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HUD'S FAIR HOUSING DUTIES AND THE LOSS OF PUBLIC AND ASSISTED HOUSING

Nearly 30 years ago, the Third Circuit Court of Appeals spelled out HUD's fair housing duties when it was approving the development of new subsidized housing. In summary, it decided that HUD had to have an institutional method for assessing the racial impact of a decision to fund the development of a new project. Now HUD has entered a new era, one in which it is approving the demolition or other loss of existing subsidized housing at about the same rate that units were added to the inventory in much of the 1970s. In this context, the same question must be asked: What are HUD's duties under the Fair Housing Act and other civil rights legislation when it faces the loss of a public or assisted housing project? The answer is that HUD must now have an institutional mechanism to gather relevant data and assess the racial impact of approving or allowing the demolition or other withdrawal of a development from the public or assisted housing inventory. It is clear that HUD is woefully short of having such a mechanism.[1]

The 1970 Litigation and Its Aftermath

The Third Circuit's 1970 decision came in a case entitled *Shannon v. United States Department of HUD*, 436 F.2d 809 (3d Cir. 1970). *Shannon* involved a decision by HUD to approve the development of a Rent Supplement project in an urban renewal area that was racially integrated. The plaintiffs in the case, residents of the area, claimed that the development of subsidized, low-income housing in their neighborhood would increase the concentration of black residents in the area and destroy the existing racial integration. They sued HUD, claiming that HUD had not considered and had no procedures for considering the impact of the project upon the racial concentration in the area and that HUD was obliged to do so by the Fair Housing Act and the 1964 Civil Rights Act.

The Court of Appeal agreed. Its review of the administrative record indicated that HUD had considered only land use factors in deciding whether to approve the development. It had not asked what the racial composition of the tenancy of the project was likely to be. It had not gathered information about the racial composition of the surround-

[1]This article focuses solely on HUD's fair housing duties. The PHAs and private owners of these projects also have responsibilities under the Fair Housing Act and other civil rights laws, but they are not analyzed in this article.

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ERRATA

The December 1998 *Bulletin* contained a chart comparing the FY 1999 and Proposed FY 2000 Budget, including the OMB Passback and HUD Appeal. *OMB Passback Reins in HUD's FY 2000 Budget Request*, 28 HOUS. L. BULL. 209, 212 (Dec. 1998). The figure provided in the chart for the Total Net HUD Discretionary Budget Authority for the FY 1999 Enacted Budget was incorrect. The correct figure is $25.139 billion. NHLP apologizes for the error. ■

ing neighborhood. It had not attempted to determine what the impact of approving the development would be on the racial composition of that neighborhood.

HUD must look at the effects of approving demolition or disposition of a development and prevent any resulting discrimination in housing, as well as act affirmatively to achieve fair housing.

The court concluded that HUD's responsibilities had been broadened by the 1964 Civil Rights Act and the 1968 Fair Housing Act. Prior to their enactment, HUD might have been allowed to remain neutral regarding the impact of a development it had approved upon the racial composition of the surrounding neighborhood. After the 1964 Act, however, HUD, in the court's view, had the responsibility to look at the effects of approving a development and to prevent any discrimination in housing that would result. After the 1968 Act, HUD had the responsibility to act affirmatively to achieve fair housing. Both of those acts had to be read *in pari materia* with the other statutes creating housing and urban renewal programs.

Although the court determined that it could not dictate what HUD's decision had to be in any particular case, it concluded that HUD's procedures for making the decisions were not in compliance with the 1964 and 1968 Civil Rights Acts. HUD's discretion had to be exercised within the framework of the national policy against discrimination in federally assisted housing and in favor of fair housing. That framework required HUD to consider the effect of the development upon the racial balance in the neighborhood. To meet that responsibility, the court concluded that HUD:

> must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.[2]

Only with such a mechanism for gathering the relevant information could HUD's decision be an informed one, one which considers the relevant factors and rationally weighs the competing considerations.

Primarily as a result of the decision in *Shannon*, HUD developed an institutionalized method for gathering the relevant information and making an informed judgment whether to provide funding for particular projects. That method was the Project Selection Criteria, which were proposed for comment in 1971 and finalized in 1972.[3] They governed the decision whether to provide funds for new projects under the public housing, Section 236 and Rent Supplement programs. Once those procedures were in place, subsequent challenges to HUD decisions to approve particular projects were judged by determining whether HUD's administrative record demonstrated that it had gathered the required information, considered the factors made relevant by the Project Selection Criteria, and made a rational judgment, given the relevant information.[4]

