



Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs

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Part I: Introduction

For more than thirty-five years, all public housing development in Chicago has been subject to the oversight of a federal district court in order to enforce a consent decree designed to reverse “intentionally perpetuated racial segregation” in public housing authority (PHA) tenant assignment and siting policies.¹ In decisions spanning 2003, 2004, and 2005, public housing residents displaced by the demolition and revitalization efforts of the Chicago Housing Authority withstood motions to dismiss two separately filed cases claiming that the PHA’s relocation efforts perpetuated racial segregation and violated fair housing laws.² In Florida, a district court allowed public housing residents to proceed with fair housing and civil rights claims against a PHA seeking to demolish and revitalize a public housing development with HOPE VI funding from the U.S. Department of Housing and Urban Development (HUD).³ A court in Massachusetts blocked the use of selection preferences favoring local residents in the Section 8 housing choice voucher programs administered by several suburban housing authorities because the preferences improperly excluded minority applicants from program participation.⁴ A federal court in New York stopped the use of selection preferences for working families because the preferences undermined implementation of a civil rights consent decree.⁵ Fair housing principles blocked prepayment of a Rural Rental Housing Program loan and termination of a project-based Section 8 contract in Arkansas.⁶ In Maryland, a district court ruled against HUD’s motion for summary judgment on tenant claims that the agency violated its responsibilities under the Fair Housing Act in the disposition of a foreclosed multi-

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family property.⁷ After ten years of litigation in Baltimore, a separate federal court said that HUD violated fair housing requirements by failing to engage in regional activities to end residential segregation in public housing.⁸ In New Jersey, it must have seemed as if civil rights law would bring a complete stop to the development of Low-Income Housing Tax Credits (LIHTCs). There, civil rights groups argued that the housing credit agency's allocation of tax credits perpetuated racial segregation by concentrating LIHTC properties in urban, segregated neighborhoods.⁹

These cases are connected by a single principle, a principle that federal, state, and local housing agencies, developers, and property managers disregard at considerable peril. In all of the cases, the courts held that housing providers have an affirmative duty to further fair housing.¹⁰

The governmentwide obligation to affirmatively further fair housing is codified in the federal Fair Housing Act.¹¹ The mandate directs all federal executive departments and agencies to ". . . administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner to affirmatively further the purposes of [the Fair Housing Act]. . . ."¹²

The goal of this directive is not only to deploy federal resources against all forms of housing discrimination but also to ensure that active steps are "taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunity [Title VIII] was designed to combat."¹³ As a result, and as evidenced by the litigation that seeks to enforce it, the responsibility to further fair housing reaches into every aspect of affordable housing, from site selection, demolition, displacement, and relocation to architectural design, marketing, tenant selection, and occupancy policies.

The disputes that underlie the litigation highlight a divide between community development activists whose efforts focus on the revitalization of distressed neighborhoods in urban centers and civil rights advocates committed to the development of affordable housing in suburban areas as a means of breaking down persistent patterns of residential segregation, isolation, and poverty.¹⁴ The divide has been a feature of debates concerning civil rights and housing and community development from the first years after the enactment of Title VIII.¹⁵ It also is evident that the day-to-day work of achieving a fair housing result in affordable housing is challenging and sometimes comes with its own human cost in terms of displacement that can drive poor households further into high-poverty, segregated neighborhoods.¹⁶ Under the circumstances, it is not entirely out of bounds to wonder whether the obligation to further fair housing is incompatible with the business of building and providing affordable housing.

Such a conclusion would be false. The three decades of litigation that have followed the enactment of Title VIII have been characterized by numerous civil rights successes, such as the renewal and desegregation of

public housing in Dallas, Texas, resulting from *Walker v. U.S. Department of Housing and Urban Development*.¹⁷ Moreover, a housing provider that is attentive to civil rights concerns has substantial discretion in choosing the methods deemed necessary to fulfill the responsibility to further fair housing.¹⁸ Consequently, the "threat" to the construction of affordable housing posed by the obligation to further fair housing, if it exists at all, should not be different from any of the other risks routinely considered in the development process, including, for example, environmental hazards or financial risks.

A large and important body of literature directed at policy makers urges reforms to federal, state, and local government housing practices as a means of promoting equal opportunity and reversing entrenched conditions of segregation and discrimination. The audience for this article is not policy makers but rather development practitioners, i.e., the developers, lenders, syndicators, and lawyers involved in the day-to-day mechanics of designing, building, and leasing or selling affordable housing.

This article examines what it means to affirmatively further fair housing and considers the difficulties faced in the employment of the strategies used "to fulfill, as much as possible, the goal of open, integrated residential housing patterns." It argues that the obligation to further fair housing can and should be served by treating civil rights concerns with the same level of care and attention devoted to any of the other risks typically underwritten in an affordable housing real estate transaction. Tax credit developers are familiar with underwriting criteria that address tax-related financial risk factors from the standpoint of statutory and judicial standards, agency regulation, and subregulatory guidance. This article examines the possibility of fair housing underwriting from a similar perspective.

Part I is this introduction. Part II explores the judicial interpretations of the obligation to further fair housing, including the responsibility to utilize institutionalized methods to ensure compliance with civil rights duties. Part III describes the federal interagency standards that define and implement the responsibility, focusing on the fair housing mechanisms used by the two federal agencies with the largest stake in affordable housing: HUD as the lead federal fair housing and housing and community development agency, and the Internal Revenue Service (IRS) as the agency charged with administering the LIHTC program. Parts IV and V identify fair housing risk factors. Part IV explores civil rights critiques of affordable housing programs, and Part V assesses civil rights progress in affordable housing development and the difficulties in implementing civil rights reforms; it also examines strategies commonly used to achieve fair housing goals. In Part VI, the article considers housing development underwriting techniques. It concludes by urging the use of comparable fair housing underwriting methods that assess and mitigate civil rights risks as one modest means of carrying out the duty to affirmatively further fair housing.

Part II: Judicial Enforcement of the Duty to Further Fair Housing

Consider for a moment the legal opinions that are a routine feature of affordable housing transactions. Opinions assure lenders and syndicators that the borrower is a properly formed business organization with the capacity and authority to complete a transaction. Opinions state that the transactional documents are enforceable against the executing parties. A tax attorney's opinion will address a host of considerations regarding statutory compliance with the Internal Revenue Code (Code) and IRS regulations, audit risks based on judicial interpretations of the Code and the regulations, and the effect of the transaction's structure on an investor's expected rate of return in light of those requirements. Opinions tell a lender or an investor that a knowledgeable professional has examined and approved the transaction after reviewing applicable legal requirements. Elements of affordable housing transactions naturally involve risks, and civil rights compliance is no different. Like other risks, civil rights compliance is a risk that has its origin in statute as interpreted by the courts, if the case law on the obligation to further fair housing is any measure. This section of the article examines that element of the obligation to further fair housing.

Courts enforce the statutory responsibility to comply with Title VIII and to further fair housing against federal agencies such as HUD, the Office of the Comptroller of Currency, the Department of Veterans Affairs, and the Rural Housing Service of the U.S. Department of Agriculture.¹⁹ State allocating agencies administering the tax credit program;²⁰ state agencies serving as lenders of federal funds in the HOME program;²¹ state quasi-public agencies administering tax-exempt bonds;²² owners operating multifamily assisted housing;²³ owners seeking to refinance assisted housing;²⁴ housing authorities administering public housing, HOPE VI grants, and tenant-based Section 8 vouchers;²⁵ and redevelopment authorities and cities administering community development and urban renewal funds²⁶ all face the possibility of a challenge for disregard of the obligation. The responsibility to further fair housing protects all classes of people covered by the Fair Housing Act, which prohibits discrimination against families with children and people with disabilities and forbids discrimination based on race, color, national origin, religion, and sex.²⁷

As interpreted by the courts, the responsibility has several elements. First, discrimination is prohibited, including deliberate discrimination, acts that aid or disregard the discrimination of others, and facially neutral practices that have a discriminatory effect on the classes of people protected by fair housing laws.²⁸ Next, those with the obligation to further fair housing have a responsibility to consider the civil rights impact of housing and development decisions. This second obligation requires agencies to consider, for example, whether the siting of new assisted developments or the demolition and disposition of existing developments will result in segregation and isolation of minorities.²⁹ It also imposes a more global respon-

sibility to "utilize some institutionalized method whereby . . . [the agency] has before it the relevant racial and socio-economic information necessary for compliance with its duties" to further fair housing.³⁰ Finally, the codification of a duty to further fair housing reflects the congressional desire "to fulfill . . . the goal of open, integrated residential housing patterns and to prevent the increase of segregation" and "to assist in ending discrimination and segregation to the point where the supply of genuinely open housing increases."³¹

When an agency or recipient assumes and carries out the responsibility to further fair housing, the actions of the agency receive considerable deference. Judicial enforcement of the obligation in actions against federal agencies is through the Administrative Procedure Act (APA). An agency action for a violation of the responsibility to promote fair housing under the APA will be set aside only if it is "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law."³² Under this standard, an agency "possesses broad discretionary powers to develop, award, and administer its grants and to decide the degree to which they can be shaped to help achieve Title VIII's goals."³³ Though not subject to the federal APA, state agencies enjoy a similar level of deference.³⁴ Agency discretion is not unlimited, however. Deference to the exercise of discretion "simply means that a court is less likely to find against the agency, for the agency is less likely to have acted unlawfully."³⁵

For Title VIII purposes, the threshold for ascertaining whether there is an abuse of discretion and a consequent disregard of the obligation to further fair housing

implies, at minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply. If [the agency] is doing so in a meaningful way, one would expect to see, over time . . . activity that tends to increase, or at least . . . does not significantly diminish the supply of open housing.³⁶

Under this approach, a disregard of the overall regional civil rights effect of decisions about the allocation of housing resources violates the duty to further fair housing while allocation practices that balance the distribution of resources in a manner that is attentive to fair housing concerns do not.³⁷ Demolition of assisted housing is unlawful when it results in an unmitigated discriminatory burden on racial minorities.³⁸ Demolition of public housing as part of a HOPE VI plan that includes "attempts at integration and opportunities for residents rather than publicly funded, high density, high rise apartments" is consistent with Title VIII, especially where "the record demonstrates consideration of impact and pursuit of a course of action that, on its face, demonstrates responsiveness to the perceived [racial] impact."³⁹ Selection practices will violate the obligation to further fair housing when they have a discriminatory effect. Marketing and admission

standards implemented as part of an agency's obligation to comply with civil rights laws or to operate within a statutory mandate governing selection preferences are permitted.⁴⁰ Relocation activities are permissible when an agency acts to mitigate a discriminatory effect.⁴¹ Inattention to that effect will have the opposite result.⁴² The same principles apply to site selection, even where assisted housing is located in a segregated neighborhood.⁴³ They also apply to the way an agency uses the data collected as it assesses the civil rights environment in which its programs operate.⁴⁴ In sum, to do nothing invites litigation and liability. Addressing civil rights concerns in a thoughtful and comprehensive manner invites respect from the courts.

Part III: Federal Implementation of Civil Rights Obligations

Like other underwriting factors that affect affordable housing development, civil rights responsibilities have their own regulatory and subregulatory structure implemented through agencies charged with administrative obligations under civil rights-enabling statutes. Part III explores the federal mechanisms for implementing civil rights laws with the aim of additionally defining the obligation to further fair housing and identifying more detailed standards that could form the basis of civil rights underwriting.

Federal Structure for Implementation of the Responsibility to Further Fair Housing

The Fair Housing Act is not the only civil rights law affecting housing programs. Programs that receive federal financial assistance are governed by Title VI of the 1964 Civil Rights Act, which forbids discrimination based on race, color, and national origin; Section 504 of the 1973 Rehabilitation Act, which outlaws disability discrimination; and the Age Discrimination Act of 1975, which prohibits age discrimination.⁴⁵ Title IX of the Education Amendments of 1972 prohibits gender discrimination in educational programs receiving federal financial assistance, including those offered in connection with housing, such as the Public Housing Resident Opportunities and Self-Sufficiency (ROSS) program, under which training is an eligible activity.⁴⁶ Title II of the Americans with Disabilities Act (ADA) bars disability discrimination in programs and services of state and local government, including state and local housing programs. Title III of the ADA prohibits disability discrimination in public accommodations like homeless shelters and in social services offered in connection with housing.⁴⁷ Governmentwide implementation of these laws is coordinated through presidential executive orders, and some courts have relied on those executive orders to impose duties directly on housing providers to further fair housing.⁴⁸

The earliest of the presidential directives was Executive Order 11,063, issued in 1962, which assigned to the President's Committee on Equal Opportunity in Housing governmentwide coordination and enforcement powers for combating discrimination based on race, color, creed, and national origin.⁴⁹ Responsibility for interagency civil rights leadership has shifted

over the years. The Department of Justice is currently assigned coordination responsibilities for Title VI, Title IX, Section 504, and those parts of the ADA addressing disability discrimination in state and local governmental services and in public accommodations.⁵⁰ Governmentwide responsibility for the Age Discrimination Act has always been with the U.S. Department of Health, Education and Welfare (HEW) and its successor agency, the Department of Health and Human Services (HHS).⁵¹ Primary responsibility for Title VIII enforcement falls on HUD, which shares certain duties with the Justice Department.⁵² HUD is responsible for leadership in the federal effort to affirmatively further fair housing.⁵³

All federal agencies are required to promulgate regulations effectuating federal laws like Title VI and Section 504 and the related executive orders.⁵⁴ Justice Department Title VI rules provide a template for all the rules that affect recipients of federal housing assistance, for the public and private entities governed by the broader scope of Executive Order 11,063, and for the state and local services subject to Title II of the ADA.⁵⁵ HUD rules for federal financial assistance and ADA rules, both derived from the Justice Department template, define a scope of civil rights conduct that is nearly identical to the Title VIII obligation to further fair housing.

