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I. Introduction

Gentrification[1] has changed the character and appearance of many of America's older, inner-city neighborhoods.[2] It has created a contest for living space between low income residents of those neighborhoods and more affluent newcomers who have been attracted to the city because of the relatively low price of housing and the high cost of commuting to and from city jobs.[3] During urban renewal city gov-

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1. According to Judge Leon Higginbotham, writing for the majority in Business Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 874 n.8 (3d Cir. 1981),

> Gentrification is a term used in land development to describe a trend whereby previously "underdeveloped" areas become "revitalized" as persons of relative affluence invest in homes and begin to "upgrade" the neighborhood economically. This process often causes the eviction of the less affluent residents who can no longer afford the increasingly expensive housing in their neighborhood. Gentrification is a deceptive term which masks the dire consequences that "upgrading" of neighborhoods causes when the neighborhood becomes too expensive for either rental or purchase by the less affluent residents who bear the brunt of the change.

The term was coined by London planners to signify the return of the upper-middle classes to that city. *See* COWLEY *et al.*, COMMUNITY OR CLASS STRUGGLE? 131 (1977). In the United States, the term gentrification has been used to describe the return of managerial and professional people—particularly younger individuals—to the central city. *See, e.g.*, Fleetwood, *The New Elite and an Urban Renaissance*, N.Y. Times, Jan. 14, 1979, § 6 (Magazine), at 16; Allman, *The Urban Crisis Leaves Town*, HARPER'S, Dec. 1978, at 41.

2. Gentrification is not limited to cities such as New York, *see* notes 14-125 *infra* and accompanying text, Philadelphia, *see* notes 126-77 *infra* and accompanying text, Chicago, *see* notes 178-231 *infra* and accompanying text, and Boston, *see* notes 232-57 *infra* and accompanying text. As one commentator has noted, gentrification is "occurring in numerous census tracts, not just our glamorous cities, but in our Cincinnatis, our Milwaukees, our Rochesters." Henig, *Gentrification and Displacement Within Cities: A Comparative Analysis*, 61 SOC. SCI. Q. 638, 650 (1980).

3. One recent study, LeGates and Hartman, *Displacement*, 15 CLEARINGHOUSE REV. 207 (1981), compared the characteristics of "inmovers" and "outmovers" in a number of gentrified communities. *Id.* at 221-26. The study found that the inmovers came mostly from other neighborhoods in the same city, not from the suburbs or other cities. *Id.* at 221. Furthermore, the study concluded that the typical household

ernments used the power of eminent domain to remove the poor from their homes in an attempt to revitalize decaying neighborhoods and reverse a decline in municipal tax revenues.[4] Now low income resi-

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settling in a gentrifying community during the 1970's "was composed of one or two unmarried or married young adults, without children; was white; had one or more members employed in a professional or managerial occupation; and earned an above average income." *Id.* at 223. The study found that the displacees were a more diverse group. *Id.* at 225. While many outmovers interviewed were lower income, working class whites, all races, age groups, and income levels were represented. *Id.* at 224-25.

As one author has stated:

> Those who interpret the history of the cities through a class conflict paradigm see in gentrification the culmination of an effort by white upper-income and business interests, publicly supported through urban renewal, loan subsidies and tax incentives, to regain control of the political and economic resources that, in the rush of suburbanization, were nearly ceded by default to a new urban majority consisting of the poor, Hispanic and black.

Henig, *supra* note 2, at 649. Class conflict, however, does not always involve racial conflict. *See, e.g.*, King v. Harris, 446 U.S. 905 (1980) (first suit brought by NAACP to oppose low income housing for minority groups in an already racially integrated neighborhood). *Cf.* Jones v. Tully, 378 F. Supp. 286 (E.D.N.Y. 1974), *aff'd sub nom.* Jones v. Meade, 510 F.2d 961 (2d Cir. 1975) (class action brought by town residents to enjoin construction of a low and moderate income housing project on grounds that such construction would perpetuate racial concentration).

4. *See* M. ANDERSON, THE FEDERAL BULLDOZER, 161-72 (1965). For example, in 1961 Governor David L. Lawrence of Pennsylvania stated:

> [Urban renewal] is the central city's only hope for maintaining its economic base, adding to its tax base, attracting to the city a cross-section of residents of every income group . . . successful urban renewal is an astonishing producer of public revenues.