Loss of Subsidized Housing: The Current Picture

We are currently in an era in which the number of buildings subsidized under the federal housing programs is shrinking. HUD has embarked upon a campaign to have at least 100,000 units of public housing demolished by the year 2000.[5] Congress has allowed private owners of HUD-subsidized developments to remove their buildings from the programs through mortgage prepayment and refusal to renew expiring Section 8 subsidy contracts.[6] HUD has also been authorized to refuse to renew subsidy contracts on buildings owned by landlords who have breached their program obligations.[7] Even before expiration of the contracts, HUD is terminating the Section 8 contracts on some buildings that have been allowed to deteriorate to substandard condition by their owners. In addition, HUD can set terms that will make renewal unattractive for the existing owners, leading them to remove their buildings from the subsidy programs.[8] When HUD acquires developments through foreclosure, it has been granted expanded power to have the developments demolished or sold without subsidies, depriving decent, affordable housing to people who are poor.[9]

HUD's role in these situations varies. In some it has more power to influence the outcome than in others. But in almost all situations, HUD is required to take a step that will

[2]436 F.2d at 821.

[3]Former 24 C.F.R. § 200.700, 37 Fed. Reg. 205 (Jan. 5, 1972); *see* former 24 C.F.R. § 880.112(c)(1), 41 Fed. Reg. 17,470 (1976) (similar criteria for Section 8 projects).

[4]*See, e.g., Business Association of University City* v. *Landrieu*, 660 F.2d 867 (3d Cir. 1981); *Jones v. Tully*, 378 F. Supp. 286 (E.D.N.Y. 1974); *South East Chicago Commission v. Department of HUD*, 343 F. Supp. 62 (N.D. Ill. 1972), *aff'd*, 488 F.2d 1119 (7th Cir. 1973).

[5]*See, e.g.*, 62 Fed. Reg. 47,740 (Sept. 10, 1997).

[6]Pub. L. No. 105-276, § 219(a), 112 Stat. 2461, 2487 (Oct. 27, 1997).

[7]*See* Pub. L. No. 105-65, § 516(d) (tenant-based assistance for tenants in disqualified properties). *See also* Pub. L. No. 104-204, § 211(b)(4)(B), 110 Stat. 2897 (Sept. 26, 1996), as amended by Pub. L. No. 105-65, § 523(e), 111 Stat. 1344 (Oct. 27, 1997).

[8]HUD Notice H 98-34 (Oct. 16, 1998).

[9]12 U.S.C. § 1701z-11(a)(3)(G) (West Supp. 1998); Pub. L. No. 104-19, tit. I, ch. X, 109 Stat. 194, 233 (1995) (Annual Contributions for Assisted Housing, 2d Proviso); Pub. L. No. 104-99, § 401, 110 Stat 36, 40 (Jan. 26, 1996); Pub. L. No. 104-204, § 204, 110 Stat. 2873, 2894 (Sept. 26, 1996) (for FY 1997 and thereafter).

substantially contribute to the outcome, which may be the loss of decent housing for people who are poor. With public housing, the local housing authority has to get HUD's approval before demolishing or selling a project, even under the new "reform" legislation.[10] When HUD acquires a project through foreclosure, HUD itself has the sole power to determine the project's future, if any.[11] If a Section 8 project has deteriorated to the extent that it no longer complies with HUD's Housing Quality Standards (HQS), HUD makes the decision whether to terminate the subsidy contract. Its choice is are not limited to ending the subsidy or allowing the owner to continue to provide substandard housing. HUD has the option of abating subsidy payments until repairs are made, taking over the project or taking the owner to court for appointment of a receiver or specific performance.[12] If HUD holds the mortgage on the property it may also facilitate a transfer of the property to a new owner and make funds available from the mortgage insurance fund for repairs that will cure the HQS violations.[13]

HUD must consider the fair housing implications for future applicants as well as affected tenants.

With the expiring Section 8 contracts, HUD also has options short of refusing to renew the contract or allowing the owner not to renew it, depending upon the factual context. If the development is in good shape and located in a desirable neighborhood, HUD may allow the owner a higher rent at real market rent as an inducement to keep the building in the Section 8 program.[14] Offering to renew those contracts only at the current, below-market rents — which HUD is doing[15] — means only that the owners will drop out of the program because they can get better returns on the private market. In these situations, the ultimate power to decide the fate of a building may reside with the private owner, but HUD can take steps that can strongly influence the private owner's eventual choice.

If the owner of a development is not qualified for renewal because of his failure to meet program requirements during the previous management of the project, HUD does not have to refuse to renew the contract on the project. Instead, it can offer to renew the contract if the project is sold.[16] That alternative keeps the housing available to poor people.