Like the Fair Housing Act, these rules forbid not only intentional conduct and segregation but also neutral practices that have a discriminatory effect.⁵⁶ The rules outlaw activities that aid or assist the discrimination of others.⁵⁷ They require planning activities and affirmative steps to remove conditions of discrimination, including conditions caused by the grantee's conduct, conditions not caused by the grantee that interfere with equal choice and program participation, and architectural barriers that prevent participation by people with disabilities.⁵⁸ They forbid site selection practices that aid or perpetuate discrimination.⁵⁹ The rules require that grantees keep records from which it is possible to monitor compliance with civil rights requirements.⁶⁰ They also require grantees to advise program participants about civil rights requirements, designate employees to accept complaints, and establish civil rights grievance procedures.⁶¹ In short, they reflect a coordinated, governmentwide definition of what it means to further fair housing and, thus, a framework on which to base fair housing underwriting criteria.

HUD and the Devolution of Affirmative Fair Housing Practices

HUD rules do more than forbid discrimination. Agency regulations and associated subregulatory guidance try to operationalize the objective of using federal resources to end segregation and create open housing by devolving affirmative responsibilities to HUD grantees. HUD calls these mandates "civil rights-related program requirements."⁶² Like HUD's Title VI and Section 504 rules, they apply to recipients of HUD program funds. They touch virtually every aspect of a grantee's interaction with HUD and with the low-income families that are the ultimate beneficiaries of HUD programs. It is useful to examine these requirements not just for their direct

effect on civil rights program operational standards, but also because they offer an additional template for the kinds of activities that might constitute fair housing underwriting.

Civil rights-related program requirements begin when grantees compete for federal funding or complete the certifications required to qualify for noncompetitive funds. For example, an application for competitive funding under a HUD notice of funding availability (NOFA) will not be processed if the applicant is the subject of an administrative charge under the Fair Housing Act, is a defendant in a Title VIII pattern and practice lawsuit, or has received a letter of findings asserting violations of Title VI or Section 504.⁶³ Applicants must also address the duty to further fair housing by including in their application a description of specific steps to “(1) [o]vercome the effects of impediments to fair housing choice that were identified in the jurisdiction’s Analysis of Impediments (AI) to Fair Housing Choice; (2) [r]emedy discrimination in housing; or (3) [p]romote fair housing rights and fair housing choice.”⁶⁴

The reference to the AI addresses the affirmative civil rights obligations of recipients of formula-based, noncompetitive HUD grants. Under the consolidated planning requirements applicable to the states, counties, and municipalities that receive HUD community development and HOME funds and the public housing agency plan requirements applicable to PHAs that receive public housing and Section 8 funds, recipients must certify that they will affirmatively further fair housing by developing a written “analysis of impediments to fair housing choice” that identifies barriers to fair housing and designs and implements an action plan to remove those barriers.⁶⁵

As part of the consolidated plan, the AI creates opportunities for comprehensive civil rights planning across multiple programs. For example, HUD consolidated planning rules require state community development and HOME grantees to “describe the strategy to coordinate the Low-Income Housing Tax Credit with the development of housing that is affordable to low-income and moderate-income families.”⁶⁶ At least one court has recognized that fair housing planning obligations under the consolidated plan rules impose the responsibility to further fair housing on state and local agencies, including state housing credit agencies.⁶⁷

Additional civil rights-related program requirements govern the day-to-day operations of HUD programs. Contracts for HUD funds include general civil rights-related covenants.⁶⁸ Fair housing duties are incorporated in relocation responsibilities when households are displaced as the result of HUD-assisted development activities.⁶⁹ Once a property is ready for occupancy, civil rights standards affect application, waiting list, and tenant selection requirements. They govern

use of residency preferences in a manner that does not have a disparate impact on members of any class of individuals protected by federal civil rights laws . . . ; [they require] [c]onsistent maintenance requirements; and . . . [c]onsistent policies across properties owned by the same owner to ensure against steering, segregation, or other discriminatory practices.⁷⁰

They include requirements for affirmative fair housing marketing plans designed as a "means to carry out the mandate of" Title VIII in order to "achieve a condition in which individuals of similar income levels in the same housing market areas have a like range of housing choices available to them regardless of their race, color, religion, sex, handicap, familial status or national origin."⁷¹ HUD rules also impose a duty on providers to counsel applicants and participants about equal opportunity and fair housing rights.⁷²

The early litigation brought under Title VIII to enforce the duty to further fair housing resulted in the promulgation of a special category of HUD civil rights-related program requirements: agency site and neighborhood selection standards for HUD-assisted housing.⁷³ With variations that result from program differences, the standards apply to public housing, the Project-Based Housing Choice Voucher Program, the HOME program, properties developed in the Section 202 program of housing and services for elders, and the Section 811 program of housing and supportive services for people with disabilities.⁷⁴

Recently reissued regulations for the Project-Based Housing Choice Voucher Program are the best articulation of the institutionalized standards for site selection that emerged from the litigation under Title VIII. Under the rules, all sites must comply with the general provisions of Title VI, Title VIII, and Executive Order 11,063, including sites for rehabilitated properties and new construction projects.⁷⁵ The criteria for new construction try to balance issues of choice, revitalization, and segregation. New projects must not be located in "areas of minority concentration" unless "sufficient, comparable housing opportunities" exist in nonsegregated areas. Reflecting the judicial view that fair housing goals are to be achieved over time, "sufficient housing opportunities" are defined as a condition where distribution of assisted units, "over a period of several years, will approach an appropriate balance of housing choices within and outside areas of minority concentration."⁷⁶ The concept of

overriding housing needs . . . permits approval of sites [in segregated areas] that are an integral part of an overall local strategy for preservation or restoration of the immediate neighborhood and of sites in a neighborhood experiencing significant private investment that is demonstrably changing the economic character of the area (a "revitalizing area").⁷⁷

Fair Housing in the LIHTC Program

With the exception of a prohibition on refusing to rent to participants in the Section 8 housing choice voucher program, concepts of fair housing and civil rights do not appear in the tax credit statute, 26 U.S.C. § 42 (Section 42).⁷⁸ To the extent that civil rights considerations are a factor in the tax credit program, they derive from legislative history, which provides that "residential rental units must be for use by the general public. . . ."⁷⁹

One facet of the tax credit regulations is the manner in which the IRS relies on HUD standards for the housing aspects of the program.⁸⁰ The IRS

follows the same practice in setting civil rights and fair housing standards. Implementing rules state that “a residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing nondiscrimination, as evidenced by rules or regulations of HUD” and HUD’s *Multifamily Occupancy Handbook*.⁸¹ The reference to the HUD handbook means that tax credit owners are permitted to offer preferences to classes such as “the homeless [or] disabled” where those preferences are permitted in HUD-subsidized housing developments, but they must not adopt practices “that would violate HUD housing policy,” such as providing units “for a member of a social organization” or “by an employer for its employees.”⁸² Under IRS rules, owners must verify compliance with the general public use requirements through annual certifications that they have not been subject to adverse administrative or judicial findings of discrimination under Title VIII.⁸³ The court in the challenge to the New Jersey Qualified Allocation Plan (QAP) interpreted the IRS regulation to apply “only to the rental of units within a project financed by the tax credit program”; that is, only to individual cases of fair housing violations and not to larger systemic issues of siting, segregation, or furthering fair housing that are at the heart of Title VIII and the related executive orders.⁸⁴

It is hard to know precisely what the IRS intends in the reference to HUD nondiscrimination rules. HUD civil rights standards encompass a broad range of requirements that apply to some housing programs but not others.⁸⁵ The regulations include rules that apply to recipients of federal financial assistance promulgated under Title VI, Section 504, Title IX, the Age Discrimination Act, and the implementing rules for Executive Order 11,063. They also include Fair Housing Act requirements applicable to both private and assisted housing and to landlords, sellers, real estate brokers, lenders, and others providing financing for housing, whether or not federal financial assistance is involved.⁸⁶ Privately owned HUD-assisted multifamily properties are also subject to affirmative fair housing marketing standards.⁸⁷ Nearly every set of rules in individual HUD programs includes civil rights-related program requirements that incorporate by reference the rules applicable for federal financial assistance, the ADA, and an array of legal requirements that apply to minority and women business development and employment opportunities for residents of assisted housing.⁸⁸ HUD rules also include civil rights-related requirements that affect only the operations of particular programs like HOME and public housing.⁸⁹ The IRS tax credit audit guide and its draft compliance guide for state housing credit agencies refer to these requirements but offer little guidance on how they should be applied. The draft compliance guide does offer detailed information on the meaning of the general public use requirements, but it discusses only matters that arise under Title VIII.⁹⁰

The IRS regulatory reference to the *Multifamily Occupancy Handbook* also can be confusing. The *Multifamily Occupancy Handbook* is the guidance for privately owned, HUD-subsidized multifamily housing programs.⁹¹ It cov-

ers programs receiving federal financial assistance within the meaning of Title VI and related laws and therefore includes a chapter that offers guidance on all of the civil rights rules found in HUD regulations.⁹² As an analytical matter, it is not clear whether all of HUD's rules and the entire handbook actually apply to LIHTC properties, as the IRS regulation suggests. There is no clear guidance on whether tax credits constitute "federal financial assistance" within the meaning of laws like Title VI, Title IX, or Section 504.⁹³ Indeed, in an entirely different guidance document, HUD's relocation handbook says that LIHTCs are not federal financial assistance within the meaning of the Uniform Relocation Act.⁹⁴ These distinctions are potentially significant. For example, Section 504 standards require the construction of architectural accessibility features in properties that undergo "substantial alteration," while Title VIII access requirements apply only to new construction.⁹⁵

The *Multifamily Occupancy Handbook* devotes an entire chapter to the more detailed selection preferences and eligibility standards applicable in individual HUD programs. These standards are presumably relevant to IRS civil rights compliance only when those HUD programs are used in combination with tax credits.⁹⁶ The one direct reference in the *Multifamily Occupancy Handbook* to tax credits appears in a discussion about single-sex housing programs and gender discrimination under Title VIII. In that context, the handbook states that "HUD does not interpret the Internal Revenue Code to require housing providers to obtain a certification from HUD that they are operating in compliance with nondiscrimination requirements as a prerequisite to obtaining" tax credits. The handbook does invite providers to contact HUD field offices with questions.⁹⁷

The IRS has taken some steps to expand the scope of the civil rights oversight in the tax credit program beyond monitoring for individual cases of discrimination. In August 2000, the Department of Treasury, the Department of Justice, and HUD entered into a memorandum of understanding in an effort to coordinate fair housing activities among the three agencies.⁹⁸ For the most part, the memorandum supports the IRS's focus on fair housing issues in the rental of individual units.⁹⁹ It aims for better inter-agency coordination by requiring HUD to notify the IRS and the appropriate state housing credit agency of pending administrative and judicial fair housing cases involving tax credit properties and by requiring the IRS to advise owners about the possible loss of credits in connection with an adverse finding or judgment.¹⁰⁰ The memorandum also calls for joint fair housing training for Treasury and housing credit agency staff by HUD and the Justice Department, activities to encourage monitoring and compliance by syndicators, improved enforcement of Title VIII architectural access standards, and annual civil rights meetings with housing credit agencies.¹⁰¹ It appears, however, that the memorandum has produced very little actual activity by HUD, the IRS, and the Justice Department.¹⁰²

Part IV: The Civil Rights Critique of Federal Fair Housing Efforts

A long history of intentional race discrimination in federal housing and development programs, especially against African-Americans, informs Title VIII's imperative to further fair housing and should form the basis for fair housing underwriting. Segregated, blighted areas were razed for highways, new homes, and businesses in the name of slum clearance and urban redevelopment. The African-American inhabitants of the affected neighborhoods were corralled into concentrated, high-rise public housing developments. Federal mortgage underwriters drew bright red lines on area maps to demark the African-American neighborhoods where no federally insured loans could be made. Housing officials maintained separate developments for African-Americans and whites through the use of discriminatory admission and unit assignment policies. The complicity of federal housing officials in creating the resulting patterns of segregation and poverty in affordable housing programs is well established.¹⁰³ In its better moments, HUD acknowledges the role played by the federal government.¹⁰⁴ Although conditions of segregation have somewhat eased in recent years, they still persist. Improvements "did not extend to black housing residents, who continued to live in low-income, predominantly black-occupied neighborhoods."¹⁰⁵

There is no single, consistently applied standard for measuring levels of poverty and racial segregation. The general view in HUD programs is that a "low-poverty" area is one in which no more than 10 percent of the residents live with household incomes at or below the federal poverty line.¹⁰⁶ A "high-poverty" area is a neighborhood where 30 percent or more of inhabitants live in poverty.¹⁰⁷ There are varying standards used to measure levels of segregation. A common measure defines a segregated area as one in which a particular racial or ethnic group comprises 50 percent or more of the total population.¹⁰⁸

By these standards, the LIHTC program is on its way to replicating the conditions that plague public and assisted housing programs. In a February 2000 assessment of thirty-nine tax credit properties placed in service between 1992 and 1994, researchers found that 86 percent of the tax credit properties studied were located in neighborhoods with rates of poverty greater than 10 percent; 46 percent of the properties were in areas with poverty rates greater than 30 percent.¹⁰⁹ Seventy-two percent of the surveyed properties were located in central cities.¹¹⁰ Nearly half were in census tracts where 80 percent to 100 percent of the residents consisted of racial and ethnic minorities; another 39 percent were sited in neighborhoods where the percentage of minority residents ranged from 21 percent to 79 percent.¹¹¹ Fifty-two percent of the surveyed properties were occupied only by minority tenants; 78 percent of the properties had minority tenant populations of greater than 70 percent.¹¹² More than half of the properties were

occupied by a resident population that was more minority than the surrounding neighborhood.¹¹³

