1,700 for-sale MPDUs and rents more than 1,500 units in multi-family buildings.

Architects and builders have become increasing creative in blending MPDUs into the surrounding market rate housing, constructing duplexes that look identical to $500,000 homes across the street or four-plexes that are indistinguishable from million-dollar mansions next door, except for the additional front doors that will be noticed only by passers-by who know what to look for.

Police departments and social agencies report no patterns of problems from a neighborhood mix of 85 percent market rate housing (mostly occupied by upper-middle class families), 10 percent "workforce" housing, and five percent "welfare-to-workforce" housing. An independent study found no adverse impact on the resale price of market-rate homes in mixed-income neighborhoods.

And, most importantly, within the nationally renowned Montgomery County Public Schools, most MPDU children prosper in overwhelmingly middle-class schools, achieving higher test scores, graduation rates, and college enrollment rates. Housing policy *is* school policy.

A National Movement

Following Montgomery County, Maryland's lead, at least 132 cities, towns, and counties have enacted inclusionary zoning (IZ) ordinances. Some 13 million people (about five percent of the country's population) now live in communities where local government mandates mixed-income housing.

Inclusionary zoning creates genuine "opportunity-based housing" that provides access to growing suburban job centers and access to higher-quality schools.

IZ jurisdictions range in population size from giant Fairfax County, Virginia (945,717) to the tiny Town of Isleton, California (818). Some 107 counties and municipalities in California have enacted IZ laws (about one-fifth of all local governments in that state). There are also clusters of IZ communities in the Washington, D.C. and Boston regions, both of which have high-cost housing markets.

In September 2003, Highland Park, a suburb of Chicago, passed the first IZ law in the Midwest; Madison, Wisconsin, adopted the Midwest's second inclusionary ordinance in January 2004. A new state law in Illinois now requires all 2,824 local governments to have at least 10 percent affordable housing. Communities falling short of that standard can receive state approval for their compliance plan by enacting an IZ ordinance with a 15 percent set-aside.

Across the country, building industry opponents invariably threaten that if inclusionary requirements are imposed on them, they will just pull up stakes and move all of their business to a neighboring town. But that is pure "urban legend." The threat sounds plausible, but no community has ever repealed its IZ law because it faced the reality of the departure—rather than simply the threat—of the building industry.

But if the opponents' fear is that the first local law will be the proverbial "camel's nose" under the regional "tent," there is plenty of evidence for that result. Municipal governments have adopted IZ laws in at least 32 counties. The 32 pioneers averaged only 17 percent of their counties' population at the time they adopted their area's first IZ law. However, additional neighbors have followed suit and a dozen county governments have enacted IZ laws covering unincorporated land so that, on average, IZ requirements now cover over half (54 percent) of the 32 counties' populations.

For example, Pleasanton was less than five percent of the population in California's Alameda County when it adopted its IZ ordinance in 1978. Similar laws enacted by San Leandro (1980), Berkeley (1986), Livermore (1986), Emeryville (1990), Dublin (1996), Union City (2001), Fremont (2002) and Alameda County itself (2000), however, have raised IZ coverage to 55 percent of that East Bay county's population.

Tailoring IZ Laws to Fit Local Conditions

Each community tailors its ordinance to its own housing needs and building industry scale. The key issues are minimum project scale ("trigger point"), percentage of inclusionary units required ("set-aside"), income ceiling for eligible households, size of density bonus, and length of control period for re-sale prices or rents.

Inclusionary requirements are triggered by housing developments as low as a minimum of five units and as large as a minimum of 50 units. The most common threshold at which IZ is required is ten or more units.

Set-aside percentages for affordable housing range from as low as five percent to as high as 35 percent. Almost three-quarters of the communities require setting aside between 10 and 15 percent of the total units in eligible developments as affordable housing.

Maximum eligible income ceilings range from 30 percent of area median income (AMI) to 120 percent of AMI.

(HUD provides annual AMI calculations for all metropolitan areas.) Many communities apportion units among different income levels. For example, a community might target 25 percent of the units to households at less than 50 percent of AMI, 50 percent of the units to those between 51 percent and 80 percent of AMI, and 25 percent of the units to those between 81 percent and 120 percent of AMI. All of the communities targeting to between 81 percent and 120 percent of AMI are in Northern and Southern California and the Boston area, regions with extremely high housing costs.

One-fifth of all jurisdictions targets all or a portion of the units for very low income households (50 percent of AMI). Reaching even lower on the income scale typically requires funneling public housing subsidies into the program by having the public housing authority purchase affordable units outright or by using housing vouchers in rental properties.

Density bonuses are utilized by 95 percent of all IZ ordinances as a primary cost-offset for homebuilders, though other cost-offsets are also common. In California, 44 percent of IZ laws offer fast-track processing, 42 percent waive certain fees, 42 percent allow reduction of certain standards (such as parking requirements), and 38 percent provide cash subsidies.

Resale price and rent control periods generally are quite long in order to maintain a stable, ongoing inventory of affordable housing. Only 14 programs have control periods of 10 or 15 years. Twenty communities require a minimum 20-year control period; 47, a 30-year control period; seven, 40 to 45 years; 20, 50 to 55 years; five, 59 to 60 years; four, 99 years; and 23 require IZ housing to be permanently affordable.

The Bottom Line

Such choices for IZ laws should not just be picked out of the air. The most successful ordinances represent collaboration among local officials, affordable housing advocates, and progressive builders, running the numbers to find out what is fair to builders while meeting community needs. For-profit homebuilders produce over 95 percent of all new housing in America. An effective IZ policy must be fair to the builders' bottom line.

Inclusionary zoning can rarely be the total answer to filling a community's affordable housing gap. Other programs, however, may result in government agencies or non-profit developers building more affordable housing on the side of town that already has existing affordable housing and lower income residents, rather than throughout the community. Inclusionary zoning creates genuine "opportunity-based housing" that provides access to growing suburban job centers and access to higher-quality schools.

The true bottom line, however, is the answer to a simple question of fairness raised by that Montgomery County school teacher back in 1973: *Isn't anyone good enough to work in a community good enough to live in that community?*

David Rusk is a speaker and consultant on urban policy. A former mayor of Albuquerque and New Mexico legislator, he is author of *Cities without Suburbs* (3rd edition, 2003) and *Inside Game/Outside Game* (1999). Many of his speeches, presentations, and research reports from the more than 100 metro areas in which he has worked are available in his "documents library" at www.davidrusk.com.

Sources

All data have been compiled by the author from personal knowledge and various sources, including the Innovative Housing Institute (www.inhousing.org), PolicyLink (www.policylink.org), Business and Professional People in the Public Interest (www.bpichicago.org), and the Non-Profit Housing Association of Northern California (www.nonprofithousing.org). For further information on Montgomery County, see Chapter 9 of the author's *Inside Game/Outside Game*, entitled "Montgomery County, Maryland: Mixing Up the Neighborhood" (1999, Washington, DC: Brookings Institution Press).

Housing Choice Voucher Discrimination: Another Obstacle to Achieving the Promise of *Brown*

Reed Colfax

The nation's failure to adopt housing policies that mandate or encourage integration in subsidized housing for low income families has undoubtedly stood as a significant barrier to achieving the promise of *Brown v. Board of Education* in the last 50 years. The two primary federal programs under which subsidies for low income housing are distributed largely permit private housing providers to determine whether the subsidies will be used in a manner that promotes integration or maintains segregation. The neighborhoods served by these programs and the schools in those neighborhoods tend to be segregated by race and income.

The Low Income Housing Tax Credit program, which serves as the largest source of federal monies for the construction of new affordable housing in the country, allows private housing developers to decide when and where they will build units. The Housing Choice Voucher program (formerly known as Section 8 vouchers and certificates), the largest "tenant based" federal housing subsidy, allows private landlords to determine whether or not they will rent to voucher holders. This article will focus on discrimination in the Housing Choice Voucher program.[1]

The Housing Choice Voucher program was explicitly designed to help break down patterns of economic and racial segregation in the America's neighborhoods (42 U.S.C. § 1437(f)). Nevertheless, the program allows private landlords to contribute to ongoing patterns of residential segregation by refusing to accept the largely minority voucher holders in historically white and middle-income neighborhoods. In concept, the Housing Choice Voucher program allows low income families to choose housing outside neighborhoods with high concentrations of minorities and poverty. In practice, landlords outside those areas often refuse to rent to so-called "Section 8s."

For example, in Washington, D.C., a city where the refusal to accept qualified tenants with housing choice vouchers is prohibited by law, landlords still regularly refuse vouchers. A D.C.-based housing advocacy organization, the Equal Rights Center, called landlords and asked whether they accepted vouchers. Approximately half of the landlords contacted either outright refused to accept vouchers or stated limitations that would effectively bar voucher holders from renting a unit.