For some projects with mortgage payments and operating costs that cannot be covered by rents even if they are set at the real market level, one option is to restructure the mortgages to reduce the mortgage payments. Then, rents at a market level may be high enough to cover the operating costs and the reduced mortgage payments. Under the "Mark to Market" legislation,[17] the mortgage restructuring is to be done by HUD or state or local participating administrative entities (PAEs). There are at least two points at which HUD or a PAE can make a decision that could lead to the loss of these units from the inventory of affordable housing. First, HUD or a PAE must develop a Rental Assistance Assessment Plan to determine whether the project-based Section 8 subsidies should be terminated and vouchers substituted. If that is done, the project will be lost to the inventory, the tenants may be displaced and encounter difficulty using their vouchers immediately or in the future, and the availability of assisted housing in the particular neighborhood of the project will be reduced.[18] Second, even if conversion to vouchers is not determined to be appropriate, HUD or the PAE may reject a particular restructuring proposal on the ground that the project needs repairs that cannot be done in a cost-effective manner.[19] Again, if that is done, the project will be lost from the inventory.

The cases in which HUD has the least discretion are the prepayment cases. There the owner can withdraw his building from the program without having to secure HUD's approval.[20] The owners do have to give notice to HUD, the tenants and the local government at least 150 days in advance of the prepayment.[21] HUD has little in the way of incentives it can offer the owner to keep the project in the program. Nonetheless, when an owner indicates a plan to prepay, HUD can inform the local governments and other local housing sponsors that the project may be available for purchase so that they could buy the project with state or local resources and keep it available for rental to low-income tenants.

[10]42 U.S.C.A. § 1437p (West 1994), amended by Pub. L. No. 105-276, § 531, 112 Stat. 2461, 2571 (Oct. 21, 1998).

[11]12 U.S.C.A. § 1701z-11(a)(3)(G) (West Supp. 1998).

[12]HUD, Housing Assistance Payments Contract, Part II, ¶ 2.21(b)(3) (Form HUD-52522 Jan. 1990).

[13]Pub. L. No. 105-65, § 213, 111 Stat. 1343, 1366 (Oct. 27, 1997).

[14]Pub. L. No. 105-65, § 524(a)(1), 111 Stat. 1343, 1408 (Oct. 27, 1997).

[15]HUD Notice H 98-34 (Oct. 16, 1998).

[16]Pub. L. No. 105-65, § 516(e), 111 Stat. 1343, 1400 (Oct. 27, 1997), *noted at* 42 U.S.C.A. § 1437f (West Supp. 1999) (Historical and Statutory Notes, "Multifamily Housing Assistance"); 24 C.F.R. § 401.480 (1999).

[17]Pub. L. No. 105-65, tit. V, 111 Stat. 1343, 1384 (Oct. 27, 1997), *noted at* 42 U.S.C.A. § 1437f (West Supp. 1999) (Historical and Statutory Notes, "Multifamily Housing Assistance").

[18]Pub. L. No. 105-65, § 515(c), 111 Stat. 1343, 1397 (Oct. 27, 1997), *noted at* 42 U.S.C.A. § 1437f (West Supp. 1999) (Historical and Statutory Notes, "Multifamily Housing Assistance"); 24 C.F.R. § 401.421 (1999).

[19]HUD Notice H 98-34, ¶ VI(4) (1998).

[20]Pub. L. No. 105-276, § 219(a), 112 Stat. 2461, 2487 (Oct. 27, 1997).

[21]*Id.*, § 219(b).

The Fair Housing Implications of the Losses

A series of federal statutes as well as the Fifth Amendment to the federal Constitution govern HUD's actions relating to the loss of these public and assisted housing developments.[22] The statutes include the Fair Housing Act, which makes it unlawful to refuse to rent or otherwise make housing unavailable to a person on the basis of race, color, national origin or other specified grounds.[23] That Act also requires HUD to administer its programs to affirmatively further fair housing.[24] Title VI of the 1964 Civil Rights Act prohibits discrimination in any activity receiving federal financial assistance or the exclusion of anyone from such activity based upon race, color, or national origin.[25] Both of those statutes prohibit both intentional discrimination and actions that have the effect of discriminating.[26] Other relevant statutes include Section 504 of the Rehabilitation Act of 1973,[27] the Americans with Disabilities Act (ADA),[28] and federal housing statutes that incorporate the civil rights statutes by reference.[29]

Analyzing the impact of the loss of low-income housing developments should begin with intentional discrimination, but it should not stop there.

The fair housing implications of the loss of these developments will vary from case to case.[30] Analyzing the implications should begin with intentional discrimination. Is there any evidence that the withdrawal of the project from the subsidy program is being undertaken because of the race or ethnic background of the residents of the project? Is the neighborhood changing and do the neighbors, local government officials or the private developers of other housing in the neighborhood view the presence of a subsidized housing project occupied predominantly by people of color as an impediment to those neighborhood changes? Are there plans to reuse the property as residential housing for significantly higher income residents, and is there any evidence that current owners or new purchasers believe they should reduce or eliminate the presence of people of color in the buildings in order to make them more marketable? Is there any evidence that those who are deciding the future use of the property have chosen to ignore the adverse effects upon people of color of the withdrawal of the property because of their unsympathetic or negative attitudes toward people of color? These questions are only examples of lines of inquiry that can be pursued to uncover purposeful discrimination that may lie behind plans for the withdrawal of a particular project from the public and assisted housing inventory.