A December 2003 survey examined 9,311 projects, in metropolitan and nonmetropolitan areas, consisting of 633,080 LIHTC units placed in service between 1995 and 2001.¹¹⁴ The 2003 study found that some 21 percent of all the surveyed units placed in service in that time period were located in high-poverty areas.¹¹⁵ Nearly two-thirds of the 1995 to 2001 units were located in census tracts with poverty rates greater than 10 percent, and 18.2 percent of the projects were in areas with rates of poverty greater than 30 percent.¹¹⁶ More than a fifth of LIHTC properties, or 21.4 percent, were in areas where minorities made up over 80 percent of the population.¹¹⁷ Nearly half of the properties, or 48.5 percent, were sited in neighborhoods where the percentage of minority residents ranged from 21 percent to 79 percent.¹¹⁸ Slightly more than 40 percent of the 1995–2001 units were located in areas where the minority population exceeded 50 percent.¹¹⁹ These facts led to litigation in New Jersey and Connecticut and foretell more lawsuits.¹²⁰

Despite the federal apparatus for affirmatively furthering fair housing, segregated living patterns also persist in private housing throughout metropolitan housing markets, where segregation diminished only incrementally between 1990 and 2000.¹²¹ The work of reversing these injustices remains unfinished decades after the enactment of Title VIII and motivates powerful critiques of federal, state, and local housing policies. Writing in 1998, Florence Roisman, for example, criticized both the IRS and state housing credit agencies for failing to further fair housing.¹²² Roisman proposed three types of changes to Treasury regulations to correct that failure. First, she urged the IRS to amend LIHTC rules to explicitly acknowledge that tax credit housing is subject to Title VIII and to incorporate into the rules the statutory obligation to not discriminate against Section 8 participants.¹²³ Second, she proposed new civil rights compliance standards for state housing credit agencies. The specific proposals track many of the requirements embodied in HUD's civil rights-related program requirements, including state certifications of compliance with fair housing laws, fair housing planning, civil rights complaint mechanisms, standards for affirmative fair housing marketing, data collection and fair housing monitoring, threshold civil rights eligibility requirements for tax credit applicants, and site and neighborhood standards.¹²⁴ Finally, Roisman suggested devolving some of these responsibilities to developers applying for and operating housing assisted with LIHTCs, again in much the same way HUD devolves similar duties to its grantees.¹²⁵

Other critiques of government policies focus more broadly on civil rights and housing within a regional context of opportunity that also encompasses jobs, education, transportation, child care, environmental enforcement, and structures for local political participation. These critiques argue that racial and economic equity is accomplished with an emphasis not just on removing conditions of segregation, but also on opening up access to

the “complex, interconnected web of opportunity structures . . . that significantly affect . . . quality of life.”¹²⁶ To proponents of this “opportunity-based” model of civil rights, a variety of factors combine to cement in place racial isolation, exclusion, and segregation:

- shortage of affordable housing;
- increasing number of people of color as a percentage of the overall population;
- persistence of racial discrimination in housing, education, health care, and employment;
- increased income inequality;
- movement of jobs away from urban centers;
- poor networks for public transportation;
- fiscal policies that divert government resources away from affordable housing and the social safety net; and
- fragmentation of government authority for planning and land use.¹²⁷

The opportunity-based civil rights model calls for regional planning and resource utilization, as opposed to the current fragmented model that directs housing resources to local, place-based governments and entities. It suggests policy changes that break down local land use barriers to affordable housing development, such as fair share housing laws that impose a duty on municipalities to build enough affordable units to accommodate a proportionate share of a region’s low-income population, inclusionary zoning and density bonus criteria, and linkage fees that raise funding for affordable housing from developers that build commercial facilities and market-rate dwellings. It supports race-conscious strategies that link housing location with considerations of environmental safety and employment and educational opportunities. It calls for voting reforms and improved structures for participation by low-income households and people of color in the political processes that govern local decision making.¹²⁸

With respect to housing programs, the opportunity-based housing model urges a larger government financial commitment to programs that preserve existing affordable housing and construct new affordable housing units.¹²⁹ It supports increases to the Section 8 housing choice voucher program and expansion of programs that promote regional mobility with Section 8 vouchers.¹³⁰ Opportunity-based housing calls on federal policy makers to promulgate regulations that break down segregated living patterns through affirmative steps to further fair housing.¹³¹ It urges an increased financial commitment to fair housing enforcement, meaningful and strengthened civil rights compliance activities, and data collection to monitor the civil rights effect of housing policies.¹³² It recommends federal leadership in regional strategies to open up and desegregate metropolitan housing markets.¹³³

Part V: Uneven Progress and Difficult Tasks

One measure of compliance with the responsibility to further fair housing is to understand whether there is “activity that tends to increase . . . the

supply of open housing."¹³⁴ From that standpoint, it is worth understanding whether there is evidence of civil rights progress on the policy front with corresponding improvements in actual fair housing conditions. Part V examines those questions, first by looking at the extent of policy changes and then at the results of the changes. It concludes that policy improvements have been modest at best. The resulting conditions suggest a means of understanding the civil rights difficulties and the risks associated with developing affordable housing and a way of understanding the practical implications of fair housing underwriting.

Policy Progress

Some of the civil rights policy recommendations discussed in Part IV are now making their way into practice. IRS regulations were amended in January 2000 to require housing credit agencies to monitor for compliance with the general public use rule by obtaining owner certifications about the existence of fair housing complaints and compliance with Section 42's nondiscrimination provisions for participants in the Section 8 housing choice voucher program.¹³⁵ Section 42 was amended to limit the LIHTC "basis boost" in allocations of tax credits to buildings in high-poverty qualified census tracts that are also "revitalizing areas."¹³⁶ By 2001, forty-three state QAPs "awarded preference points to projects that contributed to locally drafted community revitalization plans" and thirty-seven states "gave preference points to projects based on whether they were located in metropolitan or non-metropolitan areas. . . ." ¹³⁷ An explicit acknowledgment of the applicability of Title VIII, threshold civil rights eligibility, standards, and affirmative fair housing marketing requirements are becoming features of state QAPs.¹³⁸ QAPs also increasingly use preference points in competitive applications to target allocations to projects serving households protected by fair housing and civil rights laws. The majority of states, for example, offer preferential selection to "special needs" tax credit projects serving people with disabilities, elders, and large families. Two states offer extra selection points to projects with "minority preferences."¹³⁹

The recommendations of advocates of opportunity-based models of affordable housing development are also gaining some currency. In states like Connecticut, Illinois, Massachusetts, and New Jersey, long-standing laws offer relief from local zoning laws, provide smart-growth incentives for inclusionary zoning practices, and impose fair share housing obligations on suburban communities.¹⁴⁰ Advocates promote models of local engagement in which developers enter into dialogues with local officials and neighbors to neutralize opposition to affordable housing.¹⁴¹

The federal public housing program has also been the target of reform. Public housing income deconcentration requirements apply to virtually all federal public housing and encourage PHAs to link opportunities in higher-income public housing developments with regional solutions to racial integration.¹⁴² Spurred by the findings of the National Commission on Severely Distressed Public Housing, the HOPE VI program has allocated

some \$5 billion to demolish, rehabilitate, and replace severely distressed public housing and revitalize the neighborhoods in which the housing is located.¹⁴³ The worst public housing is occupied by the victims of the deliberate policies of race discrimination practiced by local, state, and federal housing and community development officials, i.e., the extremely poor, African-American or Latino people, and minority female-headed families with children. The neighborhoods surrounding public housing are also overwhelmingly occupied by the poor and minority groups.¹⁴⁴ Consequently, well-executed public housing revitalization has within it the potential to affirmatively further fair housing by reversing deep and intractable conditions of discrimination.

Reforms have changed the Section 8 housing choice voucher program. From 1994 to 1998, HUD sponsored a Moving to Opportunity (MTO) demonstration program intended to measure the benefits of using Section 8 vouchers to enable low-income households to move from high-poverty public and assisted housing to private market homes in low-poverty census tracts. The agency's Section 8 Management Assessment Program incorporates some of the mobility principles learned from the MTO demonstration program by requiring PHAs to adopt a written Section 8 policy to encourage participation by landlords outside areas of minority concentration and closer to jobs, schools, and transportation. PHAs also receive extra assessment points by placing Section 8 households in census tracts with poverty rates of less than 10 percent.¹⁴⁵

The Practical Difficulties of Implementation

Despite indicators of progress on a policy level, it is not clear that these strategies have been implemented on a comprehensive basis. Furthermore, the record suggests that, even when implemented, their civil rights effectiveness is moderate at best. This outcome seems true even in the context of court orders in public housing desegregation cases.¹⁴⁶

The tax credit program, for example, has shown "a slight trend toward the development of more tax credit units in the suburbs and fewer in central cities and non-metro areas." That minor change did not improve civil rights conditions for LIHTC residents. "[T]he data show no clear trends in the percentage of LIHTC units developed in census tracts with high rates of poverty, minority population, or renter-occupied units."¹⁴⁷ Consequently, the LIHTC portfolio, characterized by a significant degree of concentration of poverty and racial segregation,¹⁴⁸ appears unchanged from 1992 to nearly the present day.

Zoning relief laws in New Jersey, Connecticut, and Massachusetts have resulted in the construction of thousands of new units of affordable housing in less segregated, low-poverty suburbs. The evidence shows, however, that many suburban projects proposed under these laws do not survive the permitting process or local opposition.¹⁴⁹ Negotiated approaches to neighborhood opposition often lead to smaller projects with fewer affordable units, selection preferences that favor local residents, and a bias towards

homeownership and housing that serves higher-income households.¹⁵⁰ Even though enactment of laws that break down regulatory barriers is often motivated in part by a desire to promote racially integrated residential housing, none of the laws directly addresses questions of race. As a consequence, most properties in suburban areas are occupied by white, local residents and do little to promote integration.¹⁵¹

Race-conscious public housing development in low-poverty, white areas sometimes is a feature of court orders in desegregation cases. The greatest successes occur in communities where a single organization like a PHA or a community development agency commands most of the required financial resources. Even successful efforts must contend with substantial resistance from receiving communities and therefore require patient, negotiated approaches to development.¹⁵² Nevertheless, restrictive zoning practices, governmental inertia, and organized community resistance can stall, and in some cases thwart, the construction of racially integrated housing in outlying areas.¹⁵³ On occasion, there have been incidents of racial violence.¹⁵⁴ In some communities, even the courts are hostile to race-conscious remedies intended to undo decades of deliberate discrimination.¹⁵⁵

Section 8 mobility programs evidence some efficacy in breaking down patterns of isolation and poverty. Research studies show improvements for participants in neighborhood conditions, employment, health, and educational outcomes as compared to residents of public housing.¹⁵⁶ Mobility programs are most successful when voucher use is geographically restricted to low-poverty areas; when no geographic restrictions apply, households more often move to somewhat better conditions but remain in segregated, high-poverty settings.¹⁵⁷ Moves are sometimes inhibited by a short supply of units in low-poverty areas available within voucher payment standards. On occasion, poor planning floods the market with vouchers, making their use difficult at best. Participating families may be reluctant to leave the community and the social ties established in their former neighborhoods, fearing social isolation; racial harassment in the new neighborhoods; and loss of connection to family, friends, and social services. Lack of access to jobs and transportation may also diminish interest in moving.¹⁵⁸

Mobility programs are also successful when a large number of participants receive substantial support and counseling to move to low-poverty areas. Success in racial integration is less evident, except in circumstances related to desegregation court orders, where a participant's choice of housing may be limited by the racial makeup of the neighborhood.¹⁵⁹ In HUD's MTO mobility demonstration program, participants were divided into groups of families who were restricted to living in low-poverty areas and groups whose vouchers involved no geographic restrictions. For both groups, more than 90 percent of the participants leased units in neighborhoods with minority populations greater than 20 percent. Some 59.4 percent of participants with restricted vouchers and 76 percent of the households with unrestricted vouchers found themselves in areas with minority populations greater than 80 percent.¹⁶⁰ These results are replicated in stud-

ies of households relocated with Section 8 vouchers from demolished public housing in the HOPE VI public housing revitalization program.¹⁶¹ Section 8 mobility programs in connection with desegregation orders show the same pattern. Even households that initially move to better areas often return to their former neighborhoods. This tendency to return to segregated settings leads some researchers to conclude that consistent, long-term supportive services for individual households are required for mobility programs to succeed in accomplishing desegregation.¹⁶²

The legacy of public housing segregation has resulted in huge disparities in physical conditions between favored white-identified developments and deteriorated, isolated African-American developments. Efforts to equalize conditions by improving conditions in and around isolated public housing are most successful when one stakeholder, usually the PHA, controls the resources and pursues innovative approaches that include public housing demolition, on-site replacement, housing and economic development activities in the surrounding area, and a mix of homeownership and rental development. Efforts that modernize existing developments usually involve grants, capital funds, operating funds, and properties under the PHA's control. That level of control makes it possible for a PHA to use available financial resources to redress imbalances in living conditions between predominantly minority and predominantly white developments. However, the ability of a PHA to carry out reforms and equalize living conditions is compromised by diminished appropriations for public housing. The civil rights success of revitalization activities in high-poverty, segregated areas may depend heavily on the commitment of city and state authorities and a corresponding willingness to contribute community planning and development funds to the initiative. Success also can be affected by a low demand for new housing in the overall market and the overall conditions of the public housing neighborhoods, which often were selected in the first place precisely because they were isolated, undesirable locations.¹⁶³ On-site redevelopment that results in a loss of subsidized units is a source of criticism. By itself, a public housing capital improvement campaign does little to integrate individual properties or improve conditions in surrounding neighborhoods, which are likely to suffer the same high levels of poverty and racial isolation as the public housing.¹⁶⁴