The landlords' true motivations for refusing housing choice vouchers are rarely revealed, but undoubtedly many are motivated by their own and their neighbors' biases against having the poor and largely minority voucher holders in their neighborhoods. The daily, individual refusals to rent to voucher holders are quiet corollaries to the very public and explicit neighborhood opposition to the construction of affordable multi-family apartment buildings.[2] Ultimately, however, the one-at-a-time NIMBY-based refusals to rent to voucher holders may affect more homeseekers than the familiar large-scale campaigns against the construction of affordable multi-family buildings.

In most jurisdictions, the refusals to accept housing choice vouchers occur unchecked because the federal government has explicitly allowed participation in the Housing Choice Voucher program to be voluntary. Under the federal government's rules for the program, a housing provider may refuse to rent to a family simply because that family holds a housing choice voucher.[3] Such refusals have contributed to the general failure of the Housing Choice Voucher program to achieve its goal of furthering integration among the country's poor.

CHALLENGES TO VOUCHER DISCRIMINATION

In the absence of a federal rule explicitly requiring landlords to accept vouchers, two primary methods have

[1] For a discussion of discrimination in the Low Income Housing Tax Credit program, see Zimmerman, 2004.

[2] In a recent example of successful litigation challenging neighborhood opposition to the construction of affordable housing, a Georgia city settled, for $450,000, claims brought by the United States claims against the city for city's efforts to impose NIMBY-driven land-use restrictions to prevent a proposed development that would be largely occupied by African Americans (*U.S. v. City of Pooler*, 2001).

[3] For a substantial period of time, the federal government maintained a rule that if a housing provider accepted one person with a voucher that housing provider could not reject other persons because they were voucher holders. This so-called "take one, take all" rule was repealed, however, in 1996.

been used to challenge landlords' policies of refusing to accept voucher holders. First, lawsuits have been brought arguing that the refusal to rent to persons because they hold vouchers violates existing antidiscrimination laws prohibiting discrimination on the basis of race or disability. Second, state and local governments have passed laws that explicitly or implicitly prohibit discrimination based on a person's status as a housing choice voucher recipient.

While some of these efforts have been successful, they have not, to date, significantly altered the landscape for a voucher holder seeking housing in economically and racially integrated neighborhoods. Refusals are still the norm and the voucher program's goal and *Brown's* promise of integration remain distant concepts.

Challenges Under Existing Antidiscrimination Laws

A few lawsuits have been brought under the federal Fair Housing Act (FHA) against housing providers who maintain policies of refusing housing choice vouchers. These suits have generally asserted that the housing providers' policies have a "disparate impact" on minorities. Although the FHA does not directly prohibit discrimination against voucher holders, the Act and its state and local corollaries generally prohibit policies or practices that have a disproportionate adverse effect on a protected group, such as racial minorities. Typically, housing providers that maintain such a policy or practice are permitted to defend themselves by showing that their policy or practice is necessary to achieve some important and legitimate goal.

In concept, the voucher program allows low income families to choose housing outside neighborhoods with high concentrations of minorities and poverty. In practice, landlords outside those areas often refuse to rent to so-called "Section 8s."

It is not difficult to show that a policy of refusing to rent to voucher holders has a much greater impact on racial minorities than whites. In most jurisdictions, the vast majority of voucher holders and families on the voucher waiting list are minorities. For example, in the District of Columbia, approximately 98 percent of families holding vouchers or on the waiting list are African American.

Some courts have concluded, however, that the mere fact that the voucher program is voluntary is a sufficient justification for a housing provider to maintain a policy of refusing vouchers despite the substantially disproportionate adverse impact on racial minorities (*Salute*, 1998; *Knapp,* 1995). Other courts have appropriately concluded that "voluntariness" is not a *reason* for refusing vouchers and that mere permission to maintain a policy or practice does not excuse its harmful effect on minorities. In those cases, housing providers have offered other explanations for their refusal to accept vouchers, such as asserting that the administrative costs of taking vouchers are too high and that there is no guarantee that the government will set aside sufficient funds for vouchers, which are generally funded on an annual basis. Despite these claims, courts have required the housing providers to end their policy of refusing vouchers (*Bronson,* 1989).

The "disparate impact" challenges to no-voucher policies bear many parallels to the challenges in the 1970s and 1980s to no-children policies that were having substantial effects on minorities (*Betsey,* 1984). Notably, in the case of families with children, Congress ultimately took action and amended the FHA to prohibit familial status discrimination. Undoubtedly a very different Congress sits in Washington today, but the impact on minorities from voucher discrimination could very well be greater than the impact of the no-children policies of the past.

The mixed results of FHA claims challenging policies of refusing vouchers appears to have chilled the desire of voucher holders and their representatives to bring these cases, which are often complicated, resource-intensive and costly. Almost none have been brought in the past several years.

State and Local Laws Prohibiting Discrimination Against Voucher Holders

Twelve states, the District of Columbia, and localities in nine states have passed laws that explicitly or effectively prohibit discrimination against voucher holders.[4] These laws typically make "source of income" or "being a

[4] California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont, and Wisconsin each have such laws at the state level, while localities California, Georgia, Illinois, Maryland, Michigan, Missouri, New York, Oregon and Washington have such laws.

recipient of public assistance" a protected class under existing housing antidiscrimination laws. In other words the laws extend the prohibitions against discrimination in housing on the basis of race, gender, religious, and other familiar classes to discrimination on the basis of source of income or receipt of public assistance. Although housing choice vouchers appear to fall within any reasonable definition of a "source of income" and the "receipt of public assistance" among the state laws, only the District of Columbia statute explicitly references housing choice vouchers as an example of a "source of income" or "receipt of public assistance."

Tenants and housing advocates report that they regularly use these "source of income" laws to compel landlords to accept tenant applicants holding vouchers by simply noting that the landlords' refusal to accept vouchers violates the law. Nonetheless, as the Equal Rights Center study suggests, it appears that the refusal to accept vouchers continues to be widespread in jurisdictions even where the practice is illegal.

It appears that the refusal to accept vouchers continues to be widespread in jurisdictions even where the practice is illegal.

There have been successful actions against landlords refusing vouchers under the "source of income" laws (*Franklin, Tower One*, 1999, p. 1112, holding that "a landlord's refusal to accept a Section 8 voucher violates both the letter and the spirit of" New Jersey's "source of income" anti-discrimination statute). Nonetheless most jurisdictions still await the clarion statement from a court that refusing a voucher holder will almost necessarily result in liability under "source of income" statutes. Indeed, in at least one jurisdiction, courts have refused to recognize discrimination against voucher holders as a violation of the "source of income" protections (*Knapp*, 1995).

In other jurisdictions, the state or local antidiscrimination laws have built-in exceptions that may allow some housing providers to escape liability. For example, in Minnesota a court concluded that a housing provider could justify a refusal to participate in the voucher program by setting forth a non-discriminatory reason, "such as an unwillingness to bear the cost of satisfying the administrative requirements of the program" (*Babcock*, 2003, *1). In Connecticut, the provisions of the state housing anti-discrimination law "with respect to the prohibition of discrimination on the basis of lawful source of income shall not prohibit the denial of full and equal accommodations solely on the basis of insufficient income" (C.G.S.A. § 46a-64c (b)(5)). This provision may allow a landlord to escape liability by establishing high minimum income guidelines (*Commission on Human Rights,* 1999).

Housing providers have raised a variety of other defenses to liability under "source of income" laws. These defenses have been largely unsuccessful, but they create another set of obstacles to any voucher holder pursuing claims and undoubtedly complicate cases and require additional time and resources in any litigation.

For example, landlords sued under source of income statues have argued that states and localities cannot make a voluntary federal program mandatory. This argument has been soundly rejected by courts, which note that a state mandating participation in the voucher program actually furthers the purposes of the voucher program (*Commission on Human Rights,* 1999, finding that nothing in the federal voucher program prevents a state from preventing discrimination against voucher holders; *Franklin Tower One*, 1999, finding federal statute does not preempt state law prohibiting discrimination against voucher holders; *Attorney General,* 1987, finding same).

Landlords have also argued that requiring them to accept housing choice vouchers violates their constitutional right to freedom of contract and the constitutional right to be free from the government taking property without just compensation. The assertion that a private business person should be free to decide with whom he or she may contract has been consistently rejected since Southern businesses raised the argument as a justification in the 1960s for refusing to serve blacks in their hotels, stores, and restaurants (*Heart of Atlanta Motel,* 1964, 258, finding that a motel had "no 'right' to select its guests as it sees fit" if the selection violated civil rights laws). A state or locality that permits a person to engage in the business of renting apartments within its borders can surely condition such permission on a requirement that the landlord accept qualified low income tenants with housing choice vouchers.

There is little judicial precedent on landlords' assertion that by forcing them to take vouchers the government is depriving them of some use of their property. It is difficult to conceive of what is "taken" from a landlord

that is forced to accept housing choice vouchers. Such a landlord is not deprived of any economically beneficial use of property, since he or she receives the same income from the housing unit as if a non-housing voucher holder were the tenant (*In re Smith*, 1999).