The analysis does not stop with intentional discrimination. Fair housing laws require HUD to look at the effects of its actions as well as the reasons behind them. The relevant effects are twofold: (1) who bears the adverse burdens or realizes the benefits of any particular actions, and (2) the impact the action will have upon residential racial segregation or integration.[31] In almost all cases the people adversely affected by the loss of a particular public or assisted housing development will disproportionately be people of color. In many cases, nearly 100 percent of the tenants in a project will be people of color. For example, nationwide, the percentage of public housing tenants who are African-American, Hispanic or Asian-American is 68 percent. That percentage is even higher when public housing for the elderly is excluded and when the focus is upon large housing authorities in central cities. Even in situations where the projects are not 100 percent people of color, they often are make up the majority of the residents. When all or a majority of a project's tenants are people of color, the burdens of a decision to remove the project from a subsidy program will be borne more by people of color that by white people. Even in cases where the white residents are the majority, but there are more people of color among the residents than is the case in the population at large, the adverse effects will still be felt disproportionately by people of color. Thus nationwide, 37 percent of the tenants in the Section 8 New Construction and Substantial Rehabilitation projects are African-American, Hispanic or Asian, even though those groups constitute only 23 percent of all United States households.

[22] These statutes also place obligations upon the owners that may make unlawful their removal of developments from the subsidized inventories, but the focus of this article is solely upon HUD's responsibilities.

[23] 42 U.S.C.A. § 3604 (West 1998).

[24] *Id.*, § 3608.

[25] *Id.*, § 2000d.

[26] *See, e.g., Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); 24 C.F.R. § 1.4(b) (1998) (Title VI).

[27] 29 U.S.C.A. § 794 (West 1998).

[28] 42 U.S.C.A. § 12117 (West 1998).

[29] *See, e.g.*, 42 U.S.C. § 1437c-1(d)(15) (1999) (applying the Fair Housing Act, Title VI, the ADA, and Section 504 to the public housing agency plans); 42 U.S.C. § 4621(c)(4) (1999) (applying the Fair Housing Act and Title VI to relocation activities).

[30] This article focuses solely on the fair housing issues relating to race and national origin, but it will be important as well as to look at the impact of these decisions upon other groups protected by the Fair Housing Act, including families with children, women, and people with disabilities.

[31] *See, e.g., Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, supra* note 26, 558 F.2d at 1290; *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (3d Cir. 1977), *aff'd in part*, 488 U.S. 15 (1988).

The adverse impacts of the loss of a project for the tenants and potential applicants will vary. For most tenants, the loss of the subsidy will at least mean higher rents. Often tenants will be displaced, either because the buildings are being demolished or substantially rehabilitated or because the increased rents are more than they can afford. The rent increases are changes in terms and conditions governed by the Fair Housing Act. The withdrawal of a subsidy that causes those rent increases constitutes an exclusion from a federal governmental program, regulated by Title VI. The displacement amounts to otherwise making housing unavailable, which is covered by the Fair Housing Act, and is an alternative form of exclusion from a governmental program, covered by Title VI. The burden of displacement itself will often be different for tenants of color when compared to white tenants, because of the widespread racial discrimination operating in private housing markets, as well as the racial segregation that is present in many such markets. If the project in question is located in a racially integrated or otherwise all-white area, displacement may mean a loss of an opportunity for the tenants of color to live in an integrated or white neighborhood.

Fair housing laws require HUD to look at the effects of its actions, including who bears the adverse burdens or realizes the benefits of a particular action, and the impact on residental rental integration or segregation.

The burdens of a loss of a subsidized project will also fall on the applicants who would move in over time, if the project were retained in the subsidized inventory. The waiting lists and the eligible populations for subsidized housing then become significant for this analysis. A determination must be made whether people of color constitute the majority of applicants or of eligible families[32] and whether they represent a disproportionate share of the waiting list or of eligible families when compared to the population in the housing market as a whole. If they do constitute a majority or a disproportionate share of the applicants or the eligible population, loss of the project will be felt more, or at least disproportionately, by people of color. Although the plight of applicants will not be as significant in cases where the project is 100-percent occupied, where a project has been gradually vacated, as is the case with some public housing projects and less successful privately owned subsidized projects, many of the people who will be injured will be the applicants. For those applicants, as for the tenants, the question will be whether housing has unlawfully been made unavailable to them under the Fair Housing Act or they have been unlawfully excluded from a federal program under Title VI. Even in cases where the project is fully occupied, applicants can be adversely affected by, for example, the lost opportunity at a future date to live in an integrated neighborhood.