The HOPE VI program epitomizes these dynamics. The program often is applauded for replacing deteriorated public housing with new, well-designed modern housing characterized by rental and homeownership units, mixed-income developments with public housing, moderate-income tax credit, and market-rate residents. The program offers new models for development that combine public housing funds with tax credits and private sources of financing and innovations in public housing management. HOPE VI is credited with restoring distressed neighborhoods in urban centers and moving displaced households to better living conditions.¹⁶⁵ However, HOPE VI is also criticized for subjecting public housing residents to the very conditions of poverty and segregation created by previous delib-

erate policies of discrimination in federal housing programs.¹⁶⁶ It is also the subject of some of the most recent litigation alleging race discrimination in affordable housing programs.¹⁶⁷

Civil rights criticism of the program is not unfounded. HOPE VI has resulted in a significant reduction in the number of assisted units. Quite apart from the diminished supply of assisted housing, few of the original residents, estimated at 20 percent to less than 50 percent, return to the revitalized communities. Although the displaced former tenants live in areas with less poverty, at least 40 percent still live in census tracts with rates of poverty greater than 30 percent. Relocation has not resulted in less segregation. One study of Chicago's HOPE VI efforts "found that nearly all original residents who moved with vouchers ended up in neighborhoods that were at least 90 percent African-American."¹⁶⁸ The least likely candidates for rehousing in new HOPE VI communities are "hard-to-house" families, that is, those households that contain people with disabilities; large households; "grandfamilies" consisting of elders caring for minor children; elderly households; and families with multiple barriers to access to housing, such as histories of mental illness, substance abuse, lack of education or work history, and criminal backgrounds. These families may be ineligible for HOPE VI housing opportunities because of admissions policies that limit occupancy to working households, units that are designed for smaller families, rigorous requirements associated with past histories of even minor criminal conduct, or credit requirements that are based on private rental market standards.¹⁶⁹ There is a civil rights dimension to exclusion of these families, if only because the denial of a right to return may exclude people with disabilities protected by disability discrimination laws, elders protected by age discrimination rules, or families with children under the protection of the Title VIII prohibition against discrimination based on familial status.¹⁷⁰

The intractability of existing conditions of segregation and discrimination also works to hamper civil rights advances. For example, in public housing desegregation cases, it is a relatively simple matter to change discriminatory tenant selection practices. "The most common remedy . . . is to merge the Section 8 and public housing waiting lists to increase housing opportunities for all housing assistance applicants. Other changes include revisions to transfer procedures such as race-conscious tenant selection procedures. . . ."¹⁷¹ The ability of such changes to achieve racial integration is questionable. Waiting lists are often predominated by racial and ethnic minorities, and, over time, the proportion of whites in family housing may be substantially reduced.¹⁷² Minorities and nonminorities alike are reluctant to move to developments that are populated with majorities of other races because of racial bias, fear of racial violence, poor quality housing, bad neighborhoods, isolation of developments from jobs and transportation, and opposition by tenants of the receiving properties.¹⁷³ Fears of racial violence are real. In at least one jurisdiction subject to a consent decree, de-

segregation was thwarted by “racial taunts, bomb threats, and [Ku Klux Klan intimidation] directed against African-Americans.¹⁷⁴

Objective concerns about neighborhood conditions and racial violence are not the only factors that impede integrative moves. There is sometimes a mismatch among the tolerances that different racial groups have for living with one another. Surveys show, for example, that many whites prefer to live in neighborhoods where they are a clear majority, and they show a higher level of intolerance for living with African-Americans as opposed to other racial and ethnic groups. African-Americans and Latinos show a willingness to live in areas equally balanced between whites and minorities or in communities where they are in an only slight minority. Among African-Americans, indications are that integration is of lesser priority than access to equality of opportunity.¹⁷⁵

The success of civil rights strategies in affordable housing programs is also affected by the extent to which federal agencies are engaged partners in implementation, oversight, enforcement, and financial support. For example, regional approaches to desegregation cases succeed where HUD provides leadership and exercises authority over multiple agencies. In other cases, however, “HUD’s follow-through on implementation often falls short. . . . [L]ack of aggressive monitoring from HUD has exacerbated problems at some sites, including poor compliance and mistakes that have left some African-American tenants in poor quality housing.”¹⁷⁶ Lack of staffing, staff capacity, and inadequate funding result in weaknesses in HUD’s ability to monitor compliance with civil rights requirements in federally funded programs. Even though the Office of Fair Housing and Equal Opportunity has made significant progress in closing a large backlog of aged Title VIII administrative complaints,

[t]he total number of complaints filed each year with “Fair Housing Act enforcement agencies” makes up less than 1 percent of the estimated acts of housing discrimination that occur annually. . . . Taken together, it is reasonable to conclude that justice may not be forthcoming in a timely way for many victims of housing discrimination.¹⁷⁷

Finally, as the current administration moves to terminate or reduce federal funding for public housing, Section 8 vouchers, Community Development Block Grants, HOME, homeless programs, and fair housing enforcement, the ability to secure the needed financial resources to carry out civil rights reforms and affirmatively further fair housing is severely compromised.

Part VI: Conclusion

The lessons learned in the HOPE VI and Section 8 mobility programs, from the implementation of court orders in public housing desegregation cases and from the application of land use laws that break down regulatory barriers to suburban development, show that civil rights progress in affordable housing programs will be achieved only with financial commitment,

patience, and discipline. It is plain that the focus must be on more than the physical revitalization of segregated, high-poverty neighborhoods and the construction of new units in low-poverty areas of opportunity. The experience of successful mobility programs and HOPE VI public housing revitalization activities indicates that in order to further fair housing, it is critical to focus on the human aspects of affordable housing and civil rights. In other words, equal housing opportunity has true efficacy if housing providers are cognizant of people; supportive of individual human needs within the context of a community; and protective of the right to live free of bias and fear, near to real social and economic opportunity, without regard to race, color, ethnic origin, disability, age, and other protected characteristics.

It is unlikely in the current political environment that the public financial resources will be made available or that agency capacity will be sufficient to sustain a federally led and concerted effort to promote civil rights aims in affordable housing. Lack of federal leadership will not, however, protect against litigation for the state and local agencies, lenders, syndicators, or developers that disregard civil rights requirements in general and the obligation to further fair housing in particular. Consequently, the nonfederal stakeholders in affordable housing development would be well served by some approach ensuring that fair housing considerations receive a proper level of attention.

Housing credit agencies, state and municipal lenders, private lenders, syndicators, and developers all play very particular and specialized roles as stakeholders in affordable housing projects. As stakeholders, they rely on carefully designed program requirements, audit and enforcement procedures, financial underwriting criteria, and development and property management standards to meet the compliance requirements and financial expectations for all participants. These techniques are driven by concerns for financial risk avoidance, risk management, and risk mitigation. Consider, for example, how lenders, syndicators, and government agencies conduct due diligence to ascertain the environmental risks associated with a proposed site, examine budgets to determine financial feasibility, and gather financial statements and audits to ensure that a borrower or developer has the financial capacity to carry out a project. Or consider the "comprehensive market study of the housing needs of the individuals to be served by the project"¹⁷⁸ required in the LIHTC program and the way lenders and syndicators routinely require market studies to ensure that there is a demand for proposed housing developments.

Investors and lenders also look for ways to shift the risk of financial loss to others by asking for representations of legal authority to transact business, warranties of financial condition, promises of regulatory compliance, and other covenants. Legal opinions, including tax attorney opinions that address complex topics of audit risk, serve a similar purpose. Guarantees and repurchase agreements, through which a developer or owner promises to cover the losses of the lender or the investor for such matters as cost

overruns, failure to complete construction, failure to deliver tax benefits, and environmental losses, are additional tools used to shift responsibility when things go wrong. In order to ensure that affordable housing properties are operationally viable after construction completion and lease-up, partnership agreements, loan documents, and regulatory agreements often require owners to make regular reports to lenders and investors. Noncompliance with operating standards or evidence of financial difficulties may trigger remedial actions or force financial contributions by general partners and guarantors and can result in removal of a general partner or a management agent from day-to-day operations. These devices not only protect investors or lenders but also impose discipline on developers and provide powerful incentives for ensuring that projects are developed properly and on time.

The responsibility to affirmatively further fair housing by utilizing an institutionalized method to analyze the "relevant racial and socioeconomic information necessary for compliance with" Title VIII is, in many respects, the civil rights equivalent of financial underwriting in an affordable housing transaction.¹⁷⁹ Consequently, it ought to be possible to underwrite for fair housing and civil rights considerations, including the obligation to further fair housing.

The template for civil rights underwriting is available from the already existing federal and judicial structure for implementing the duty to further fair housing. When taking steps to fulfill the obligation, a housing provider has substantial latitude to determine the nature and scope of appropriate action. A federal regulatory framework common to multiple housing programs defines the key elements of the duty: nondiscrimination, planning, affirmative steps that remove conditions of discrimination over a period of time, monitoring, and record keeping. For recipients of HUD assistance, the devolution of the obligation to further fair housing means that civil rights concerns are addressed at every stage of the process: when applicants seek funds, when projects are selected for funding, when contracts are signed, when HUD funds are distributed, when sites are selected for projects, when households are displaced by development activities, and when dwelling units are made available for occupancy. Judicial decisions teach that fair housing responsibilities are informed and even limited by the statutory and regulatory requirements at work for the particular housing program in question and by the role that the agency or recipient plays within the statutory and regulatory structure.

Underwriting for fair housing means that applicants for financing would be required to meet threshold civil rights requirements, similar to the standards used by HUD to distribute competitive funds under NOFAs. Market studies could scan the racial, ethnic, family, age, and disability status of the households that might be displaced by development. They could include components that identify whether a proposed property is located in a revitalizing area, or whether conditions of racial, economic, and social isolation will result in perpetuation or exacerbation of segregation. Civil rights

elements in market studies also could address the factors associated with the opportunity-based housing approach to fair housing: meaningful access to jobs, transportation, good quality schools, and political participation.

Civil rights underwriting can take into account whether relocation activities will comply with the fair housing-related requirements for relocating families displaced by development activities.¹⁸⁰ It can also include due diligence standards that ensure a proposed project will comply with the architectural access requirements of Section 504, Title VIII, and the ADA. Underwriting for fair housing might include an analysis to ensure that the location of a property will not perpetuate segregation and will lead to wider housing opportunities across a housing market area. Budgeting standards might measure whether there are adequate funds for proper relocation. Underwriting standards used by housing credit agencies, government and private lenders, and syndicators might involve relaxed cost criteria for the higher land acquisition costs and larger per-unit transaction costs that are associated with low-density developments in suburban locations. Like the LIHTC market study, there are ready templates for this kind of due diligence, including, for example, HUD's HOPE VI Relocation Plan Guide, the self-evaluations required by Section 504 and the ADA, affirmative fair housing marketing plans, and the plans proposed by HUD in connection with compliance with Title VI to ensure meaningful access for people with limited English-speaking ability.¹⁸¹

After occupancy, an owner can be required to provide more than the certifications of no Title VIII administrative charges required by the LIHTC rules. Owners can be required to monitor and report on the characteristics of applicants on waiting lists and occupants in residency in much the same way HUD regulations require that public housing waiting lists be monitored to ensure that site-based selection practices do not result in segregation.¹⁸²

It bears repeating that some of these techniques are already in use in the affordable housing context. Applicants for tax credits often must certify that they are not the subjects of civil rights charges, and many housing credit agencies require the submission of affirmative fair housing marketing plans in connection with reservations of credits. Recipient and subrecipient contracts for HUD assistance incorporate civil rights compliance covenants.¹⁸³ Tax credit regulatory agreements and the forms of partnership documents in use in LIHTC projects often include representations and covenants about compliance with the general public use rule and the nondiscrimination provisions applicable to Section 8 voucher program participants. Guarantees given by developers to cover the loss of investor tax benefits presumably extend to a loss of credits associated with a violation of the general public use rule.¹⁸⁴

Fair housing underwriting is a modest idea. The objective is only to make fair housing visible in the affordable housing real estate transaction by placing an assessment of civil rights risk on the same plane as an evaluation of financial risk. In a judicial setting where the obligation to further fair housing confers discretion on owners and other stakeholders, fair hous-

ing underwriting does not mean that a project is necessarily blocked if civil rights risks are identified. It should mean that there has been an analysis of civil rights concerns, a consideration of the mitigating steps needed to neutralize discriminatory outcomes, and an identification of the affirmative activities necessary to promote equal choice and residential integration.

Fair housing goals must be accomplished with more than just affordable housing programs. Furthermore, fair housing underwriting in affordable housing cannot take the place of a vigorous federal financial commitment to affordable housing programs. Nevertheless, it is the responsibility of state and local affordable housing programs and the stakeholders in those programs to engage in activities that not only ensure civil rights compliance, but also improve fair housing conditions in the market areas in which we work and in the housing that is developed. To disregard this obligation will lead to litigation, development delay, extra cost, and financial risk to participants in affordable housing programs. Civil rights underwriting can mitigate the possibility of such outcomes. If conducted "in a meaningful way," we can "expect to see" that affordable housing development will "tend to increase" and will "not significantly diminish the supply of open housing."¹⁸⁵ That much is the practical, legal, and moral mandate of fair housing laws.