Undoubtedly there are great difficulties in passing strong prohibitions against voucher discrimination. Enforcing the existing laws through litigation entail substantial costs and risks. Voucher holders and their advocates must surmount those difficulties and bear the costs and risks if vouchers are to achieve their potential to be a powerful tool for achieving *Brown's* promise of integration. Their efforts must take place in the courts and through advocacy on Capitol Hill, and in statehouses and at city halls around the country.

Absent clear laws and clear precedent prohibiting the refusal to rent to voucher holders, too many landlords in historically white neighborhoods will continue to resist the predominantly minority voucher holders. The small number of cases challenging the indisputably prevalent discrimination against voucher holders strongly suggests that the lack of clarity regarding the application of federal, state, and local laws that explicitly or implicitly proscribe voucher discrimination discourages voucher holders and their advocates from mounting legal challenges to the unfair treatment. Unless the federal government, states, and localities pass or strengthen voucher discrimination laws and courts clearly hold that such laws mean what they say, we may still be reaching for the promise of *Brown* in another 50 years.

Reed Colfax is a civil rights attorney with Relman & Associates. He previously served as the project director of the Fair Housing Project and as a staff attorney at the Washington Lawyers' Committee for Civil Rights and Urban Affairs, where he represented numerous individuals and organizations in housing and public accommodations discrimination cases in federal and state courts. Prior to joining the Committee, Mr. Colfax was a staff attorney with the NAACP Legal Defense and Education Fund, Inc., where he litigated fair housing and equal employment opportunity cases and advocated before Congress and other federal agencies for stronger anti-discrimination laws and policies. Mr. Colfax also clerked for the Honorable Thelton E. Henderson, United States District Court Judge for the Northern District of California.

References

42 U.S.C. § 1437(f).

Attorney General v. Brown. (1987). 400 Mass. 826, 511 N.E.2d 1103.

Babcock v. BBY Chestnut Ltd. Partnership. (2003). 2003 WL 21743771 (Minn. App.).

Betsey v. Turtle Creek Associates. (1984). 736 F.2d 983 (4th Cir.).

Bronson v. Crestwood Lake Section 1 Holding Corp. (1989). 724 F. Supp. 148 (S.D.N.Y.).

C.G.S.A. § 46a-64c (b)(5).

Commission on Human Rights and Opportunities v. Sullivan Associates. (1999). 250 Conn. 763, 789.

Franklin Tower One, LLC v. N.M. (1999). 725 A.2d 1104 (N.J.).

Heart of Atlanta Motel, Inc. v. U.S. (1964). 379 U.S. 241.

In re Smith and Wilmette Real Estate & Mgmt. Co. (1999, April 19). 1999 WL 308207 (Chi. Com. Hum. Rel.).

Knapp v. Eagle Prop. Mgmt. Corp. (1995). 54 F.3d 1272 (7th Cir).

Salute v. Stratford Greens Garden Apartments. (1998). 136 F.3d 293 (2d Cir).

U.S. v. City of Pooler, Georgia. (2001). No. CV401-263 (S.D. Ga.).

Zimmerman, K. (2004, September). The low income housing tax credit program and civil rights law: Updating the fight for residential integration. *The NIMBY Report,* 24.

The Low Income Housing Tax Credit Program and Civil Rights Law: Updating the Fight for Residential Integration

Kenneth H. Zimmerman*

INTRODUCTION

In 1968, the Kerner Commission threw down a gauntlet that continues to challenge and haunt those committed to urban areas, community revitalization, and racial justice. The Commission stated, "[F]ederal housing programs must be given a new thrust aimed at overcoming the prevailing pattern of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them." This was "fundamental" to its recommendations about how to respond to the violence and destruction that in the 1960s tore apart many American cities. (National Advisory Committee on Civil Disorders, 1968).

What place this stark warning should play in the policies and programs of today is, in essence, the question posed by the current civil rights challenge to how the state of New Jersey allocates its share of the nation's largest and most significant low income housing development program, the Low Income Housing Tax Credit (LIHTC). At issue are the ground rules for a program that has created over 1.1 million units since 1986, and continues to produce 60,000 to 100,000 units per year (Millennial Housing Commission, 2002).

In this article, I provide the context for the lawsuit, describe the legal issues involved, and identify several underlying questions that emerge from the suit. In doing so, I rely largely on the legal briefs I have filed in my role as co-counsel to several non-profit affordable housing, environmental, and civil rights groups that appear as amicus curiae in the matter. These groups have focused upon two legal issues being considered by the courts for the first time: whether and how the pro-integration mandate of the federal Fair Housing Act (FHA) and the state constitution's *Mt. Laurel* doctrine (which requires all New Jersey municipalities to provide a reasonable opportunity for the construction of their fair share of low income housing) apply to the state's allocation of the LIHTC.

After providing background on the LIHTC and racial segregation in New Jersey, the article explains these legal issues, as well as a largely adverse appellate court decision, which is currently being appealed to the New Jersey Supreme Court. The article then identifies and discusses several questions related to the broader policy and political issues that emerge from the dynamics of the litigation. Even assuming a successful legal outcome, meaningful long-term change will require addressing these issues, such as how best to use the LIHTC to promote meaningful racial and economic integration and what steps can be taken to muster necessary support for such policies. I suggest that these challenge us to move beyond an "urban vs. suburban" dynamic, and call on us to rethink how we make the case for promoting racial integration.

The Kerner Commission report provides a touchstone as we engage with these issues. Shockingly, the level of racial and economic segregation in New Jersey, as in the nation as a whole, remains nearly as great as it was 35 years ago. As we grapple today with how to apply the Kerner Commission's still-powerful and relevant warning in the context of the LIHTC and beyond, we are just beginning to identify and respond to all the matters to be addressed. This article is offered as a small step in promoting that discussion.

NEW JERSEY'S RESIDENTIAL SEGREGATION AND LOW INCOME HOUSING TAX CREDITS

New Jersey is one of the most racially and ethnically segregated places in the country. As the New Jersey Public Policy Research Institute's 2002-2003 report

* The views expressed in this article are my own and do not necessarily represent those of the New Jersey Institute for Social Justice or any of these entities for whom I am serving as co-counsel in the litigation described in this article. This article is adapted from an earlier piece written for the New Jersey Public Policy Research Institute. Materials, including the legal briefs referenced in this article, are available at the Institute's website, www.njisj.org.

notes, the area experiences "what can only be termed hypersegregation…and [w]hat is especially alarming…is that the levels of hypersegregation remain fairly constant." (New Jersey Public Policy Research Institute, 2003, pp. 5-6). According to the 2000 census, for example, the Newark metropolitan area is the fifth most segregated large metropolitan area in the nation for both African Americans and Latinos with little change in segregation levels since 1980 (Lewis Mumford Center for Comparative Urban and Regional Research, 2001).

It is in this context that New Jersey's LIHTC program operates. By a considerable margin, the LIHTC program is the state's largest funding program for the development of low income housing.[1] The state's inventory of projects financed by the LIHTC since 1987 includes 380 tax credit developments containing more than 21,000 low income units. In recent years, HMFA has distributed about $15 million worth of credits annually, which translates into between $105 and $125 million of total equity investment each year (Housing and Mortgage Finance Agency, n.d.).

Even assuming a successful legal outcome, meaningful long-term change will require addressing policy and political issues, such as how best to use the LIHTC to promote meaningful racial and economic integration.

While the tax credits are created at the federal level and governed by a federal regulatory framework (Roisman, 1998), HMFA and equivalent agencies in other states have significant flexibility regarding how to distribute the state's allocation. To determine New Jersey's allocation strategy, HMFA develops each year a Qualified Allocation Plan (QAP), which sets forth criteria for selecting among the private developers who submit proposals to receive available tax credits. The specifics of the QAP typically have considerable significance because the number of applications consistently exceeds the available credits.

It is not in dispute that HMFA has allocated the LIHTC resources in a way that concentrates low income family housing in urban areas and provides significant numbers of elderly projects in suburban locations. In 2002, for example, HMFA's allocation provided funding for 840 units in urban areas, of which 668 (80 percent) were family units, and 238 units in suburban areas of which 139 (58 percent) were family units (Non-Profit Amici, 2004).

There is more controversy about the extent to which HMFA has encouraged economically or racially integrated housing. Especially over the past several years, HMFA has provided incentives for programs, most notably through a set-aside for HOPE VI proposals, which encourage some form of mixed income development. HMFA has also provided incentives for projects that further *Mt. Laurel* compliance, although these have been largely overshadowed by other priorities (Non-Profit Amici, 2002).

HMFA has paid substantially less attention to racial integration both in individual projects and from an overall program perspective, generally relying on its efforts to promote suburban and mixed income development. Aside from a generic "Affirmative Marketing" requirement for projects with 25 or more units, HMFA has not specifically attempted to promote racially integrated projects through its QAPs. Moreover, HMFA has made no attempt to collect data on the racial composition of projects or on the effects of the state's LIHTC policies on neighborhood racial or economic changes (N.J. Admininistrative Code).