The provision of tenant-based assistance for current occupants being displaced does not eliminate fair housing considerations.

The provision of tenant-based assistance for the current occupants of a building being removed from the subsidized inventory does not eliminate the fair housing considerations. When housing subsidies are provided only to current occupants, subsidies for the units that have been vacated are lost to the market. Even though the tenants are given vouchers, they may be displaced if the building is demolished, the rents are raised above the voucher payment standard, or the owner of the building refuses to accept vouchers or uses more strict screening practices. That displacement will raise fair housing concerns if the building from which the tenants move is located outside of segregated neighborhoods or the tenants are forced into a private market where substantial discrimination exists. In some markets, the vouchers will be unusable by many current tenants, so the offering of vouchers becomes irrelevant.

In measuring the burden that people of color may bear when a development is removed from a subsidy program, one also has to look at the proposed reuse of the buildings and the land. If new housing is to be developed on the land or the existing project is to be substantially rehabilitated, factors that may influence the racial composition of replacement housing become very significant.[33] Rent levels, prices for homeownership units, marketing efforts and particular tenant selection practices may tend to exclude people of color and disproportionately favor white applicants. When HUD officials decide whether to approve or allow the withdrawal of a project from the subsidy program and its replacement by a new housing development that will be less accessible by people of color, these impacts need to be addressed. That is particularly true with regard to cur-

[32]It is important to look at the population of eligible families in situations where, unlike the eligible population as a whole, the owner's waiting list, if any, does not include any or a disproportionate number of people of color.

[33] *Brown v. Artery*, 654 F. Supp. 1106 (D.D.C. 1987).

rent tenants who are people of color and who may be excluded from the replacement housing by such practices.[34] In addition to the burdens borne by individual members of protected classes, it is also necessary to assess the impact of the loss of the project upon residential racial segregation and integration. Many owners of the privately owned subsidized projects that are likely not to renew their Section 8 contracts are located in neighborhoods that are all white or racially integrated. Often removal of the project from the subsidy program will lead to displacement of people of color from the project and the denial of housing in the future to applicants who are people of color. They are likely to be replaced in increasing numbers by white applicants, because of higher, unsubsidized rents that are affordable to disproportionately more white people and disproportionately fewer people of color. If the subsidized project is home to a significant portion of the people of color living in the neighborhood, loss of the project will result in a decrease of residential integration in the neighborhood.

A related fair housing concern arises from the *Shannon* decision and the Project Selection Criteria that implemented it. Under those criteria, HUD adopted a policy of approving only the development of a new project in an area of minority concentration if a similar, offsetting project was being developed in a racially integrated or predominantly white area. Although there were not many Section 236 or Rent Supplement projects developed after the Project Selection Criteria were promulgated, the Section 8 projects were developed under a similar policy. Many of the Section 8 projects now being withdrawn from the program by their owners were built under those policies. It is important to inquire whether a project being withdrawn from the program is one that was relied upon at the time of its development as offsetting the development of another project in an area of minority concentration. If so, that fact should be relevant to HUD's determination about what steps it should take with regard to the removal of the project.

HUD's Responsibilities in These Cases

As a matter of law, but unfortunately not as a matter of practice, it is fairly well established that HUD cannot administer its housing programs as if the federal civil rights and fair housing acts had never been enacted and the Fifth and Fourteenth Amendments were not part of the Constitution. If nothing else, the decision in *Shannon* brought that home to HUD. Similar cases involving other federal housing programs have reminded HUD of its obligations to act in conformity with the civil rights and fair housing legislation.[35] Congress has repeatedly emphasized the applicability of the Fair Housing Act and the civil rights acts to all of HUD's operations. The original Fair Housing Act explicitly requires HUD to administer the programs and activities relating to housing and urban development in a manner to affirmatively further Fair Housing Act policies.[36] As numerous other housing and community development programs have been enacted, Congress has explicitly required compliance with the civil rights and fair housing legislation as a part of those programs.[37] When Congress regulated the prepayment of FHA and FmHA mortgages, it made the fair housing implications of the prepayment decisions significant considerations.[38] The President has required that Fair Housing Act compliance be an integral part of all federal programs relating to housing and community development.[39]

Congress has repeatedly emphasized the applicability of the Fair Housing Act and civil rights acts to all of HUD's operations.

HUD has made the fight for fair housing the number one priority of its annual business operating plan.