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1. *Gautreaux v. Chi. Hous. Auth.*, 178 F.3d 951, 952 (7th Cir. 1999).
 2. *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710 (N.D. Ill. 2003); *Wallace v. Chi. Hous. Auth.*, 321 F. Supp. 2d 968 (N.D. Ill. 2004) (partially allowing plaintiffs' request for reconsideration); *Wallace v. Chi. Hous. Auth.*, 224 F.R.D. 420 (N.D. Ill. 2004) (certifying plaintiff class). *See also* *Cabrini-Green Local Advisory Council v. Chi. Hous. Auth.*, No. 04 C 3792, 2005 U.S. Dist. LEXIS 273 (N.D. Ill. Jan. 10, 2005).
 3. *Reese v. Miami-Dade County*, 210 F. Supp. 2d 1324 (S.D. Fla. 2002).
 4. *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass. 2002).
 5. *Davis v. N.Y.C. Hous. Auth.*, 60 F. Supp. 2d 220 (S.D.N.Y. 1999).
 6. *Owens v. Charleston Hous. Auth.*, 336 F. Supp. 2d 934 (E.D. Mo. 2004), *aff'd sub nom.*, *Charleston Hous. Auth. v. USDA*, 419 F.3d 729 (8th Cir. 2005).
 7. *Dean v. Martinez*, 336 F. Supp. 2d 477 (D. Md. 2004).
 8. *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005).
 9. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) [hereinafter 2003 QAP].
 10. *See* *Gautreaux v. Chi. Hous. Auth.*, 178 F.3d 951 (7th Cir. 1999); *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710 (N.D. Ill. 2003); *Wallace v. Chi. Hous. Auth.*, 321 F. Supp. 2d 968 (N.D. Ill. 2003); *Wallace v. Chi. Hous. Auth.*, 224 F.R.D. 420 (N.D. Ill. 2003) (certifying plaintiff class). *See also* *Cabrini-Green Local Advisory Council v. Chi. Hous. Auth.*, No. 04 C 3792, 2005 U.S. Dist. LEXIS 273 (N.D. Ill. Jan. 10, 2005); *Reese v. Miami-Dade County*, 210 F. Supp. 2d 1324 (S.D. Fla. 2002); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass. 2002); *Davis*, 60 F. Supp. 2d at 220; *Owens*, 336 F. Supp. 2d at 934; *Dean*, 336 F. Supp. 2d at 477; *Thompson*, 348 F. Supp. 2d at 398; 2003 QAP, 848 A.2d at 1.
 11. *See* 42 U.S.C. § 3608(d), (e)(5) (2005).

12. 42 U.S.C. § 3608(d). The Fair Housing Act, also known as Title VIII, was enacted as Pub. L. No. 90-284, §§ 801-19, 82 Stat. 81 (1968) (codified as amended in 42 U.S.C. §§ 3601-3619), and was amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended in scattered sections of 42 U.S.C.), and the Housing for Older Persons Act of 1995, Pub. L. No. 104-76, 109 Stat. 787 (1995) (codified as amended in 42 U.S.C. § 3607). The Act separately directs HUD to "administer the programs and activities relating to housing and urban development in a manner to affirmatively further the policies of" Title VIII. See 42 U.S.C. § 3608(e)(5). The Act is not the only federal law that promotes open housing. The congressional declaration of national housing policy directed at all federal agencies includes among its objectives "the development of well-planned integrated residential neighborhoods." 42 U.S.C. § 1441 (2005). Other laws applicable to HUD programs, such as public housing, Community Development Block Grants (CDBGs), and the Housing Opportunities Made Equal (HOME) program, direct grantees to take action to "affirmatively further fair housing." See 42 U.S.C. § 1437c-1(d)(15)(2005) (public housing); 42 U.S.C. § 5318(c)(3) (2005) (CDBG); 42 U.S.C. § 12705(b)(15) (2005) (HOME).

13. *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d. Cir. 1973).

14. 2003 QAP, 848 A.2d at 10; Robert Neuwirth, *Renovation or Ruin?*, 5 SHELTERFORCE 8 (Sept./Oct. 2004); John A. Powell, *Opportunity-Based Housing*, 12:2 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 188 (2003).

15. See, e.g., *Shannon v. HUD*, 436 F.2d 809, 822 (3d Cir. 1970) ("Nor are we suggesting that the desegregation of housing is the only goal of national housing policy. There will be instances where a pressing case may be made for rebuilding of a racial ghetto."). See also Michael J. Vernarelli, *Where Should HUD Locate Assisted Housing? The Evolution of Fair Housing Policy*, in HOUSING DESEGREGATION AND FEDERAL POLICY (John M. Goering ed., 1986).

16. See Edward G. Goetz, *The Reality of Deconcentration*, 36 SHELTERFORCE 16 (Nov./Dec. 2004) (criticizing HOPE VI and Section 8 Housing Choice Voucher mobility programs). See also, NAT'L HOUS. LAW PROJECT ET AL., FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM (2002), available at www.nhlp.org/html/pubhsg/FalseHOPE.pdf.

17. *Walker v. HUD*, 734 F. Supp. 1231 (N.D. Tex. 1989).

18. See, e.g., 2003 QAP, 848 A.2d at 88; *NAACP, Boston Ch. v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989).

19. See *NAACP, Boston Ch. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987); *Jones v. Comptroller of Currency*, 983 F. Supp. 197, 203 (D.D.C. 1997); *Jorman v. Veterans Admin.*, 579 F. Supp. 1407, 1408 (N.D. Ill. 1984); *Debolt v. Espy*, 832 F. Supp. 209 (S.D. Ohio 1993) (U.S.D.A.).

20. See 2003 QAP, 848 A.2d at 1; *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871 (8th Cir. 2003).

21. See *Oti Kaga*, 342 F.3d at 871.

22. *United States v. Mass. Indus. Fin. Agency*, 921 F. Supp. 21 (D. Mass. 1996).

23. *Liddy v. Cisneros*, 823 F. Supp. 164 (S.D. N.Y. 1993).

24. See *Owens v. Charleston Hous. Auth.*, 336 F. Supp. 2d 934 (E.D. Mo. 2004).

25. See, e.g., *United States v. Yonkers Bd. of Educ.*, 837 F. 2d 1181 (2d Cir. 1987) (public housing); *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710, 719

(N.D. Ill. 2003); *Reese v. Miami-Dade County*, 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) (HOPE VI); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (Section 8).

26. *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987 (D. Pa. 1976); *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974).

27. 42 U.S.C. § 3604 (2005). *See also* *NAACP, Boston Ch. v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989) (African-Americans); *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702 (8th Cir. 2003) (race, gender, and familial status); *Am. Disabled for Attendant Programs Today v. HUD*, 170 F.3d 381 (3d Cir. 1999) (disability); *Hispanics United of DuPage County v. Vill. of Addison*, 988 F. Supp. 1130 (N.D. Ill. 1997) (Hispanics); *Debolt v. Espy*, 832 F. Supp. 209 (S.D. Ohio 1993) (families with children); *Fayyumi v. City of Hickory Hills*, 18 F. Supp. 2d 909 (N.D. Ill. 1998) (Arab-Americans). Although Title VIII does not distinguish among protected classes in imposing the responsibility to further fair housing, it is less than clear that the courts will enforce the obligation on an even basis. Compare, for example, the outcome in *NAACP, Boston Chapter*, in which the court imposed Title VIII liability for acts of racial discrimination, with the result in *Debolt*, where familial status claims were dismissed with the observation that the Fair Housing Act does not compel the construction of dwelling units for large families. It is worth noting that Title VIII is intended to achieve fair housing goals "within constitutional limits." 42 U.S.C. § 3601 (2005). Constitutional principles subject race-conscious decision making to a form of "strict scrutiny," while classifications based on other characteristics like gender or disability are subject to far less rigorous standards. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). These constitutional distinctions may serve as a backdrop to the apparently varying treatment sometimes accorded to the different protected classes in Title VIII litigation.

28. *See, e.g., Clients Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983) (HUD failed to meet obligation to further fair housing where the agency violated constitutional prohibitions on discrimination); *NAACP v. Harris*, 567 F. Supp. 637, 644 (D. Mass. 1983); *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 840 (N.D. Ohio 1989) (HUD failure to act on knowledge that housing authority's admissions policies were intended to promote racial segregation); *Langlois*, 234 F. Supp. 2d at 75 (selection preferences for local residents had effect of excluding minority applicants and therefore violated obligation).

29. *See Otero v. N.Y.C. Hous. Auth.*, 484 F.2d at 1134 (2d Cir. 1973); *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970); *Pleune v. Pierce*, 765 F. Supp. 43, 47 (E.D.N.Y. 1991) (siting decisions). *See also Darst-Webbe Tenant Ass'n Bd.*, 339 F.3d at 713; *Dean v. Martinez*, 336 F. Supp. 2d 477, 488 (D. Md. 2004); *Wallace*, 298 F. Supp. 2d at 719 (demolition, disposition, and displacement).

30. *Shannon*, 436 F.2d at 821.

31. *Otero*, 484 F.2d at 1134; *NAACP, Boston Ch. v. Kemp v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987). *See also* the cases cited in *In re Adoption of the 2003 Low-Income Hous. Tax Credit Qualified Allocation Plan*, 848 A.2d 1, 12 (N.J. Super. Ct. App. Div. 2004) [hereinafter *2003 QAP*].

32. 5 U.S.C. § 706(1)(A) (2005).

33. *NAACP, Boston Ch.*, 817 F.2d at 160. *See also Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 907 (8th Cir. 2005) (object of APA review "is not a review to determine whether HUD has, in fact achieved tangible results in the form of furthering opportunities for fair housing. Rather,

our review is to assess whether HUD exercised its broad authority in a manner that demonstrates consideration of and an effort to achieve, such results.”).

34. *See, e.g., 2003 QAP*, 848 A.2d at 11 (adoption of QAP is a rulemaking process; agency rules are generally considered valid); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 70 (D. Mass. 2002) (local selection preferences can be based on needs identified by local housing agencies).

35. *NAACP, Boston Ch.*, 817 F.2d at 157.

36. *Id.* at 156. *See also Shannon v. HUD*, 436 F.2d 809, 819 (3d Cir. 1970) (HUD has “broad discretion to choose between alternate methods of” furthering fair housing, “but that discretion must be exercised within the framework of the national policy against discrimination.”).

37. *Compare Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005) (HUD failure to consider regional approaches to desegregation), *with 2003 QAP*, 848 A.2d at 15–16 (New Jersey QAP provides incentives to investment in minority neighborhoods and expands assisted housing opportunities in nonminority neighborhoods).

38. *Charleston Hous. Auth. v. USDA*, 419 F.3d 729.

39. *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 908 (8th Cir. 2005).

40. *Compare Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 72 (D. Mass. 2002) (discriminatory selection preferences), *with Almonte v. Pierce*, 666 F. Supp. 517, 529 (S.D.N.Y. 1987) (fair housing marketing); *McGrath v. HUD*, 722 F. Supp. 902, 907 (D. Mass. 1989) (implementation of Title VI voluntary conciliation agreement), *and Liddy v. Cisneros*, 823 F. Supp. 164, 176 (S.D.N.Y. 1993) (statutory selection preferences).

41. *Jenkins v. State of Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984).

42. *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 713 (8th Cir. 2003); *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003).

43. *Croskey St. Concerned Citizens v. Romney*, 335 F. Supp. 1251, 1256 (E.D. Pa. 1971); *Chi. Comm’n v. HUD*, 343 F. Supp. 62, 66 (N.D. Ill. 1972); *Jones v. Tully*, 378 F. Supp. 286, 292 (E.D.N.Y. 1974). *See Shannon v. HUD*, 436 F.2d 809, 822 (3d Cir. 1970).

44. *Am. Disabled for Attendant Programs Today v. HUD*, 170 F.3d 381, 388 (3d Cir. 1999).

45. *See* 42 U.S.C. § 2000d, 2000d–1, –4 (2005) (originally enacted as the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. 6, §§ 601–05, 78 Stat. 291, 252–53 (1964)); HUD implementing regulations at 24 C.F.R. pt. 1 (2005) (prohibition of discrimination based on race, color, and national origin). *See also* 29 U.S.C. § 794 (2005) (originally enacted as the Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. 5, § 504, 87 Stat. 355 (1973)); 24 C.F.R. pt. 8 (2005) (outlawing disability discrimination); 42 U.S.C. § 6101 (originally enacted as the Older Americans Amendments of 1975, Pub. L. No. 94-135, 89 Stat. 728 (1975)); 24 C.F.R. pt. 146 (forbidding age discrimination). The Fifth and Fourteenth Amendments to the U.S. Constitution broadly require equal treatment based on individual characteristics such as race, color, gender, or disability. *See* U.S. CONST. amend. XIV, § 1 (Equal Protection Clause). Other federal statutes involve similarly broad statutory mandates, like the federal laws enacted in the years following the Civil War. *See, e.g.,* 42 U.S.C. § 1981 (“All persons shall have the same right in every State and Territory to make and enforce contracts. . . .”); 42 U.S.C. § 1982

("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."). These laws are important. However, the article focuses on the civil rights laws more usually encountered in the context of affordable housing.

46. 20 U.S.C. § 1681 (2005) (originally enacted as the Education Amendments of 1972, Pub. L. No. 92-318, tit. 9, 86 Stat. 235 (1972)); 24 C.F.R. pt. 3. *See also* 70 Fed. Reg. 13,576, 13,578, 14,069 (Mar. 21, 2005) (Title IX applicable to educational activities funded under ROSS program).

47. *See* 42 U.S.C. § 12131 and Justice Department implementing regulations at 28 C.F.R. pt. 35 (Title II); 42 U.S.C. § 12181 and implementing regulations at 28 C.F.R. pt. 36 (Title III).

48. 2003 QAP, 848 A.2d 1, 12-13 (N.J. Super. Ct. App. Div. 2004); *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710, 720 (N.D. Ill. 2003); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 75 (D. Mass. 2002).

49. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962) (Equal Opportunity in Housing). Although the directive is a predecessor to Title VI, it prohibits discrimination in a broader array of federally related housing activities, including facilities owned or operated by the federal government, housing provided with federal loans, grants or contributions, housing assisted with insured loans, housing developed with real estate obtained with urban renewal funds, and the lending practices of private institutions for any loans insured by the federal government. *Id.* § 101. *Compare* 42 U.S.C. § 2000d-4 (Title VI not applicable to federal "financial assistance extended by way of contract of insurance or guarantee").

50. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980) (Justice Department responsibilities under Title VI, Title IX, and Section 504); Exec. Order No. 13,166, 65 Fed. Reg. 50,119 (Aug. 16, 2000) (Justice Department to take leadership role in establishing guidance to implement Title VI requirements ensuring access to federal programs by people with limited English-speaking abilities); Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 21, 2001) (Justice Department to share responsibilities with Department of Health and Human Services in federal implementation of obligation to ensure integrated, community-based options for people with disabilities under ADA). The ADA assigns responsibility for accessible transportation to the Department of Transportation, enforcement responsibilities for employment discrimination to the Equal Employment Opportunity Commission, and responsibilities for setting minimum standards for architectural access to the Architectural and Transportation Barriers Compliance Board. Primary ADA duties are otherwise the obligation of the Justice Department. *See* 42 U.S.C. § 12204(a) (2005) (architectural access); 42 U.S.C. § 12116 (2005) (employment); 42 U.S.C. §§ 12134, 86 (Title II and Title III enforcement, except for transportation, assigned to attorney general). Prior to Exec. Order No. 12,250, coordination of implementation activities for Section 504 was assigned to HEW. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,997 (Nov. 4, 1980).

51. 42 U.S.C. § 6103 (2005).

52. *See* 42 U.S.C. §§ 3608(a)-(b), 3612 (administrative enforcement by HUD). *Compare* 42 U.S.C. § 3610(g)(2)(C) (2005) (primary responsibility for zoning re-

lated cases assigned to attorney general) with 42 U.S.C. § 3614(a) (2005) (Department of Justice responsible for pursuing pattern and practice cases).

53. Under 42 U.S.C. § 3608(e)(3), HUD must provide technical assistance to other federal agencies in carrying out duties under 42 U.S.C. § 3608(d). HUD's leadership obligations for furthering fair housing have been reaffirmed several times. See Exec. Order No. 12,259, 46 Fed. Reg. 1,253 (Dec. 31, 1980) (Leadership and Coordination of Fair Housing in Federal Programs); Exec. Order No. 12,892, 59 Fed. Reg. 2,939 (Jan. 20, 1994) (Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing). See also Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) (assigning coordination activities for environmental justice to the Environmental Protection Agency, with significant roles also assigned to HUD and HHS).

54. 20 U.S.C. § 1682 (2005) (Title IX); 29 U.S.C. § 794(a) (2005) (Section 504); 42 U.S.C. § 2000d-1 (2005) (Title VI); 42 U.S.C. § 6103 (2005) (Age Discrimination Act). See also Exec. Order No. 11,063, 27 Fed. Reg. 11,527; Exec. Order No. 12,250, 45 Fed. Reg. 72,995, § 1-402; Exec. Order No. 12,892, 59 Fed. Reg. 2,939, § 4-402; and Exec. Order No. 13,166, 65 Fed. Reg. 50,119, § 3.

55. 28 C.F.R. pt. 41 (Section 504 coordinating rules); 28 C.F.R. pt. 42(f) (Title VI coordinating rules). See also 43 Fed. Reg. 2,131 (Jan. 13, 1979) (HEW Section 504 coordinating rules for all federal agencies modeled on Title VI rules); 44 Fed. Reg. 33,776 (June 12, 1979) (to same effect, HEW Age Discrimination Act coordinating rules); 44 Fed. Reg. 55,522 (Sept. 26, 1979) (proposed HUD rules for Exec. Order No. 11,063); 48 Fed. Reg. 20,637, 20,639 (May 6, 1983) (proposed HUD Section 504 rules); 56 Fed. Reg. 35,693, 35,694 (July 26, 1991) (ADA Title II rules based on Section 504).

56. See 42 U.S.C. § 3604 (2005) (Title VIII prohibition on discrimination). For Title VIII cases outlawing disparate impact, see, for example, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), and *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988). HUD regulations that forbid discriminatory conduct, including disparate impact, are codified at 24 C.F.R. § 1.4 (2005) (Title VI), 24 C.F.R. § 8.4 (2005) (Section 504), 24 C.F.R. § 107.15(f) (2005) (Exec. Order No. 11,063), and 24 C.F.R. § 146.13 (Age Discrimination Act). For Title II of the ADA, see 28 C.F.R. § 35.130 (2005).

57. 24 C.F.R. § 1.4(b)(1) (2005) (Title VI); 24 C.F.R. § 8.4(b)(4)(v) (2005) (Section 504); 24 C.F.R. § 146.13(a)(2) (2005) (Age Discrimination Act); 28 C.F.R. § 28.130(b)(1)(v) (2005) (Title II ADA).

58. See 24 C.F.R. § 1.4(b)(6) (2005) (Title VI); 24 C.F.R. § 8.24(d) (2005) (Section 504 accessibility transition plan); 24 C.F.R. § 8.33(d) (reasonable modifications in practices and procedures under Section 504); 24 C.F.R. § 8.51 (2005) (Section 504 self-evaluation to remove impediments to full participation); 24 C.F.R. § 8.55 (2005) (Section 504 affirmative action); 24 C.F.R. § 107.20(b)-(c) (2005) (affirmative action under Exec. Order No. 11,063); 24 C.F.R. § 146.13(f) (2005) (special benefits for elders and children under Age Discrimination Act); 24 C.F.R. § 146.25(b) (self-evaluation under Age Discrimination Act); 28 C.F.R. § 35.105 (2005) (self-evaluation, Title II, ADA); 28 C.F.R. § 28.130(b)(7) (2005) (reasonable modifications under Title II of the ADA); 28 C.F.R. § 35.130(c) (2005) (Title II ADA affirmative action); 28 C.F.R. § 35.150(d) (2005) (ADA Title II accessibility transition plan). See also Notice of Guidance to Federal Assistance

Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 70,968 (draft dated Dec. 19, 2003) (planning requirements to ensure meaningful access by people with limited English-speaking ability).

59. 24 C.F.R. § 1.4(b)(2)(iii) (2005) (Title VI); 24 C.F.R. § 8.4(b)(5) (2005) (Section 504); 28 C.F.R. § 35.130(b)(4) (2005) (Title II ADA).

60. 24 C.F.R. § 121.2 (2005). *See also* 24 C.F.R. § 1.6(b) (2005) (Title VI); 24 C.F.R. § 8.55(b) (2005) (Section 504); 24 C.F.R. § 107.30 (2005) (Exec. Order No. 11,063); 24 C.F.R. § 146.27 (2005) (Age Discrimination Act).

61. 24 C.F.R. § 1.6(d) (2005) (Title VI, information for program beneficiaries); 24 C.F.R. § 3.135 (2005) (Title IX, designation of responsible employee, grievance procedures); 24 C.F.R. § 8.53 (2005) (same, Section 504); 28 C.F.R. § 35.107 (2005) (same, Title II, ADA).

62. Office of Fair Hous. & Equal Opportunity, Dep't of Hous. & Urban Dev., FHEO Notice 96-3, Administration of the Civil Rights-Related Program Requirements of the Department's Housing and Community Development Programs Under the March 16, 1995 Delegation and Redelegation of Authority (1996).

63. Notice of HUD's Fiscal Year (FY) 2004, Notice of Funding Availability, 70 Fed. Reg. 13,575, 13,577 (Mar. 21, 2005). Under 42 U.S.C. § 3614(a) (2005), the Department of Justice may commence a civil action when there is reasonable cause to believe that "any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any rights granted by" the Fair Housing Act. In processing administrative complaints filed under Title VIII, HUD is authorized to issue an administrative charge against a respondent after investigation and an unsuccessful attempt at voluntary conciliation. 42 U.S.C. § 3610(g) (2005). HUD regulations provide for similar administrative proceedings under Title VI and Section 504, where a formal letter of findings triggers a respondent's right to further administrative review, and the possibility of sanctions.

64. Notice of HUD's Fiscal Year (FY) 2004, Notice of Funding Availability, 70 Fed. Reg. at 13,576-77 (threshold nondiscrimination criteria); *id.* at 13,578 (affirmatively furthering fair housing). Additional civil rights qualifications for funding include complying with the ADA, providing economic opportunities for very-low-income persons, ensuring participation by minority- and women-owned businesses, and ensuring compliance with requirements to improve access to housing programs and services for persons with limited English-speaking proficiency. *Id.* at 13,578-79.

65. 42 U.S.C. § 1437c-1(d)(15) (2005); 24 C.F.R. § 903.7(o)(2) (2005) (public housing and Section 8); 42 U.S.C. § 5304 (2005) (CDBG); 42 U.S.C. § 12705(b)(15) (2005) (Comprehensive Housing Affordability Strategy for use of HOME funds); 24 C.F.R. § 92.225(a)(1) (2005) (consolidated plan).

66. 24 C.F.R. § 91.315(k) (2005).

67. 2003 QAP, 848 A.2d 1, 13 (N.J. Sup. Ct. App. Div. 2004).

68. *See, e.g.*, 24 C.F.R. § 1.5(a) (2005) (Title VI); 24 C.F.R. § 8.50 (2005) (Section 504); 24 C.F.R. § 92.504(c)(2)(v) (2005) (contractual obligation of affirmative fair housing marketing for subrecipients of HOME funds).

69. *See, e.g.*, 24 C.F.R. § 92.353(c)(1) (2005) (HOME); 24 C.F.R. § 236.1001(c) (2005) (Section 236 program). 24 C.F.R. § 983.10(c) (2005) (Project-Based Hous-

ing Choice Vouchers). Regulations issued by the U.S. Department of Transportation under the Uniform Relocation Act (URA) impose similar civil rights obligations for displacement resulting from the use of assistance from any federal agency, including HUD. *See, e.g.*, 49 C.F.R. § 24.205(a)(1) (2005) (relocation under the URA must take into account the impact of displacement on minorities, the elderly, large families, and people with disabilities); 49 C.F.R. § 24.205(c)(1) (2005) (URA advisory services must be consistent with Title VI, Title VIII, and Exec. Order No. 11,063); 49 C.F.R. § 24.205(c)(2)(ii)(C) (2005) (“[M]inorities shall be given reasonable opportunities to relocate to . . . dwellings . . . not located in an area of minority concentration.”).

70. OFFICE OF FAIR HOUS. EQUAL OPP’TY, DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK NO. 4350.3 REV-1, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, ¶ 2-9 (2003) [hereinafter MULTIFAMILY OCCUPANCY HANDBOOK].

71. OFFICE OF MULTIFAMILY HOUS., DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK NO. 8025.1 REV-2, IMPLEMENTING AFFIRMATIVE FAIR HOUSING MARKETING REQUIREMENTS, ¶¶ 1-3; 24 C.F.R. § 200.610 (1993). *See also* MULTIFAMILY OCCUPANCY HANDBOOK, *supra* note 70, ¶ 2-5(D); 24 C.F.R. pt. 108 (2005).

72. *See, e.g.*, 24 C.F.R. §§ 42.350(a), 941.207(c) (2005) (referrals to replacement dwellings in nonsegregated areas as part of relocation counseling); 24 C.F.R. § 982.301(a)(2), (b)(12) (2005) (PHAs must refer Section 8 participants to housing opportunities in low-poverty areas and must provide participants with lists of accessible dwelling units).

73. HUD site and neighborhood rules are traced to the decision in *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970). A more detailed study of HUD’s site and neighborhood rules is in *Where Should HUD Locate Assisted Housing?* *See* Ver-narelli, *supra* note 15.

74. *See* 24 C.F.R. § 92.202 (2005) (HOME); 24 C.F.R. §§ 891.125, 891.320 (2005) (Sections 202 and 811); 24 C.F.R. § 941.202 (2005) (public housing); 24 C.F.R. § 941.602(a)(3) (2005) (mixed-finance public housing). *See also* 70 Fed. Reg. 58,891, 58,918 (Oct. 13, 2005) (promulgating 24 C.F.R. § 983.57) (Project-Based Housing Choice Vouchers).

75. *See* 70 Fed. Reg. 59,919 (promulgating 24 C.F.R. § 983.57(b)(2)).

76. *Id.* (promulgating 24 C.F.R. § 983.57(c)(2) and (3)).

77. *Id.*, promulgating 24 C.F.R. § 983.57(e)(3)(vi). The idea of overriding housing needs also reflects a congressional mandate that HUD not withhold assistance from a neighborhood solely because it is a high poverty, segregated area. *See* 42 U.S.C. § 1436b (2005). In addition, the re-issued rule incorporates regulatory mandates for deconcentration of poverty in public housing. *Compare* 70 Fed. Reg. 59918, promulgating 24 C.F.R. § 983.57(b)(1) with 24 C.F.R. § 903.2 (2005). The new voucher rule’s standards for deconcentrating poverty focus on the extent to which the neighborhood of a proposed Housing Choice Voucher project is a target for investment of other HUD resources and development of market rate housing. The deconcentration criteria also examine whether the census tract is losing assisted units to demolition, and whether poverty is declining in the census tract. *Id.* Although deconcentration of poverty is a new feature of the Project-Based Housing Choice Voucher rule, it is worth noting that like the rest of the rule, the deconcentration standards are similar to the site selection requirements imposed by HUD in response to the early litigation under Title VIII to further fair housing. *See* Notice H 81-2 (HUD) Clarification

of Site and Neighborhood Standards for New Assisted Housing Projects in Areas of Minority Concentration (January 5, 1981) at pages 4 and 5.

78. 26 U.S.C. § 42(h)(6)(B)(iv) (2005).

79. H.R. CONF. REP. NO. 99-841 (1986).

80. *See, e.g.*, 26 C.F.R. § 1.42-5(d)(2)(ii) (2005) (housing quality standards for LIHTC units must meet HUD uniform physical conditions standards); Rev. Rul. 94-57 (income eligibility for admission to LIHTC units is measured with reference to HUD area-median-income determinations).