Since the lawsuit was filed, HMFA has revised its approach, at least to some extent, and explained its orientation in considerably greater detail. In the 2003 QAP (which was developed in the midst of the lawsuit), HMFA began permitting some non-urban developments to qualify for the largest point category available and increased the points awarded to certain projects that helped a municipality meet its *Mt. Laurel* obligation (Non-Profit Amici, 2003). In lengthy appendices, HMFA set out three broad policy goals for the QAP—affordable housing creation, promotion of smart growth, and community revitalization—and emphasized that community revitalization was specifically intended to further deconcentration of poverty and mixed income development (New Jersey Register, 2003). HMFA also obtained supportive testimony from several notable

[1] Following the convention for federal housing programs, this article uses the term "low income housing" to refer to housing restricted to persons with incomes at or below 80% of median. New Jersey uses the term "low income," however, to refer to those persons below 50% of median and "moderate income" for those between 50% and 80% of median (*Mt. Laurel*, 1983, p. 221, note 8).

urban revitalization experts, such as Jeremy Nowak of the Reinvestment Fund (New Jersey Register, 2003). Nonetheless, in apparent contradiction of the intent of these steps, the 2003 QAP resulted in all family projects being located in urban areas.

THE LITIGATION

Overview

The case captioned *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan* (2004) is, at least in its general outlines, relatively straightforward with few contested basic facts. Of course, the merits of the various legal claims presented and the significance of the policy implications of these legal standards are an entirely different matter.

The case is a challenge by a southern New Jersey fair housing group, Fair Share Housing Center (Fair Share), and two local chapters of the NAACP (collectively, Fair Share plaintiffs), who claim that the state of New Jersey has violated a broad array of federal and state constitutional and statutory standards by concentrating LIHTC-funded housing in urban, racially concentrated areas. In doing so, plaintiffs rely on a range of academic and social policy experts, such as Gary Orfield and David Rusk, who emphasize the negative consequences of reinforcing residential racial segregation (Orfield & Eaton, 1996; Rusk, 1999). The state of New Jersey vigorously contests the premise that federal or state law has been violated, asserting that it is fulfilling, not violating, legal and program standards by emphasizing development in urban areas. A diverse group of amici has joined the fray.

These amici include, among others, four New Jersey organizations representing more than one hundred groups in the state committed to developing affordable housing, preserving the state's cities, and fighting for the rights of the state's minority communities (the non-profit amici).[2] Through several joint friend of the court briefs, they have emphasized two points. First, the tax credit program must abide by the FHA's pro-integration mandate and the state constitution's *Mt. Laurel* doctrine. Second, the application of these laws should lead to changes in the way LIHTC funds are distributed so that they further urban revitalization efforts and increase suburban affordable housing development that promotes integration. As discussed below, these groups argue that racial and economic integration should be a major criterion in the allocation process, but that this should not lead to all or even a disproportionate majority of LIHTC development in suburban areas.

In part, the non-profit amici emphasized this position to differentiate their views from those of both the Fair Share plaintiffs and the state. On one hand, the non-profit amici fundamentally disagree with the state's assertion that neither the FHA nor the *Mt. Laurel* doctrine applied to its LIHTC allocation. At the same time, these groups have differences with the Fair Share plaintiffs who implied that the application of these and other legal standards precluded allotment of LIHTC resources to urban areas. The non-profit amici's position was particularly important in light of a companion case that the Fair Share plaintiffs had filed against urban, but not suburban, developers who had received tax credits pursuant to the 2002 and 2003 QAP. Although ultimately settled, this companion action by the Fair Share plaintiffs sparked substantial press and industry reaction, including a perception by certain urban elected officials and others that the civil rights challenge to the LIHTC allocation was intended to halt urban development activity throughout the state.

The non-profit amici argue that racial and economic integration should be a major criterion in the allocation process, but that this should not lead to all or even a disproportionate majority of LIHTC development in suburban areas.

The Non-Profit Amici's Legal Position

Among the broad array of claims raised by the Fair Share plaintiffs, the non-profit amici focus on the application of the federal Fair Housing Act's pro-integration mandate and the state constitution's *Mt. Laurel* doctrine. They also suggest principles that should inform a QAP that is legally compliant and furthers sound policy objectives.

Their major contention concerns the FHA's requirement that all federal housing funds be used in "in a manner

[2]The four organizations are the New Jersey Institute for Social Justice, the Coalition for Affordable Housing and the Environment, the Housing and Community Development Network, and the New Jersey Public Policy Research Institute. For more information, see Non-Profit Amici (2002), pp. 12-15.

affirmatively to further" fair housing (42 U.S.C. § 3608(d)). This provision was included when the FHA was enacted in 1968. The issue of whether this provision applies to the LIHTC, and, if so, how, has never previously been considered by the courts or examined seriously by the responsible federal agencies. Like the Fair Share plaintiffs, the non-profit amici have argued strongly that the provision does apply and that HMFA was simply wrong in its persistent assertions that this pro-integration mandate did not apply to a state agency administering a federal program.

As explained by Congress in passing the Act and recognized by the many courts that have interpreted it over the past 35 years, this standard provides that public agencies must consider and promote the goal of racial integration when developing their housing policies and programs. In the landmark decision of *Shannon v. HUD* (1970), the Third Circuit found that the affirmatively furthering fair housing provision meant that HUD could not undertake urban revitalization actions without assessing their potential for furthering racial segregation. In response, HUD promulgated developed regulations governing the siting of public and other federally supported housing that essentially preclude such projects in locations which would further minority racial concentration unless (a) sufficient, comparable housing opportunities exist outside areas of such concentration, or (b) the project is necessary to meet overriding housing needs that could not be otherwise satisfied (see, e.g., 24 C.F.R. §§ 891.125(c), 941.202(c), 983.6(b)(3)).

The amici contended that the HMFA violated the Fair Housing Act by not taking into account issues of racial and ethnic segregation and must do so.

The non-profit amici contended that the HMFA violated the FHA by not taking into account issues of racial and ethnic segregation and must do so. These amici also set out some of the ways that HMFA might take such steps, noting first that a necessary starting point for compliance was what the courts have termed an "institutionalized method" for obtaining and considering racial and other demographic information. More broadly, while observing that the LIHTC operates differently than public housing and that HMFA has ample discretion regarding allocation of the LIHTC, they argued that the HMFA must further fair housing goals and has ample means to do so. It might, for example, create a pro-integration funding cycle or assign additional points to projects that demonstrate an intent and ability to achieve integrated housing.

The non-profit amici also asserted that the state's actions regarding the LIHTC were governed by the state constitutional mandate requiring all municipalities to provide a "realistic opportunity for the construction of [the] fair share of the regional need for low and moderate income housing" (Non-Profit Amici, 2002, pp. 26-30).[3] The amici argued that this *Mt. Laurel* doctrine applies as fully to the state and its agencies as it does to municipalities, whose zoning authority emanates solely from the state itself. Given that the New Jersey Supreme Court has emphasized that one of the ways municipalities would be expected to meet their affordable housing obligations was by "procuring available Federal or State subsidies to aid in the construction of affordable housing" (*Mt. Laurel*, 1975, pp. 217, 262), the amici asserted that the state was required to do more than provide ineffective and limited incentives for suburban affordable housing development.

The Non-Profit Amici's Policy Position

Although the non-profit amici noted that a full-scale discussion of the specifics of a revised QAP was premature, they outlined the following principles for an appropriate QAP:

(1) Racial integration should be one major criterion considered in the allocation process.

(2) The provision of family LIHTC housing in appropriate suburban locations should be a priority and seek to serve the broadest possible range of economic groups, and that "appropriate" suburban locations means housing in locations that offer a meaningful opportunity for racial integration.

(3) The provision of housing in urban areas that furthers racial and economic integration and/or helps implement a meaningful neighborhood revitalization strategy should also be a priority.

(4) The allocation process should not disproportionately favor suburban over urban sites.

(5) Flexibility should be preserved to permit other projects addressing critical housing needs to be accommodated.[4]

In setting out these principles, the amici emphasized

[3] For a more comprehensive explanation of the *Mt. Laurel* doctrine and its application to state actions, see Payne, 1998.

[4] For a fuller discussion of the principles that should underlie the LIHTC, see Mallach, 2003.

several points. First, the amici asserted the importance of information collection and assessment as an initial step toward the establishment of site selection standards. Second, in considering what the ultimate site selection criteria should be, the non-profit amici noted that geographic location is only one factor that determines whether housing can or does further integration. Instead of an exclusive focus on geographic location, the non-profit amici suggest that other factors should be taken into account, such as whether an urban project is undertaken as part of a meaningful neighborhood revitalization strategy, and whether suburban locations are accessible to mass transit, meaningful employment opportunities, and critical supports (e.g., affordable childcare).