It is also clear that legislation during the past few years that has tended to lessen federal control over local administration of housing programs has not eliminated the need to comply with civil rights and fair housing acts. In some cases, Congress has made it clear that, despite deregulation, the Fair Housing Act remains applicable to particular housing activities.[40] In others, Congress has been silent on the matter or even indicated that a new statutory provision applies "notwithstanding any other provision of law." Even in those cases, a court may not read such congressional action as implicitly making the civil rights and fair housing acts inapplicable to HUD's administration of its housing programs.

[34] *See Cabrini-Green Local Advisory Council v. Chicago Hous. Auth.*, 1997 WL 02 (N.D. Ill. Jan. 22, 1997).

[35] *See, e.g., Muñoz-Mendoza v. Pierce*, 711 F.2d 421 (1st Cir. 1983); *NAACP, Boston Chapter v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994).

[36] 42 U.S.C. § 3608 (1998).

[37] *See, e.g.*, 42 U.S.C. § 5304(b)(2) (1994) (CDBG); 42 U.S.C. § 12705(b)(13) (1994) (local governments securing HOME and homeless program funds must affirmatively further fair housing).

[38] *See* 42 U.S.C.A. § 1472(c)(5)(G)(ii) (West 1994).

[39] Executive Order 12892 (Jan. 20, 1994).

[40] *See, e.g.*, Pub. L. No. 104-134, § 204(b) of § 101(e), 110 Stat. 1321-281 (Apr. 26, 1996) (deregulation of United States Housing Act provisions only), noted at 42 U.S.C.A. § 1437f (West Supp. 1998) ("Public Housing Moving to Work Demonstration"); 42 U.S.C. § 1437c-1(d)(15), added by Pub. L. No. 105-276, § 511, 112 Stat. 2461, 2531 (Oct. 21, 1998) (PHA planning subject to civil rights laws); 42 U.S.C. § 1437d(s), added by Pub. L. No. 105-276, § 525, 112 Stat. 2461, 2568 (Oct. 21, 1998) (site-based waiting lists subject to civil rights laws).

Implicit repeals of federal legislation are disfavored, especially implicit repeals of civil rights legislation.[41]

A similar analysis applies to recently enacted statutory provisions authorizing HUD to take particular actions with regard to its housing programs, particularly the privately owned, HUD-subsidized housing programs. Thus, even though HUD has been authorized to dispose of foreclosed projects without subsidies, that does not mean that the civil rights statutes are irrelevant when HUD makes its decision about what to do with a particular project. If *Shannon* and its progeny established no other principle, they did establish that HUD's judgments in administering its housing programs cannot be guided by the housing acts alone. The fair housing and civil rights acts are equally relevant. Similarly, HUD has been empowered in the Mark-to-Market legislation to refuse to renew some Section 8 contracts, for example, contracts with owners who have violated their housing program obligations or contracts on projects which an assessment shows should be vouchered out. Yet, Congress has not made the fair housing and civil rights acts inapplicable to HUD when it makes those judgments.

Ironically, in 1968, when HUD funded the project that was the subject of the *Shannon* litigation, the one requirement HUD had regarding the racial impact of its programs was that a Report on Minority Group Considerations had to be prepared when a proposed activity would result in a substantial net reduction in the supply of housing available to minority group families.[42] That requirement was a product of the substantial criticism of HUD's urban renewal program that had resulted in the displacement of large numbers of people of color. Now, when HUD is once again in the business of displacing large numbers of people of color instead of expanding the supply of housing, the former Report on Minority Group considerations would be especially relevant. Unfortunately, it is not part of HUD's institutional systems any more.

The Complete Failure of HUD to Meet Its Fair Housing Responsibilities

If the federal civil rights and fair housing laws were to be followed in those situations where public and assisted housing developments are being removed from HUD's inventory, it would seem that racial impact would be a key component of HUD's decision-making. HUD would have to have an institutional method to gather all the relevant information about the consequences of the planned action for people of color and upon patterns of residential racial segregation and integration. It would have to make consideration of those consequences an integral part of its reasoning process. It is clear, however, that that is not the case. In situation after situation, as the following examples demonstrate, no information about the racial impact of its actions is gathered, and racial impact is never made part of the decision-making process.

Public housing demolition and disposition. By statute, a PHA cannot demolish or sell a public housing project unless it secures prior approval from HUD. Those approval decisions are made by the Special Applications Center in Chicago. To secure approval, the PHA must submit an application to that office on a form called the Demolition/Disposition Application.[43] Nowhere on that eight-page form is any information requested about the race of the tenants, the people on the waiting list, the surrounding neighborhoods or the neighborhoods into which the tenants are likely to be relocated. The Special Applications Center is not directed by HUD's policies to secure such information from any other sources, and in practice it does not secure and consider such information. HUD officials in the cities where the projects proposed for demolition or sale are located are not directed to provide the Special Applications Center any information about the racial impact of the demolition or sale decision, although they are asked to provide information about the environmental impact of the proposed action. Officials in HUD's Office of Fair Housing and Equal Opportunity are not asked to review PHA applications for approval to demolish or sell a project. In short, race is not a part of HUD's process for deciding whether to allow a public housing project to be demolished or sold.