81. 26 C.F.R. § 1.42-9(a) (2005). It may be that the interpretation of the general public use rule has its origin in the favored status nonprofit tax-exempt organizations enjoy under the LIHTC statute. *See, e.g.*, 42 U.S.C. § 42(h)(5)(A) (2005) (nonprofit set-aside). *See also* Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 884 (1993). Under long-standing IRS policy, the public purpose requirements associated with Code Section 501(c)(3) deny tax-exempt status to organizations that engage in discriminatory conduct. For a discussion of the IRS policy, see *Bob Jones Univ. v. United States*, 461 U.S. 574 (1982).

82. 26 C.F.R. § 1.42-9(a) (2005). *See also* IRS, Notice 89-6, Low-Income Housing Tax Credit—Utility Allowance Requirements, Determination of General Public Use, and Provision of Services (1989), available at www.novoco.com/IRS_Rulings/IRS_Notices/notice_89-6.pdf. Under this standard, “any residential rental unit that is part of a hospital, nursing home, sanitarium, lifecare facility, trailer park, or intermediate care facility for the mentally and physically handicapped is not for use by the general public and is not eligible for credit under Section 42.” 26 C.F.R. § 1.42-9(b) (2005).

83. 26 C.F.R. § 1.42-5(c)(1)(v) (2005).

84. 2003 QAP, 848 A.2d 1, 24 (N.J. Super. Ct. App. Div. 2004).

85. *See* Florence Roisman, *Mandates Unsatisfied: The Low-Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 n.107 (July 1998) (IRS reference to HUD rules “comprises almost the entire seven volumes of title 24 of the Code of Federal Regulations.”).

86. Title VIII implementing regulations are codified at 24 C.F.R. pt. 100, et seq. (2005).

87. 24 C.F.R. pt. 108 (2005); 24 C.F.R. pt. 200(M) (2005).

88. *See, e.g.*, 24 C.F.R. § 5.105(a) (2005) (Section 8 new construction, substantial rehabilitation and housing finance agency contracts); 24 C.F.R. § 92.103(a) (2005) (HOME program); 24 C.F.R. § 200.30(a) (2005) (HUD-insured and -assisted mortgages); 24 C.F.R. § 960.103(a) (2005) (public housing).

89. *See, e.g.*, 24 C.F.R. § 92.103(b) (2005) (affirmative fair housing marketing and minority outreach in HOME-assisted projects); 24 C.F.R. § 960.206(b) (2005) (civil rights standards for local selection preferences in public housing admissions).

90. *See* IRS, LOW-INCOME HOUSING CREDIT AUDIT GUIDE, ch. 2 (1999), available at www.novoco.com/IRS_Regulations/LIHTC_AuditTechniqueGuide.pdf. *See also* IRS, GUIDE FOR COMPLETING FORM 8823: LOW-INCOME HOUSING CREDIT AGENCIES REPORT OF NONCOMPLIANCE OR BUILDING DISPOSITION, ch. 11 (2003) (draft on file with author).

91. MULTIFAMILY OCCUPANCY HANDBOOK, *supra* note 70, ¶¶ 1–2 and fig. 1-1.

92. MULTIFAMILY OCCUPANCY HANDBOOK, *supra* note 70, at ch. 2. Other HUD multifamily programs, such as the mortgage insurance made available

through the Section 221(d)(4) program, do not involve subsidies and are not subject to the handbook or to civil rights criteria for programs receiving federal financial assistance. *See, e.g.*, 24 C.F.R. § 1.2(e) (2005) (term *federal financial assistance* does not include “contracts of insurance”).

93. *See, e.g.*, 66 Fed. Reg. 6760 (Jan. 22, 2004) (listing the Treasury Department programs subject to Title IX; the LIHTC program is not on the list).

94. *See* HUD, HANDBOOK 1378.0, TENANT ASSISTANCE, RELOCATION AND REAL PROPERTY ACQUISITION, ¶¶ 1–14, available at www.hud.gov/offices/cpd/library/relocation/policyandguidance/handbook1378.cfm. It is unclear how HUD reached the conclusion that tax credits are not federal financial assistance for purposes of the URA because in that law, *federal assistance* is broadly defined to include “contributions provided by the United States.” 42 U.S.C. § 4601(4) (2005). *See also* Fed. Reg. 70,589, 614 (2005) (promulgating 49 C.F.R. § 24.2(a)(13) (2005)) (federal financial assistance is “a grant, loan or contribution provided by the United States, except any federal guarantee or insurance”).

95. Compare 24 C.F.R. § 8.23 (2005) (Section 504) (substantially altered properties must be accessible) with 24 C.F.R. § 100.205(a) (2005) (Title VIII fair housing accessibility standards apply only to new construction).

96. MULTIFAMILY OCCUPANCY HANDBOOK, *supra* note 70, at ch. 3. The chapter explains, for example, that occupancy in Section 202 projects developed before 1990 might be limited to elders and nonelders with physical disabilities, while Section 202 projects developed after 1990 are available only to elders. MULTIFAMILY OCCUPANCY HANDBOOK, *supra* note 70, ¶¶ 3–20. Housing providers have been able to use tax credits in combination with Section 202 funding since the end of 2003. *See* 68 Fed. Reg. 67,315 (Dec. 1, 2003) (promulgating interim mixed finance rule for Section 202 program); *see also* 70 Fed. Reg. 54,199 (Sept. 13, 2005) (promulgating final rule).

97. MULTIFAMILY OCCUPANCY HANDBOOK, *supra* note 70, ¶ 3-22(B)(2)(b).

98. *See* Dep’t of Hous. & Urban Dev. & Dep’t of Justice, Memorandum of Understanding Among the Department of Treasury, the Department of Housing and Urban Development, and the Department of Justice (2000), available at www.hud.gov/offices/fheo/lihtcmou.cfm [hereinafter MOU].

99. *See id.*

100. *See id.*

101. *Id.*

102. On inquiry by the author, it appears that, at this writing, the only currently active elements of the memorandum are the referral mechanisms under which HUD notifies the IRS and state credit agencies of pending fair housing complaints.

103. DAVID M. P. FREUND, DEMOCRACY’S UNFINISHED BUSINESS: FEDERAL POLICY AND THE SEARCH FOR FAIR HOUSING, 1961–1968 (2004), available at www.prrac.org/pdf/freund.pdf (report submitted to the Poverty and Race Research Action Council); Arnold R. Hirsch, *Searching for a “Sound Negro Policy”: A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUSING POL’Y DEBATE 393 (2000), available at www.fanniemae.foundation.org/programs/hpd/pdf/hpd_1102_hirsch.pdf; DOUGLAS R. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). *See also* RAYMOND A. MOHL, URBAN EXPRESSWAYS AND THE CENTRAL CITIES IN POSTWAR AMERICA (2002) (“[P]ublic officials and policy makers . . . used expressway construction to destroy low-income and especially black neighbor-

hoods in an effort to reshape the physical and racial landscapes of the postwar American city.”). This discussion of discriminatory practices in federal housing programs is not meant to disregard other equally unjust practices that cemented patterns of racial segregation, including racial violence, zoning, and land use laws that enforced racial exclusion. Florence W. Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 173, 198 (2001).

104. Notice on Site-Based Waiting Lists, 62 Fed. Reg. 1026, 1027 (Jan. 7, 1997) (“For the first 25 years of the [U.S. Housing Act] the Federal Government permitted, if not encouraged segregation by race in public housing developments.” Privately owned assisted housing “was disproportionately utilized by nonminority applicants, leading to further isolation of minority tenants in public housing.”).

105. SUSAN J. POPKIN ET AL., 1 BASELINE ASSESSMENT OF PUBLIC HOUSING DESEGREGATION CASES 4 (HUD 2000).

106. See, e.g., 24 C.F.R. § 985.3(h) (2005) (Section 8 Management Assessment Program poverty deconcentration bonus for locating participant households in census tracts with poverty rates of less than 10 percent).

107. See, e.g., 24 C.F.R. § 960.202(b)(2)(ii)(C) (2005) (public housing income targeting requirements define *high-poverty area* as a neighborhood with rate of poverty at or greater than 30 percent). The 30 percent measure is used here because it is used by researchers examining siting practices in the LIHTC program. See, e.g., OFFICE OF POLICY DEV. & RESEARCH, HUD, UPDATING THE LOW-INCOME HOUSING TAX CREDIT DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2001, at 33 (2003) [hereinafter UPDATING THE LIHTC CREDIT DATABASE]; LARRY BURON ET AL., HUD, ASSESSMENT OF THE ECONOMIC AND SOCIAL CHARACTERISTICS OF LIHTC RESIDENTS AND NEIGHBORHOODS 4-4 (2000), available at www.huduser.org/Publications/PDF/lihtc.pdf.

108. See, e.g., HUD, FY 2003 HOPE VI REVITALIZATION GRANT AGREEMENT 20 (2003) (hereinafter “FY 2003 HOPE VI REVITALIZATION GRANT AGREEMENT”) available at <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/fy03/index.ctm>. This fifty percent threshold is a less than satisfying and certainly less than generally accepted measure for understanding the meaning of segregation. It is used here because it is a basis on which researchers have measured levels of segregation in the LIHTC program. See UPDATING THE LIHTC DATABASE, *supra* note 106, at 23. The HOPE VI Revitalization Grant Agreement actually uses alternative measures to identify conditions of racial segregation, including the fifty percent benchmark, but also including a differential standard where the percentage of a particular racial or ethnic group in a specified area is twenty percent greater than the percentage of that group in the metropolitan statistical area (MSA), and another standard whereby the neighborhood’s total percentage of minorities is at least twenty percent higher than the total percentage of all minorities for the MSA as a whole. FY 2003 HOPE VI REVITALIZATION GRANT AGREEMENT, *supra* note 107, at 20. Under HUD’s siting rules, an “area of minority concentration” is defined as any area where the proportion of minority residents “substantially exceeds” that of the jurisdiction as a whole. OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, HUD, HANDBOOK 8004.1, CONSOLIDATED CIVIL RIGHTS MONITORING REQUIREMENTS FOR SECTION 8 AND PUBLIC HOUSING (1989). Whether a differential is “substantial” depends on the demographics of the housing market, including living patterns,

numbers of minority and non-minority families, patterns of reinvestment and disinvestment, and other factors. See, NOTICE H-81-2 (HUD), CLARIFICATION OF SITE AND NEIGHBORHOOD STANDARDS FOR NEW ASSISTED HOUSING PROJECTS IN AREAS OF MINORITY CONCENTRATION (January 5, 1980) at pages 2 and 3. HUD's *Fair Housing Planning Guide*, applicable to programs subject to consolidated planning requirements, like HOME and CDBG, defines a "racially non-impacted location" as an area where a particular ethnic or racial group is less than 30% of the total population of the area. OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, HUD, FAIR HOUSING PLANNING GUIDE, para. 2.5 (1996) (hereinafter "FAIR HOUSING PLANNING GUIDE"), available at <http://www.hud.gov/offices/fheo/images/ghpg.pdf>. By that measure, a neighborhood where thirty percent or more of the population is characterized as minority residents would be considered segregated. The Census Bureau evaluates segregation by reference to five categories, based on nineteen statistical measures. The five categories evaluate the *evenness* of the distribution of minorities within an area, the *isolation* of racial and ethnic groups from other groups, the *concentration* of racial and ethnic minorities in a particular geographic area, the degree to which racial and ethnic minorities are *centralized* around the urban core, and the extent of *clustering* of minorities in adjoining areas. See U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000 (2002), available at <http://www.census.gov/hhes/www/housing/resseg/pdf/censr-3.pdf>. Measures of segregation are laden with value judgments about what constitutes an appropriate level of racial mixing. For a thoughtful discussion about these issues, see, SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 41-42 (2004) (to define an integrated neighborhood as one that is between ten percent and fifty percent African-American "seems to buy into the dangerous logic that a predominantly African-American neighborhood cannot be an integrated one").

109. BURON ET AL., *supra* note 107, at 4-3.

110. *Id.*

111. *Id.*

112. *Id.* at 4-17.

113. *Id.* at 4-19.

114. See UPDATING THE LIHTC CREDIT DATABASE, *supra* note 107.

115. *Id.* at 29.

116. *Id.*

117. *Id.*

118. *Id.* at 23.

119. See *id.* at 23 (location in metro and nonmetro areas); *id.* at 30-33 (characteristics of neighborhoods by race and poverty). Unlike the 2000 study of thirty-nine sample properties, the HUD LIHTC database on which the 2003 study is based does not compile information about the characteristics of occupant tax credit households. See BURON ET AL., *supra* note 107 and accompanying text.

120. 2003 QAP, Allocation Plan, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004); *Asylum Hill Problem Solving Revitalization Ass'n v. King*, No. (X02) CV030179515S, 2004 Conn. Super. LEXIS 27 (Jan. 5, 2004) (unreported) (order dismissing fair housing claims because Title VIII creates no private right of action against housing credit agency).

121. LISA ROBINSON & ANDREW GRANT-THOMAS, *THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, RACE, PLACE, AND HOME: A CIVIL RIGHTS AND METROPOLITAN OPPORTUNITY AGENDA* 13–21 (2004); powell, *supra* note 14.

122. Roisman, *supra* note 85.

123. *Id.* at 1032.

124. *Id.* at 1033–47.

125. *Id.* at 1047.

126. powell, *supra* note 14, at 189.

127. *Id.* at 192; ROBINSON & GRANT-THOMAS, *supra* note 121, at 33.

128. powell, *supra* note 14, at 205–17; ROBINSON & GRANT-THOMAS, *supra* note 121, at 87.

129. ROBINSON & GRANT-THOMAS, *supra* note 121, at 72–73, 85; Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 178 (1999).

130. ROBINSON & GRANT-THOMAS, *supra* note 121, at 80; Roisman, *supra* note 129, at 176. *See also* Alexander Polikoff, *Race Inequality and the Black Ghetto*, 13 POVERTY & RACE 1 (Nov./Dec. 2004) (arguing for a national Section 8 mobility program), available at www.prrac.org/mobility/polikoff.pdf.