Finally, the non-profit amici emphasized that the problems inherent in both the ongoing efforts to rebuild New Jersey's urban areas and the continued dramatic levels of residential segregation in the state cannot be solved in the context of a single housing program, even one as significant as the LIHTC.[5] Ultimately, these challenges require a multi-faceted approach based on significant public and private sector leadership, political will, a coordinated approach across a range of programs, and the commitment of resources.

The appellate court appeared equally troubled by whether the housing finance agency could further racial integration and, if so, what mechanism could be utilized to do so.

The Appellate Division Decision

In a 22-page unanimous decision issued in April 2004, a three-judge panel of New Jersey's Appellate Division concluded that the FHA's "affirmatively to further" fair housing provision did apply to the state's allocation of the LIHTC. The decision determined, however, that the HMFA had satisfied the FHA's pro-integration mandate. The court also rejected the *Mt. Laurel* doctrine's application to the state's allocation of the LIHTC.

The decision is significantly flawed in several significant respects,[6] and is being appealed to the New Jersey Supreme Court, which, due to the unanimous nature of the opinion, is not required to review it. While a full-scale analysis of the decision is beyond the scope of this article, the most troubling aspects of the decision concern its failure to provide any substance, content, or standards to the "affirmatively to further" mandate. While the HMFA has taken certain positive steps in the 2003 QAP, it has taken no specific actions to promote racial integration or even collect data and analyze whether its actions are promoting racial integration rather than exacerbating racial segregation. Further, the appellate division decision violates basic canons of statutory construction by ignoring completely the language of the FHA, its legislative history, or the substantial authority, including *Shannon*, 1970, interpreting it.

While these failures amply warrant the New Jersey Supreme Court's review and reversal, several aspects of the decision reflect concerns that should be noted. Most significantly, the court was clearly troubled by what it perceived to be adverse consequences for urban development activity if it concluded that HMFA had not satisfied the FHA's pro-integration mandate. The court stated, for example, that "focusing primarily on the racial composition of a relevant housing locale may compromise HMFA's fundamental mission [of promoting affordable housing]" (*In re Adoption*, 2004, p. 11). In doing so, the court appeared to give substantial weight to HMFA's contention that a ruling for Fair Share would place "a moratorium on financial assistance to urban centers" (*In re Adoption,* p. 17), and HMFA's claim that it was effectively promoting racial integration through its incentives for urban mixed income housing and *Mt. Laurel* compliant suburban projects. Neither of these claims is supported or supportable, but the court's noting of them suggests the potential weight that they carry.

The court appeared equally troubled by whether the agency could further racial integration and, if so, what mechanism could be utilized to do so. On one level, the court's discomfort in this regard seemed to reflect an unfortunate judicial reluctance to take action where the executive branch had failed to provide guidance, as well as a basic lack of understanding about the HMFA's immense ability to influence developer actions through the criteria established in the QAP. The court raised further questions about the extent to which race could be taken into account legally and practically, and whether, even if race were taken into account, this would result

[5] For an examination of the Housing Choice Voucher program and integration, see Colfax, 2004.

[6] See Non-Profit Amici, 2004, for a more complete analysis of the decision's failings.

in racially integrated developments. There are powerful responses to these concerns, but they again suggest challenges in moving forward a racial integration agenda.

EMERGING ISSUES AND QUESTIONS

The litigation to date and the dynamics it has spawned raise several questions applicable not only to how the civil rights laws should be applied to the LIHTC, but more broadly to efforts to address residential racial segregation. Some preliminary thoughts in this regard follow.

Moving Beyond Urban vs. Suburban

In the litigation, the debate about the appropriate way to allocate the LIHTC frequently focuses on whether HMFA has allocated too many of the LIHTC resources to urban areas. The implication of this critique is that we can best promote racially integrated communities simply by shifting LIHTC development from urban to suburban locations. This argument is problematic.

Ultimately, broad policy arguments about the importance of fair housing are insufficient if the specific mechanisms to realize those objectives are not identified.

First, the framing of the debate as urban versus suburban leads to the exceedingly troublesome inference that urban areas are "bad" and suburban areas are "good." One does not need to revisit the long-standing debates about place-based revitalization versus person-based development strategies to see how such a simplistic framing has ill-considered political and policy implications. Moreover, it relies on the reductionist premise that urban development can never further integration, and that suburban development typically will. As reflected in the analysis of the occupants of suburban projects built pursuant to the *Mt. Laurel* doctrine, this is not the case (Wish & Eisdorfer, 1997).

Instead, it is worth focusing upon how this effort, and others like it, can be reframed, as john powell (2003) has started to do, in terms of "opportunity" and the need to address the underlying reasons why reinforcement of racial segregation limits opportunity. On one hand, this creates the context to explain how government action created and reinforced residential racial segregation, and thus why public action is warranted to overcome it. It also allows the broadening of the discussion to incorporate not just housing location but employment and transit access and other aspects of meaningful economic opportunity.

Making the Case: Expanding the Choice Paradigm

The litigation and the resulting public debate show the absence of widespread consensus on the importance of integration. As a preliminary matter, it is necessary to explore and explain further what is meant by integration in this context and in today's society. This seems particularly crucial given how multi-ethnic and multi-racial this country has become, the substantial presence of new immigrants particularly in urban areas, and new conceptions of the role diversity plays or should play. The Supreme Court's recent affirmative action decision in *Grutter v. Bollinger* (2003) recognizing diversity as a compelling governmental interest in higher education, and the broad set of interest groups that advocated for that outcome (e.g., higher education, corporate America, the military), offers one example of how to do so.

Further, it appears necessary to explain more fully the basis for social policy in this area. Part of the challenge is how easily integration efforts can be (mis)interpreted as paternalistic and attempts at crude and ill-advised social engineering. The response must be articulated in such a way that it neither furthers such impressions nor seems defensive. In part, this can be done by emphasizing what it means to provide individuals seeking economic and other opportunity with a meaningful choice, not just a theoretical choice. Beyond this, however, such efforts should be connected to a broader discussion about the value of integration, not just for specific individuals and communities, but our society as a whole.

Convincing the Skeptics: Identifying What Works

A distinct challenge is far more practical: how to demonstrate that there are concrete steps that the HMFA and other housing finance agencies can take that will result in the desired goal of integrated housing. While there are numerous reasons why LIHTC stakeholders might not support efforts to promote racially integrated housing, some of those involved with the program are ideologically neutral and primarily concerned with ensuring the most expeditious and least

complicated distribution of LIHTC resources.

As an initial response, it is important that those promoting integrated housing have ready examples of "successful" outcomes. These need not be LIHTC projects, but must be sufficient to overcome the fatalistic perspective, to some extent reflected in the Appellate Division opinion, that the effort to promote racial integration is inconsistent with the goal of maximizing the development of low income housing. To complement this focus, it is equally necessary to provide detailed recommendations about how a QAP might be redrafted to promote the desired fair housing goals. Ultimately, broad policy arguments about the importance of fair housing are insufficient if the specific mechanisms to realize those objectives are not identified. To do so, one must engage with progressive elements in the developer and syndicator community, and understand as fully as possible any countervailing dynamics that would lead to unintended negative consequences if implemented.

The Role of Litigation and Broader Stakeholder Engagement

Finally, it seems necessary to define and connect the role this and other litigation is intended to play with broader racial and economic justice strategies. As a starting point, it is unlikely that even a fundamental reallocation of LIHTC resources by themselves would lead to a substantially more integrated state. Further, the courts, even in a state with a progressive and activist judicial tradition such as New Jersey's, are unlikely to take a leadership role on such issues without simultaneous efforts to build a broad base of public support and even political consensus. In this regard, it is important to remember that the establishment of an appropriate legal standard is only a first step and that the critical issues of implementation and continued monitoring require sustained engagement over multiple years.

It is necessary to consider whether and how to use this litigation as a beachhead to engage a broader range of stakeholders in pursuit of the longer-term goal of integrated communities. Such an effort would focus attention not only on the case's potential for significant program reform, but also on the manner in which it raises the profile of the issue and the extent to which it can be and is used to build a political constituency for the end goal. More practically, this suggests the importance of determining how best to engage not only the private sector developers and syndicators but also public agencies and non-profit HOPE VI actors who are central players in the LIHTC program.

CONCLUSION

There is no easy answer to the Kerner Commission's challenge, as the experience of the past 35 years has demonstrated. Nonetheless, the application of civil rights law to the LIHTC offers a critically important opportunity to do so. Both the promise and the unanswered questions this litigation poses demonstrate that much work remains to be done, not just by judges and lawyers but by all those committed to a just and equitable society.

Kenneth H. Zimmerman is the founding Executive Director of the New Jersey Institute for Social Justice. Previously, Mr. Zimmerman served in the federal government as a civil rights policy maker and litigator as a Deputy Assistant Secretary in HUD's Office of Fair Housing and Equal Opportunity and a trial attorney with the United States Department of Justice's Civil Rights Division, litigating housing and lending discrimination cases across the country. He has also worked as a legal services attorney, taught at the American University's Washington College of Law and at the Attorney General's Advocacy Institute, and served as a Wasserstein Public Interest Fellow at Harvard Law School.