Racial impact should be a key component of HUD's decision-making process in its removal of units from its inventory.

Foreclosure and property disposition. When owners of rental projects with HUD- insured mortgages default on their mortgages, the lenders assign the mortgages to HUD, HUD explores steps to be taken to work out the defaults with the owners, HUD forecloses on the mortgages if no satisfactory work-out can be secured, and HUD either loses the property at the foreclosure sale or acquires it and develops a plan for disposition. The governing statute provides that one of the goals of HUD's foreclosure and property disposition program must be to support fair housing strategies.[44] The governing regulations, however, authorize HUD to decide to demolish such projects or foreclose upon and sell such projects without ensuring that they remain available as affordable housing for low- and very low-income

[41] 75 FRAUD 531, 535 n.3 (D. Minn. 1997), on appeal, No. 98-1075 (8th Cir. 1999).

[42] *See Morton v. Mancari*, 417 U.S. 535, 549 (1974).

[43] HUD Form 52860 (July 1998).

[44] 12 U.S.C. § 1701z-11(a)(3)(G) (West Supp. 1998).

families.[45] They say nothing about considering the racial impacts of such actions. The Handbooks indicate that all activities relating to the administration of housing acquired by HUD through foreclosure must be conducted on a nondiscriminatory basis and that HUD's policy is to administer its housing programs affirmatively so that individuals of similar incomes in the same housing market area have a like range of housing choices available regardless of their race, color, sex, religion, national origin or age.[46] But the emphasis in the Handbook is on the managers' marketing and tenant selection activities. There is no direction concerning the relevance of fair housing to HUD's decisions about disposing of the projects.[47] Even when the HUD Handbook spells out the rights of tenants being displaced by a property disposition decision, HUD requires only that tenants have their rights under the Fair Housing Act explained to them.[48] There is no direction to HUD staff to consider whether the action leading to the displacement itself may violate the tenants' rights under the Fair Housing Act.

Advocates fighting against the loss of a project should consider whether HUD's failures in that particular case provide a basis for injunctive relief.

Section 8 contract terminations. When landlords secure Section 8 subsidies for a project, they sign a contract with HUD promising to take certain steps while they receive the subsidies, the primary one of which is to maintain their housing in accordance with HUD's Housing Quality Standards.[49] If the landlord defaults on the contract, HUD has the power to terminate the contract or to take less drastic steps, including abating payments or taking possession of the project. The decision to terminate a contract can have disastrous consequences for the current tenants. The governing regulations specify very little about how HUD is to decide whether to terminate a Section 8 contract.[50] The relevant HUD Handbook states only what HUD's remedies are, including termination, and what procedures HUD must take when pursuing those remedies. No mention is made about considering whether the burden of terminating the contract would fall disproportionately upon people of color or taking steps to mitigate those burdens. There is no requirement that officials in HUD's Office of Fair Housing and Equal Opportunity review the decision to terminate a Section 8 contract.[51]

Expiring Section 8 contracts. The situation is the same for cases in which Section 8 contracts expire. HUD's regulations governing the renewal of Section 8 contracts and the restructuring of the underlying mortgages do not even mention the Fair Housing Act or the HUD Office of Fair Housing and Equal Opportunity.[52] They do specify that the Participating Administrative Entities and the landlords seeking renewal cannot have any outstanding civil rights violations. But in all the planning process for making the decisions whether to renew contracts and, if so, on what terms, there is no mention of gathering information related to the fair housing concerns and injecting fair housing into the reasoning process. For example, the regulations setting the standards for substituting vouchers for project-based assistance make no mention of considering the impact of the decision upon the housing opportunities of people of color.[53] Obviously, HUD has decided to operate this program as if the fair housing and civil rights laws did not exist, except to the extent that owners and administrative entities may be disqualified if they violate those laws.

Where Do We Go From Here?

HUD's utter failure to fulfill its fair housing responsibilities in these situations should have consequences. Certainly, with regard to any particular development, advocates who are fighting against the loss of a project should seriously consider whether HUD's failures in that particular case provide a basis for injunctive relief against removal of the project from the inventory. The court's ultimate decision will turn upon many factors. It may vary depending upon the context in which HUD is acting, *e.g.*, terminating or refusing to renew a Section 8 contract, approving the demolition of a public housing project, or awarding a HOPE VI grant. It may also vary depending upon the nature of the racial impact, for example, closing a racially integrated project in a predominantly white neighborhood or displacing large numbers of people of color into a segregated housing market. Whatever the situation, the possibility of such a challenge merits consideration.