131. ROBINSON & GRANT-THOMAS, *supra* note 121, at 86.

132. ROBINSON & GRANT-THOMAS, *supra* note 121, at 87–88; Roisman, *supra* note 129, at 175, 178.

133. ROBINSON & GRANT-THOMAS, *supra* note 121, at 87.

134. NAACP, Boston Ch. v. Sec'y of Hous. & Urban Dev., 817 F.2d 160 (D. Mass. 1989).

135. 65 Fed. Reg. 2323, 2325 (Jan. 14, 2000) (promulgating 26 C.F.R. § 1.42-5(c)(1)(v) (2005) (Title VIII certification); 26 C.F.R. § 1.42-5(c)(1)(xi) (Section 8 certification)). The procedures adopted in the interagency memorandum of understanding through which HUD notifies the IRS of Title VIII complaints also originated as a recommendation by civil rights activists. *See* Roisman, *supra* note 85, at 1040 n.144.

136. 26 U.S.C. § 42(m)(1)(B)(ii)(III) (2005) (as amended by Pub. L. No. 106-554, § 1(a)(7), 114 Stat. 2763 (2000) (Title I § 137(b))).

137. JEREMY GUSTAFSON & J. CHRISTOPHER WALKER, *URBAN INST., ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM* 6 (2002), available at www.huduser.org/publications/pdf/AnalysisQAP.pdf.

138. Roisman, *supra* note 85, at nn.125, 130 & 168.

139. GUSTAFSON & WALKER, *supra* note 137, at 10–12.

140. *See* Municipal Housing Finance Assistance Act, CONN. GEN. STAT. § 8-300 (2004–05); Affordable Housing Planning and Appeal Act, ILL. PUB. ACT § 93-0595 (2003); Regional Planning Law, MASS. GEN. LAWS, ch. 40B (1969) (zoning relief); MASS. GEN. LAWS, ch. 40R (1969); Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to 52:27D-307 (West 2005).

141. Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 78 (2002).

142. *See* 65 Fed. Reg. 81,222, 81,215 (Dec. 22, 2000) (promulgating deconcentration rule and urging regional mobility strategies to promote racial integration). HUD's rule for poverty deconcentration in public housing aims at opening developments with higher-income profiles to residents of lower incomes.

The regulation says that income deconcentration obligations operate separately from fair housing requirements. However, the rule explicitly states that HUD will challenge a PHA's certification under 24 C.F.R. § 903.7(o) (2005) that it is affirmatively furthering fair housing where a PHA "does not reduce racial and national origin concentrations in developments or buildings and is perpetuating segregated housing." 24 C.F.R. § 903.2(d)(3) (2005).

143. 42 U.S.C. § 1437v (2005). See also NAT'L COMM'N ON SEVERELY DISTRESSED PUB. HOUS., FINAL REPORT TO CONGRESS AND THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT (1992).

144. SUSAN J. POPKIN ET AL., THE URBAN INSTITUTE, A DECADE OF HOPE VI: RESEARCH FINDINGS AND POLICY CHALLENGES 8 (2004), available at www.urban.org/UploadedPDF/411002_HOPEVI.pdf.

145. 24 C.F.R. § 985.3(g) (2005) (expanding housing opportunities); 24 C.F.R. § 985.3(h) (deconcentration bonus). For a description of the MTO program, see LARRY ORR ET AL., HUD, MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: INTERIM IMPACTS EVALUATION (2003).

146. By some counts, from 1968 to the present day, litigation was required to force an end to race discrimination in public housing programs in more than thirty American cities. Roisman, *supra* note 129, at 194 (listing desegregation suits in which HUD is a defendant). The cases range across decades, from the still-active supervision of the federal courts in *Gautreaux v. Chicago Housing Authority*, first decided in 1969, to the recent decision in *Thompson v. U.S. Department of Housing and Urban Development*. See *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969) (decision on liability); *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736 (N.D. Ill. 1969) (remedial decree); *Gautreaux v. Chi. Hous. Auth.*, 178 F.3d 951 (7th Cir. 1999) (continuing effect of remedial decree); *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md.). Remedial orders in public housing desegregation cases tend to involve many of the civil rights strategies urged by advocates in affordable housing programs. Typical features include changes to tenant selection practices, public housing demolition, rehabilitation of existing public housing developments, revitalization activities in the neighborhoods surrounding existing public housing, on-site replacement of public housing, and dispersal strategies that limit new construction of public housing to low-poverty, nonsegregated areas and include the use of Section 8 vouchers with geographic restrictions and mobility counseling. 1 POPKIN ET AL., *supra* note 105, at 38–42.

147. UPDATING THE LIHTC CREDIT DATABASE, *supra* note 107, at 44.

148. See *supra* notes 109–11 and accompanying text.

149. Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: 30 Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 23 W. NEW ENG. L. REV. 61, 76–79 (Symposium 2001) (80 percent of proposed projects are denied or approved with conditions; half of the proposed units are built and 55 percent of proposed projects are built); Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After 10 Years, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 61, 76–79 (Symposium 2001).

150. Krefetz, *supra* note 149, at 89–90.

151. 2003 QAP (N.J. Super. Ct. App. Div. 2004); Roisman, *supra* note 129, at 188. See also Naomi Bailin Wish & Stephen Eisdofer, *The Impact of Mount Laurel Initiative: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON

HALL L. REV. 1268, 1294–95 (1997) (identifying significant racial disparities between applicants and successful occupants).

152. 2 POPKIN ET AL., *supra* note 105, at 3-33 to -35 (Dallas); *id.* at 5-22 to -28 (Minneapolis). See also Edward G. Goetz, *Desegregation Lawsuits and Public Housing Dispersal: The Case of Hollman v. Cisneros in Minneapolis*, 70 J. AM. PLAN. ASS'N (2004).

153. 2 POPKIN ET AL., *supra* note 105, at 1-24 to -25 (Allegheny County); *id.* at 3-33 to -35 (Dallas); *id.* at 5-24 to -27 (Minneapolis); *id.* at 6-14 to -17 (New Haven). See also Gautreaux v. Chi. Hous. Auth., 178 F.3d 953 (7th Cir. 1999) (eighteen-year delay in developing scattered-site housing results in appointment of receiver).

154. 2 POPKIN ET AL., *supra* note 105, at 6–15 (arson in New Haven).

155. Compare Walker v. City of Mesquite, Tex., 169 F.3d 973 (5th Cir. 1999) (district court desegregation order to site new public housing in predominantly white area violates equal protection), with Walker v. City of Mesquite, Tex., 2005 WL 503719 (5th Cir. Mar. 4, 2005) (permitting selection of same site based on nonracial classifications).

156. ROBINSON & GRANT-THOMAS, *supra* note 121, at 60–61.

157. ORR ET AL., *supra* note 145, at 30.

158. 1 POPKIN ET AL., *supra* note 105, at 67–68.

159. James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUS. POL'Y DEBATE 231, 256 (2005).

160. ORR ET AL., *supra* note 145, at 29–38.

161. LARRY BURON, URBAN INSTITUTE, AN IMPROVED LIVING ENVIRONMENT? NEIGHBORHOOD OUTCOMES FOR HOPE VI RELOCATEES (2004).

162. 1 POPKIN ET AL., *supra* note 105, at 67–68.

163. Compare 2 POPKIN ET AL., *supra* note 105, at 1-32 (consent decree in Allegheny County, Pa.), with 2 POPKIN ET AL., *supra* note 105, at 3-50 to -52 (Dallas).

164. 1 POPKIN ET AL., *supra* note 105, at 80–81, 96 (discussing improvements to existing developments).

165. 2 POPKIN ET AL., *supra* note 105, at 19–26, 30, 45.

166. NAT'L HOUS. LAW PROJECT ET AL., *supra* note 16, at 38.

167. See, e.g., Reese v. Miami-Dade County, 210 F. Supp. 2d 1324 (S.D. Fla. 2002); Wallace v. Chi. Hous. Auth., 298 F. Supp. 2d 710 (N.D. Ill. 2003); Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., 2005 WL 61647 (N.D. Ill. Jan. 10, 2005); Darst-Webbe Tenant Assoc. Bd. v. St. Louis Hous. Auth., 299 F. Supp. 2d 952 (8th Cir. 2003).

168. POPKIN ET AL., *supra* note 144, at 29.

169. Susan J. Popkin & Martha Burt Cunningham, *Public Housing Transformation and the Hard-to-House*, 16 HOUS. POL'Y DEBATE (2005).

170. The extent to which the obligation to further fair housing protects large families is not clear. Compare Debolt v. Espy, 832 F. Supp. 215 (S.D. Ohio 1993) (USDA obligation to further fair housing does not compel the construction of rental units for large families), with 70 Fed. Reg. 59,919 (promulgating 24 C.F.R. § 983.57(e)(3)(iv) (project-based Section 8 site and neighborhood standards; for purposes of determining whether comparable housing opportunities exist outside areas of minority concentration, PHA should consider availability of units for large families)).

171. 1 POPKIN ET AL., *supra* note 105, at 38.

172. *Id.* at 71.

173. *Id.* at 75.

174. 2 POPKIN ET AL., *supra* note 105, at 4–12 (describing implementation of the consent decree in *Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982), and racial violence).

175. See CASHIN, *supra* note 108, at 21 n.29 (citing Camille Zubrinsky Charles, *Processes of Residential Segregation, in URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES* (Alice O'Connor et al. ed., 2001) (“Whites expressed the strongest degree of racial solidarity” and mean percentage of 52 percent white is ideal neighborhood for white respondents; African-Americans, Latinos, and Asians expressed desire to live in areas that are 40 percent to 45 percent minority); *id.* at 28 (describing “integration fatigue” of African-Americans and the desire for equal opportunity); John Yinger, *On the Possibility of Achieving Racial Integration Through Subsidized Housing, in HOUSING DESEGREGATION AND FEDERAL POLICY* 293–95 (John M. Goering ed., 1986) (38 percent of African-Americans willing to move into all-white neighborhood and 95 percent of African-Americans willing to move to area that was 14 percent African-American; “tipping” point of predominance of African-Americans in white neighborhood that would prompt white flight is 7 percent). See also Wilhelmina A. Leigh & James D. McGhee, *A Minority Perspective on Residential Racial Integration, in HOUSING DESEGREGATION AND FEDERAL POLICY* 34 (John M. Goering ed., 1986) (57 percent of African-Americans and 15 percent of whites would prefer half-white, half-minority neighborhood; integration is of lesser import to African-Americans than “freedom from impediments to fulfillment of their human potential”); TARA D. JACKSON, HARVARD CIVIL RIGHTS PROJECT, *THE IMPRINT OF PREFERENCES AND RACIAL ATTITUDES IN THE 1990S: A WINDOW INTO CONTEMPORARY RESIDENTIAL SEGREGATION PATTERNS IN THE GREATER BOSTON AREA* 14 (2004), available at www.civilrightsproject.harvard.edu/research/metro/Tara.pdf (evidence of “sharp decline in white support for integration as the black population approaches 30 percent and . . . more precipitous drop in white support for neighborhoods fully integrated with blacks”).

176. 1 POPKIN ET AL., *supra* note 105, at 79. See 2 POPKIN ET AL., *supra* note 105, at 2-33 (HUD follow-up requiring suburban Buffalo communities to complete analyses of impediments to fair housing successful in thirty-one of forty-one municipalities).

177. U.S. COMM’N ON CIVIL RIGHTS, *TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? VOLUME IV: AN EVALUATION OF THE DEPARTMENTS OF EDUCATION, HEALTH AND HUMAN SERVICES AND HOUSING AND URBAN DEVELOPMENT AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION* 132 (2004). For similar findings with respect to enforcement of disability discrimination laws, see NAT’L COUNCIL ON DISABILITY, *RECONSTRUCTING FAIR HOUSING* (2001), available at www.ncd.gov/newsroom/publications/2001/pdf/fairhousing.pdf.

178. 42 U.S.C. § 42(m)(1)(A)(iii) (2005).

179. *Shannon v. HUD*, 436 F.2d at 821 (3d Cir. 1970).

180. See, e.g., 49 C.F.R. § 24.205(a)(1) (2005) (relocation under the URA must take into account the impact of displacement on minorities, the elderly, large families, and people with disabilities); 49 C.F.R. § 24.205(c)(1) (2005) (URA advisory services must be consistent with Title VI, Title VIII, and Exec. Order No.

11,063); *id.* § 24.205(c)(2)(ii)(C) (“[M]inorities shall be given reasonable opportunities to relocate to . . . dwellings . . . not located in an area of minority concentration.”).

181. See HUD, CPD 02-8, Guidance on the Application of the Uniform Relocation and the Real Property Acquisition Policies Act of 1970 (URA), as Amended, in HOPE VI Projects, app. A (2002); Office of Pub. & Indian Hous., HUD, Notice PIH 2003-31, Accessibility Notice: Section 504 of the Rehabilitation Act of 1973 (2003); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2005); Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151, 4152, 4153, 4156 (2005); 24 C.F.R. pt. 200(M) (2005) (affirmative fair housing marketing); 68 Fed. Reg. 70,968 (Dec. 19, 2003) (LEP planning requirements).

182. 24 C.F.R. § 903.7(b)(2) (2005).

183. See, e.g., 24 C.F.R. § 1.5 (2005) (Title VI); 24 C.F.R. § 8.50(c) (2005) (Section 504); 24 C.F.R. § 92.504(b)(3)(v)(B) (2005) (developer fair housing covenants in HOME program).

184. 26 C.F.R. § 1.42-9(c) (2005).

185. NAACP, Boston Ch. v. Sec’y of Housing and Urban Development, 817 F.2d 154 (1st Cir. 1987).