References

24 C.F.R. §§ 891.125(c), 941.202(c), 983.6(b)(3).

42 U.S.C. § 3608(d).

Colfax, R. (2004, September). Housing choice voucher discrimination:Another obstacle to achieving the promise of *Brown. The NIMBY Report,* 20.

Grutter v. Bollinger. (2003). 539 U.S. 306.

Housing and Mortgage Finance Agency. (n.d.). *Tax credit services*. Retrieved from http://www.state.nj.us/dca/hmfa/txcredit.

In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan. (2004). 369 N.J. Super. 2, 848 A.2d 1, 2004 WL 902145 (N.J. Super. A.D.).

Lewis Mumford Center for Comparative Urban and Regional Research. (2001, April 3 [rev. Dec. 12]). *Ethnic diversity grows, neighborhood integration lags behind*. Retrieved from http://mumford1.dyndns.org/cen2000/WholePop/WPreport/page1.html.

Mallach, A. (2003, April 21). *Toward a policy framework for the allocation of low income housing tax credits*. Retrieved from http://www.njisj.org/reports/framework_report.html.

Millennial Housing Commission. (2002, May 30). *Meeting our nation's housing challenges*. Washington, DC: U.S. Government Printing Office. Retrieved from www.mhc.gov/MHCreport.pdf.

National Advisory Commission on Civil Disorders. (1968). *Report of the National Advisory Commission on Civil Disorders*.Washington, DC: U.S. Government Printing Office.

New Jersey Public Policy Research Institute. (2003). *State of black New Jersey: Issues for a new millennium*. Retrieved from http://policy.rutgers.edu/njppri/pdf/annual_report.pdf.

N.J. Administrative Code, Title 5, § 80-33.13(c)(14).

New Jersey Register. (2003). 35, pp. 3321-41.

Non-Profit Amici. (2004). *Appellate Brief*.

Non-Profit Amici. (2002). *Brief*.

Non-Profit Amici. (2003). *Brief*.

Orfield, G. & Eaton, S. (1996). *Dismantling desegregation:The quiet reversal of Brown v. Board of Education.* New York: New Press.

Payne, J. (1998, May). Lawyers, judges and the public interest. *Michigan Law Review, 96*, 1685.

powell, j. (2003). Opportunity-based housing. *Journal of Affordable Housing and Community Development, 12*, 188.

Roisman, F. (1998). Mandates unsatisfied: The low income housing tax credit program and the civil rights laws. *University of Miami Law Review, 52,* 1011.

Rusk, D. (1999). *Inside game/outside game.* Washington, DC: Brookings Institution Press.

Shannon v. HUD. (1970). 364 F.2nd 809 (3d Cir.).

Southern Burlington County NAACP v. Township of Mt. Laurel. (1983). 92 N.J. 158.

Southern Burlington County NAACP v. Township of Mt. Laurel. (1975). 67 N.J. 151.

Wish, N. & Eisdorfer, S. (1997). The impact of Mount Laurel initiatives: An analysis of the characteristics of applicants and occupants. *Seton Hall Law Review, 27*, 1268.

The Case for Joining Forces: Affordable Housing and Quality Education

Scott Goldstein and Robin Snyderman

Ask any homebuying family what criteria it will use to select a community and chances are that quality schools will top the list. Then ask nearly any resident of a disinvested community to list their greatest neighborhood concerns and one is likely hear about the poor conditions and lack of quality choices in both housing and schools. The federal courts have a long history of prohibiting segregation in both schools and housing, from *Brown v. Board of Education* (1954) to Chicago's *Gatreaux* case (1976) and beyond. Researchers such as Gary Orfield have been making the case for years that the problems of housing segregation and poor-quality schools are intertwined and the solutions need to involve both:

> My belief is that teachers are the only ones who fully understand the consequences of segregation and desegregation. Teacher voices are very important to dispel the notion held by most white suburban parents that they are doing a favor for their children by isolating them from the largely non-white world in which their kids will eventually have to function….One of the issues that teachers need to talk about is that under the No Child Left Behind legislation, most of the schools that will be sanctioned seem to be high poverty, highly segregated schools. It's not coincidental that we are beating up on the same places that we have resegregated (Orfield, 2004, para. 8).

The Chicago metropolitan region is one of the most racially and economically segregated areas in the country. The reasons for this are many and date back to the migration of African-Americans to the North when racial and economic segregation closed them off from most of Chicago. The resulting settlement patterns were reinforced by the massive public housing development in the city in the 1950s and 1960s and by the inaccessibility of better-off suburbs to minorities and lower-income residents in recent decades.

But even in the Chicago area, housing patterns and costs are rapidly changing. The region as a whole is becoming far more diverse. Many Chicago neighborhoods have "come back" and housing prices are steeply increasing. Over the past three years, median home prices in Chicago increased on average by 35 percent, with many individual properties rising over 100 percent (R. Messina, personal communication, September 9, 2004). Poverty is no longer predominantly an urban issue. Large areas of suburbs, especially to the south and near west, are struggling with a rising concentration of poverty and social problems, and are ill-equipped to deal with them alone.

Funding for education has intersected these changing housing patterns. Illinois was the only state to receive an "F" for equity of school funding a national ranking completed by the prestigious Editorial Projects in Education (Skinner & Staresina, 2004). Many Illinois schools across city, suburban, and rural districts are being forced to make tough decisions that compromise the quality of education they provide to their students, increasing class sizes, laying off teachers, cutting training programs, and relying on outdated textbooks and equipment.

As in most states, there has not been a strong alliance in Illinois between housing advocates on the one hand and education and tax reformers on the other. This may be due to the huge challenges and obstacles to reform in each sector or to advocates' tendencies to stay focused on their own causes, seek funding for their own issues at the local, state and federal levels, and not create a package that could be perceived as too expensive.

In many cases, there may be an antagonistic relationship when, for example, education advocates in communities experiencing growth oppose the development of affordable homes for families with children, fearing that the new property taxes generated will not cover the increased costs of educating additional students. These concerns feed into opposition to affordable housing where it is most needed, in communities with good schools and access to jobs and transportation. Meanwhile, communities without a sufficient commercial and industrial tax base are forced to increase their tax rates, further driving away businesses and jobs and making fiscal demands that the remaining residents struggle to support.

The most basic tie between education and housing is

the necessity of one to support the other. There are few thriving neighborhoods without quality schools and unstable housing environments have a detrimental impact on residents' ability to succeed at school. This article makes that case that, for either affordable housing or education funding and quality reform to have any chance of long-term success, there needs to be a much greater understanding of how these issues interrelate and an alliance must be forged to push for change. While the reasons for coordinated action are many, the root cause for the current predicament is the local property tax system. We explore its impact on affordable housing and thus family and neighborhood stability, as well as emerging organizing strategies that can serve as the catalyst for needed change.

As Richard Rothstein asserts:

> A serious commitment to narrowing the academic achievement gap should include a plan to stabilize the housing of working families with children who cannot afford adequate shelter. A national housing policy that reduced the mobility of low-income working families with children might also do more to boost test scores of their children than many commonly advocated instructional reforms (2004, p. 135).

Education advocates in communities experiencing growth may oppose the development of affordable homes for families with children, fearing that the new property taxes generated will not cover the increased costs of educating additional students.

Tax Impacts on Low and Moderate Income Families

Property taxes are fair, aren't they? After all, people with pricier homes pay more in taxes than those in lower-cost homes. The truth is, however, that tax policies in states such as Illinois, which rely so heavily on local property taxes to fund schools, have a disproportionate, regressive impact on low and moderate income families. This is for three major reasons.

First, low and moderate income families spend a far greater portion of their incomes on housing costs, which include property taxes. The 20 percent of Illinois taxpayers who make less than $15,000 pay 4.3 percent of their incomes in property taxes, while the middle 20 percent of taxpayers, with an average income of $36,400, pay 2.7 percent of their incomes in property taxes. The wealthiest one percent of residents, with an average income of $1.2 million, pay 2.2 percent of their incomes in property taxes (Gardner, Lynch, Sims, Schweigert, & Meek, 2002).

Second, in Cook County, as in many urban areas, rental properties are actually assessed at a *higher* level than single-family homes or condominiums. While some might argue that the owner of the building is making a profit and therefore should be taxed more than homeowners, the truth is that the building owner will pass as much of the tax on to the renter as possible, just like any other building expense. Under the federal tax code, homeowners can deduct property taxes, but renters (who essentially pay property taxes as a portion of their rent) cannot.

Finally, impoverished areas with fewer businesses and more affordable homes have less valuable property to tax. The result in Illinois is far higher property tax rates in areas with greater concentrations of affordable housing. For example, the Village of Park Forest has been working for years to convert a failed regional mall into a new mixed-use downtown area in order to improve the tax base for the community. But with the highest property tax rate in the state, compounded by a Cook County classification that taxes businesses at three times the level of single-family homes, the challenges of attracting commercial anchors are enormous.