With individual projects, even if litigation is not pursued, the failure of HUD to meet its fair housing responsibilities and its consequent vulnerability to litigation should be considered in the process of negotiating a better deal for the affected tenants and applicants. It could be the leverage that

[45]24 C.F.R. § 290.25 (1998).

[46]HUD Handbook 4315.1, ch. 6 (CHG 1 Nov. 1993).

[47]There is a law that authorizes HUD to manage and dispose of projects, notwithstanding any other law (Pub. L. No. 104-204, § 204, 110 Stat. 2873, 2894 (Sept. 26, 1996) (for FY 1997 and thereafter)), but that statute should not be read as implicitly repealing the Fair Housing Act.

[48]HUD Handbook 4315.1, ch. 13, ¶ 13-5 (CHG 1 Nov. 1993).

[49]HUD Housing Assistance Payments Contract, Part II, ¶ 2.5 (Form HUD-52522 Jan. 1990).

[50]24 C.F.R. §§ 880.506 and 880.507 (1998).

[51]HUD Handbook 4350.5, ch. 9 (Mar. 1992).

[52]24 C.F.R. Part 401, published at 63 Fed. Reg. 48,296 (Sept. 11, 1998).

[53]24 C.F.R. § 401.421 (1999).

produces agreement upon a better relocation plan or a greater opportunity to return to housing that is built on the old project site. It may produce more tenant-based assistance for displaced tenants, greater use of exception rents or a higher payment standard, or more assistance in locating relocation housing. It can be a way to secure a larger number of units in any replacement housing for people who are poor.

HUD's fair housing concerns involving the actions of others should likewise be applied to its assessment of the impact of its own funding and other decisions.

Beyond the individual projects, there is the question whether HUD's institutional systems could be changed across the board, through litigation of either a series of cases or one major one, or through negotiations and political pressure. Making considerations of race a fundamental part of HUD's decision-making process would be a monumental challenge. That is especially true in situations where increased federal expenditures would result or local government and private owner interests would be frustrated. The fact of the matter is that over the past 30 years, fair housing has been much more of a concern to HUD when it involves the actions of others — private landlords or real estate agents, or, to a lesser extent, housing authorities and local governments receiving HUD funds. When it comes to HUD's own decisions about its own funds or other actions, HUD has repeatedly operated as if the fair housing laws did not apply.

But the decision in *Shannon*, at least on paper, made consideration of racial impact a part of HUD's decisions about which projects to fund in the 1970s, and those paper systems had some impact on HUD's actual decisions in individual cases.[54] Now, when HUD's actions can lead to the loss of housing for people of color, HUD should also have systems on paper and in reality that make fair housing an integral part of its decision-making process. With such systems in place and in practice, fewer people of color are likely to bear the burdens of HUD's actions in these areas. ■

[54] *See Marin City Council v. Marin County Redev. Agency*, 416 F. Supp. 700 (N.D. Cal. 1975) and 416 F. Supp. 707 (1976).

EIGHT MASSACHUSETTS HOUSING AUTHORITIES PRELIMINARILY ENJOINED FROM APPLYING LOCAL PREFERENCES TO CERTIFICATE AND VOUCHER PROGRAMS

The Housing Act of 1998 (the Act)[1] has made several changes to the way in which public housing authorities (PHAs) may establish and maintain waiting lists for the certificate and voucher programs. First, the Act permanently repealed the federal need-based preferences that required PHAs to give preference to families who occupied substandard housing, who are involuntarily displaced, or who pay more than 50 percent of their income for rent.[2] Second, the Act authorizes PHAs to adopt local residency preferences that conform to the individual PHA's plan of operations[3] provided they do not otherwise violate any laws. Third, the Act requires that not less than 75 percent of the assistance provided by a PHA under the certificate and voucher programs in any fiscal year be provided to families whose incomes do not exceed 30 percent of area median income (the "75-percent rule").

PHAs are adopting new admissions preferences following repeal of the federal need-based preferences.

New Local Admission Standards and Preferences

As a result of these changes, many housing authorities are reviewing their existing preference policies for the certificate and voucher programs, and some are beginning to adopt new admission standards and preferences. Recently, in Massachusetts, eight smaller suburban public housing authorities jointly conceived and adopted new policies that drop the federal need-based preferences and replace them with a local residency preference. Specifically, the eight

[1] Pub. L. No. 105-276 (Oct. 21, 1998).

[2] *See id.*, §514, rewriting 42 U.S.C.A. § 1437d(c)(4)(A)(i) and f(d)(1)(A) (West 1994).

[3] For a discussion of PHAs' new plan requirements, *see Congress' New Public Housing and Voucher Programs*, 28 HOUS. L. BULL. 165, 185 (Oct./Nov. 1998).