Conversely, a community like Schaumburg, with the most successful mall in the region, has much lower property taxes to support its schools and no municipal property taxes. The result is that for every dollar in assessed value, a taxpayer in Park Forest pays 16.9 percent while one in Schaumburg pays 7.5 percent. This dramatic difference in tax rates and quality of schools results in a vicious circle, in which more businesses move out of places like Park Forest and into lower tax areas like Schaumberg, exacerbating the problem and raising taxes even more for the people and businesses left behind.

The Supply of Affordable Housing

School funding and tax policies also have a direct impact on the supply of housing. A limited supply of affordable housing creates an unstable environment for children

and families, which in turn has negative implications for schools. Conversely, stable housing has been shown to improve reading levels and attendance rates at school (Rusk, 1999) as well as workforce stability among employers (DeKoven, 2003).

The limited supply of quality, affordable housing means families move regularly. Not only does inadequate housing affect the ability of parents to seek work in high job growth areas where jobs are plentiful and schools are higher quality, but the schools which students cycle through must grapple with very high mobility rates. For example, the Metropolitan Planning Council (MPC) and Urban Land Institute have been assisting the Village of Riverdale, just over the southern border of the City of Chicago, with its efforts to redevelop a failed townhome development. The affected school district has an 80 percent mobility rate and a perennial fiscal crisis. How can a teacher possibly make progress with his or her students when four out of every five students in a classroom will not be there at the end of the year? And how can an individual student get a quality education when he or she is constantly moving to new housing and schools?

There is an increased sophistication on the part of housing advocates to communicate the value of affordable housing to broader audiences.

High reliance on local property taxes makes the cost of providing housing more expensive to homeowners and renters alike. Even worse, since local leaders know they need to support their schools through property taxes, multi-family housing proposals are routinely turned down. Through zoning and building codes, municipal officials make it very difficult for developers to build affordable housing. Some communities go as far as asking developers to design townhomes and condominiums with fewer bedrooms to discourage families from moving into their school districts.

The cumulative impacts of these policies are clear. Since 1990, has been a 49 percent increase in homeowners in the Illinois paying more than 30 percent of their incomes on housing. While population increased by 11 percent and jobs by 16 percent during the 1990s, the rental housing stock in the Chicago region actually shrank. Only three percent of all permits pulled were for multifamily housing, compared to 22 percent nationwide (Metropolitan Planning Council, 2004).

Researchers point out that typical economic models of supply and demand do not apply in the Chicago regional housing market and that other non-economic variables are at play. The notoriety of the old Cabrini Green public housing project has tainted public perceptions and acceptance of affordable housing, while local jurisdictions have lacked the housing tools and tax policies from the state to address demand. As a result, in high job growth areas and revitalizing neighborhoods in Illinois, housing is beyond the reach of average working families. In areas where housing is less expensive, jobs and other opportunities are scarce, contributing to traffic congestion, high cost of new infrastructure, economic disparity, and racial segregation. Increasingly, employers are identifying this jobs-housing mismatch as a barrier to doing business in Illinois.

As neighborhoods rebound and property values grow, working-class households face ever escalating property tax bills, even though their incomes are not necessarily increasing. This has led to a string of band-aid solutions, including property tax caps that have extremely limited the ability of local school districts to raise property taxes. Tax caps instituted in the early 1990s limited the growth of a school district's overall tax extension from year to year to the lesser of the rate of inflation or five percent (Dye, 2001). As property taxes on individual homeowners could still increase by far more, however, Illinois recently passed legislation capping an individual homeowner's tax assessment at no more than seven percent per year.

These stop-gap measures help individual taxpayers but tax caps on schools have not been supplemented with increased state funding for schools, leading to fiscal distress for nearly all schools in the state. The seven percent assessment cap pushes more tax burden onto apartment buildings and businesses. As a result, these problems are finally bringing education and housing advocates together with developers.

Organizing for Change

How do housing and education and tax reform groups work together to break the logjam? For starters, there is an increased sophistication on the part of housing advocates to communicate the value of affordable

housing to broader audiences, speaking less about units, projects and subsidies, and more about jobs, homes, neighborhoods and sensible growth.[1] This effort has engaged municipal, business and state leaders in supporting housing policies at state and local levels, via the Metropolitan Mayors Caucus, MPC's employer-assisted housing initiative, and the Governor's Housing Task Force, which was created through executive order to implement the state's first housing policy.

Essential to the long-term viability of these initiatives is a diverse coalition called A+ Illinois. This coalition is engaged in a broad-based campaign to secure a quality education for every child in Illinois, deliver lasting property tax relief, and protect services that are vital to children, families and communities.

A+ Illinois is demanding changes to make school funding more adequate and fairer for all children and communities. The coalition is working to "bring the bottom up" by helping struggling students and schools to meet state learning standards, while preserving high-quality education where it already exists. A+ Illinois also seeks to improve the quality of life of children and their families through a comprehensive restructuring of state finances that balances property tax reform with new state revenues that fairly and adequately respond to community needs.

Housing and other human service organizations are joining A+ Illinois to support the families they serve because they understand that a stronger state fiscal footing will free up resources to support housing and other services. A+ Illinois is mobilizing a multi-level campaign, including grassroots organizing, media strategies and legislative advocacy, to support its efforts. While it is too soon to judge the ultimate success of A+ Illinois, it has already brought strong, statewide organizations with hundreds of thousands of members to the table, from the Illinois Farm Bureau to the Illinois Education Association. The goal is nothing less than a complete restructuring of how schools are funded in Illinois to ensure that children in all neighborhoods have access to a quality education.

From the perspective of a family with school-age children, hope and stability are grounded in the quality, affordability and accessibility of both home and school. It is such a simple and modest goal. Its achievement, however, is complicated and undermined by current tax policies, public attitudes and growth trends. As housing and education advocates join forces with business leaders, faith-based organizations and local and state policymakers, the hope is that these sophisticated networks will make the most basic of propositions a reality: quality homes and quality schools, affordable and accessible throughout Illinois.

[1] For example, Housing Illinois (www.housingillinois.org) is a new but accomplished coalition of affordable housing organizations using research, advertising, media outreach, and organizing to raise public awareness and encourage civic and political leadership on behalf of affordable housing in communities throughout the Chicago metropolitan region.

Scott Goldstein is vice president of policy and planning and **Robin Snyderman** is housing director of the Metropolitan Planning Council, a nonprofit, nonpartisan group of business and civic leaders committed to serving the public interest through the promotion and implementation of sensible planning and development policies necessary for a world-class Chicago region. More information can be found at www.metroplanning.org. The authors would like to acknowledge the contributions of their colleague, Samantha DeKoven, to this article.

References

Brown v. Board of Education of Topeka. (1954). 347 U.S. 483.

DeKoven, S. (2003). *Regional employer-assisted collaboration for housing (REACH): 2003 year-end report.* Retrieved from http://www.metroplanning.org/cmadocs/REACH_2003end_yR.pdf.

Dye, R.F. (2001, October). *Ten years of tax caps in Illinois*. Paper presented at 2001 Conference on Tax Increment Financing at the Institute of Government and Public and Government Affairs, University of Illinois. Retrieved from http://www.igpa.uillinois.edu/events/confHighlights/tif/tenyears.htm.

Gardner, M., Lynch, R., Sims, R., Schweigert, B., & Meek, A. (2002, February). *Balancing act: Choices for Illinois tax reform*. Retrieved from http://www.ctj.org/itep/ilmenu.htm.

Hills v. Gautreaux et al. (1976). 425 U.S. 284.

Metropolitan Planning Council. (2004, February 6). *Accomodating the housing needs of families and*

workers as the Chicago region and Illinois grow. Retrieved from http://www.metroplanning.org/resource.asp?objectID=1605&categoryID=2.

Orfield, G. (2004, Winter). A discussion on race and resegregation. *The Southern Journal of Teaching and Education.* Retrieved from http://www.sjteonline.com/winter2004gorfield.htm.

Rothstein, R. (2004). *Class and schools: Using social, economic and educational reform to close the black-white achievement gap.* Washington, DC: Economic Policy Institute.

Rusk, D. (1999). *Inside game/outside game*. Washington, DC: Brookings Institution Press.

Skinner, R.A. & Staresina, L.N. (2004). Quality counts 2004: State of the states. *Education Week, 23*, 97.

National Low Income Housing Coalition Membership Form

Membership Types

Individual

- ☐ Low Income $20
- ☐ Regular $50
- ☐ Sustaining $200

I am ☐ joining NLIHC
☐ renewing my membership

Nonprofit Organizations & Government Agencies
(by operating budget)

- ☐ Up to $100,000 $50
- ☐ $100,000–249,000 $100
- ☐ $250,000–499,999 $200
- ☐ $500,000–999,999 $350
- ☐ $1,000,000–1,500,000 $750
- ☐ over $1,500,000 $1000

Corporations

- ☐ Corporations $1000

Nonprofit organizations, corporations and government agencies may list additional staff to receive *Memo to Members* on the back of the form

☐ Yes! I want to be an NLIHC member for the year ending **6/30/05** $_____

☐ Yes! I would like to contribute to the Scholarship Fund to support the participation of low income people in NLIHC. $_____

Total amount enclosed: $_____

Member Information (please print)

Name of member _____

Primary contact person (if organizational membership) _____

Address _____

City _____ State _____ Zip_____

Telephone _____

Fax _____

Email **(required to receive the newsletter)** _____

Congressional Dist/Rep name _____

Please contact us if you cannot receive the newsletter, Memo to Members, via email.

Payment

☐ Check enclosed

☐ Visa ☐ Mastercard ☐ American Express

Credit Card Number: _____ Exp Date _____

Cardholder Signature: _____

Please return completed form and payment to:

NLIHC
1012 14th Street NW, Suite 610
Washington DC 20005

202.662.1530
202.393.1973 fax
www.nlihc.org
membership@nlihc.org

Dues and gifts are tax-exempt under Section 501(c)(3) of the Internal Revenue code, except $15 for production costs.

Organizational members may list additional staff to receive Memo to Members by email

Name: _____

Email: _____

Name: _____

Email: _____

Name: _____

Email: _____

Name: _____

Email: _____

Name: _____

Email: _____

National Low Income Housing Coalition
Publications Catalog

Out of Reach: America's Housing Wage Climbs

In 2003, the national housing wage—the amount that a person working full-time had to earn per hour to be able to afford a modest two-bedroom unit—was $15.21. For each county, state, and metropolitan region, *Out of Reach* provides data on how much a person needs to earn to afford modest rental housing. The housing wage has become a part of the housing lexicon, as advocates, legislators, and the media find *Out of Reach* an invaluable source of information about the affordable housing crisis. In addition, individuals look to Out of Reach to help them place their own housing situation in context.

Sept 2003
NLIHC Members $15 All others $25

2004 Advocates' Guide to Housing and Community Development

Whether you are a newcomer to housing policy or a seasoned advocate, the Advocate's Guide to Housing and Community Development Policy will help you stay on top of what's new in the world of housing. The *2004 Advocates' Guide* includes almost 60 chapters describing programs and issues from the Brownfields Economic Development Initiative to the Workforce Investment Act, as well as current policy proposals including the National Housing Trust Fund. The guide represents the work of many national and local advocacy groups who have generously provided substantive information. Several appendices include information on the federal legislative process and effective lobbying strategies and tactics.

April 2004
NLIHC Members $15 All others $25

Changing Priorities: The Federal Budget and Housing Assistance 1976-2007

Is Congress increasing or decreasing its support for affordable housing? Look to *Changing Priorities* for the answer. The report provides an overview of HUD budget trends from 1976 through 2007 as measured in inflation-adjusted dollars. The report also looks at assisted housing as a proportion of HUD's budget authority, addresses spending trends for a number of major HUD programs, and shows who benefits from federal housing subsidies. Through graphs and text, *Changing Priorities* provides advocates with a comprehensive picture of the federal commitment to affordable housing.

August 2002
NLIHC Members $15 All others $20

Low Income Housing and Services Programs: Towards a New Perspective

This paper provides an historical overview of low income housing that linked with services programs, now known as Housing *Plus* Services. The paper also introduces a new phraseology and core principles for Housing *Plus* Services programs.

March 2001
NLIHC Members $5 All others $10

A Report on State-Funded Rental Assistance Programs: A Patchwork of Small Measures

This study is the first attempt to collect information from every state and the District of Columbia on the rental assistance programs supported solely with state or local resources. For each state's programs, the report describes the assistance provided, who is served by each program, and the funding level.

March 2001
NLIHC Members $15 All others $25

Scarcity and Success: Perspectives on Assisted Housing

This report consolidates what is known and not known about voucher use. In addition to synthesizing the literature on voucher use, it incorporates the results of a survey of Section 8 administrators and two meetings of voucher stakeholders. The report concludes that HUD should track program results and provide incentives to public housing authorities to improve Section 8 administration.

March 2000
NLIHC Member $15 All others $25

Our Website is our most up-to-date resource!

www.nlihc.org

- Current and past **Memo to Members** weekly newsletters
- Information on the Department of Housing and Urban Development (HUD) budget
- Information on state housing coalitions
- Legislative Updates, Calls to Action and News Alerts
- Lots of links, issue papers, and information about our Board, our staff and our mission
- **New!** Local Area Low Income Housing Database
  An assessment of local housing conditions from the 2000 Census.
  Available at www.nlihc.org/research/lalihd/.

All publications are shipped using USPS Media Mail.

NLIHC has a 30 day return policy on all publications.

Sent free to NLIHC members

America's Neighbors: The Affordable Housing Crisis and the People it Affects

For decades, housing advocates have talked about the number of *households* experiencing housing problems. For the first time, a new report breaks out the number of *people* experiencing housing problems, and the results are striking. Nearly 65 million low income people - 24% of the entire U.S. population- are experiencing problems including cost burdens, substandard conditions, overcrowding, or homelessness. *America's Neighbors: The Affordable Housing Crisis and the People it Affects* uses data from the most recent American Housing Survey (2001) to paint a picture of who is impacted by the country's lack of affordable housing.

February 2004
NLIHC Members Each current membership will receive a copy in the mail.
Additional copies / All others $10

Losing Ground in the Best of Times: Low Income Renters in the 1990s

The 1990s were a time of economic expansion but the rising tide did not lift all boats. Despite improved income and housing conditions for many Americans, housing problems became more concentrated among the lowest income rental households, and their access to affordable rental units declined. Using HUD Special Tabulations of 1990 and 2000 Census data, *Losing Ground in the Best of Times: Low Income Renters in the 1990s* examines national and state-level trends during the decade and discusses policy implications of the results.

February 2004
NLIHC Members Each current membership will receive a copy in the mail.
Additional copies / All others $10

Memo to Members

NLIHC's weekly newsletter, *Memo to Members*, is widely considered to be *the* authoritative voice on current federal housing policy. *Memo* provides up-to-date information on proposed bills and federal legislation, HUD budget reports, reports from the field, synopses of new housing research, and a weekly column by NLIHC President Sheila Crowley. *Memo* is sent to members each week by email or fax. To check your membership status and order, e-mail our membership associate at membership@nlihc.org.

The NIMBY Report

NIMBY – Not In My Back Yard – symbolizes the actions neighborhoods use to exclude certain people because they are homeless, poor, or disabled, or because of their race or ethnicity. The NIMBY Report supports inclusive communities by sharing news of the NIMBY syndrome and efforts to overcome it. Published for nearly 10 years by the American Friends Service Committee, it is now published by the National Low Income Housing Coalition, in collaboration with the Building Better Communities Network.

Spring 2001 NIMBY:
Smart Growth and Affordable Housing

Fall 2001 NIMBY: ***Does Design Matter***

Spring 2002 NIMBY: ***The Olmstead Factor: Integrating Housing for People with Disabilities***

Fall 2002 NIMBY: ***Using Civil Rights Laws to Advance Affordable Housing***

No. 1 2003 NIMBY: ***From NIMBY to YIMBY : Lessons in Yes in My Back Yard***

March 2004 NIMBY: ***Deconstructing "Deconcentration"***

September 2004 NIMBY: ***Fifty Years Later: Brown vs. Board of Education and Housing Opportunity***

NLIHC Members Each current membership will receive a copy in the mail as new issues are produced.

Additional copies / Back editions / All others $10

Order Form

Title	Quantity	Price
	total	

mail completed form to:

NLIHC
1012 14th Street NW,
Suite 610
Washington, DC 20005

or fax to: 202.393.1973

Name _____ Check ☐

Organization _____ Visa ☐ Mastercard ☐ American Express ☐

Address _____ Name on card _____

City _____ State _____ Zip _____ Signature _____

Phone _____ Fax _____ Credit Card Number _____

Email _____ Expiration Date _____

About The NIMBY Report

NIMBY—"Not In My Back Yard"—has become the symbol for neighborhoods that exclude certain people because they are homeless, poor, or disabled, or because of their race or ethnicity.

The NIMBY Report supports inclusive communities by sharing news of the NIMBY syndrome and efforts to overcome it. It is published by the National Low Income Housing Coalition. Irene Basloe Saraf was the staff editor for this issue.

A monthly edition, prepared in collaboration with the Building Better Communities Network, is distributed as a supplement to NLIHC's weekly newsletter, *Memo to Members*. Semi-annual issue reports such as this provide in-depth analysis on specific subjects.

The NIMBY Report Advisory Board

National Low Income Housing Coalition Board of Directors

National Low Income Housing Coalition (NLIHC)
1012 Fourteenth Street NW, Suite 610, Washington, D.C. 20005
202.662.1530; Fax 202.393.1973; info@nlihc.org; www.nlihc.org

The NIMBY Report, September 2004
Fifty Years Later: *Brown v. Board of Education* and Housing Opportunity
Members: additional copies $10
Non Member Price: $10