Id. at 161, *citing* Private Financing Considerations in Urban Renewal, A Report of the Proceedings of the 6th Annual NAHRO Conference on Urban Renewal, April 16-18, 1961. *See also* S. GREER, URBAN RENEWAL AND AMERICAN CITIES 27-29 (1965) (discussing the erection of malls and office buildings in previously blighted areas to counteract declining municipal tax bases). Eminent domain was one of the primary tools used by local governments and municipalities to clear slum areas and their inhabitants for urban renewal. *See, e.g.*, R. CARO, THE POWER BROKER 968 (1974) (other methods were street closings and utility easements); W. Sogg and W. Wertheimer, *Legal and Governmental Issues in Urban Renewal*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 131 (J. Wilson ed. 1966). The first federal urban renewal statute which provided federal aid to the cities for renewal projects was Title I of the Housing Act of 1949, 63 Stat. 413, 414, 42 U.S.C. §§ 1441-1490h (1976). For a discussion of the 1949 Act and its legislative history, *see* FOARD AND FETTERMAN, FEDERAL URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 79-103 (J. Wilson ed. 1966). Although the 1949 Act stated as its purpose the national goal of "a decent home and a suitable living environment for every American family," 42 U.S.C. § 1441a (1976), this goal was not realized. In many instances, urban planners and local governments ignored the Act's requirement that families being relocated from Title I sites be placed in "decent, safe, and sanitary dwellings" and moved those families to less adequate housing. R. CARO, THE POWER BROKER, 961-83 (1974).

> Some places were much worse than what the family had left. For example, a family of two moved from a four-room standard apartment with all

dents are being displaced by middle and upper income individuals interested in acquiring inner-city housing on the private market.

The federal courts have become the most recent forum for the class conflict over urban space.[5] The issue, which in one case reached the Supreme Court,[6] is whether the Department of Housing and Urban Development (HUD) can build, sponsor or subsidize low income

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> utilities, central heating and hot water, private bath and toilet into a three-room apartment in poor condition, with no central heating, no refrigeration, tiny bath in kitchen and a hall toilet. Another family of three moved from four standard rooms to a six-room "railroad flat" with not a single enclosed room, holes in the floor and ceiling plaster falling.

Id. at 975. The Housing and Urban Development Act of 1968, 82 Stat. 476 (codified in scattered sections of 5, 12, 15, 20, 31, 38, 40, 42 U.S.C.) (1976), was enacted to meet the housing needs of those families who had not realized the national goal as stated in the 1949 Act. 82 Stat. 601, 42 U.S.C. § 1441a (1976). The 1968 Act was to effect nationwide urban renewal by providing twenty-six million new and rehabilitated housing units, six million of which were to be occupied by low and moderate income families. *Id. See* J. KRASNOWIECKI, HOUSING AND URBAN DEVELOPMENT 243-44 (1969); E. MORRIS AND H. HALPRIN, URBAN RENEWAL AND HOUSING 2-3 (Practising Law Institute 1969).

Concern for declining municipal tax bases was also behind the enactment of recent Urban Development Action Grant (UDAG) legislation. *See* 42 U.S.C. § 5318(a) (Supp. II 1978) ("In order to promote the . . . development of viable urban communities . . . the Secretary is authorized to make urban development action grants to severely distressed cities and urban counties to help alleviate physical and economic deterioration through reclamation of neighborhoods having excessive housing abandonment or deterioration, and through community revitalization in areas with population outmigration or a stagnating or declining tax base.").

5. Conflicts between the affluent and the poor in urban areas have often centered on the location of public housing. *See, e.g.*, Forest Hills Residents Ass'n v. New York City Hous. Auth., 69 Misc. 2d 42, 329 N.Y.S.2d 69 (Sup. Ct. N.Y. County), *rev'd per curiam*, 39 A.D.2d 64, 332 N.Y.S.2d 156 (2d Dep't), *aff'd sub nom.* Margulis v. Lindsay, 31 N.Y.2d 167, 286 N.E.2d 724, 335 N.Y.S.2d 285 (1972) (action by residents of a white, middle class neighborhood to block the construction of public housing in the neighborhood). During the 1960's, public housing residents, often black, began claiming that the failure of local housing authorities to locate public housing in any but black neighborhoods violated their civil rights. *See* Comment, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. PA. L. REV. 1330, 1331-32 (1974). In Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969), for example, the court ordered the city of Chicago to begin locating public housing outside black areas in order to achieve integrated housing patterns. During the height of urban renewal, therefore, the class struggle focused on the power of the state to influence housing patterns. With the emergence of gentrification, the struggle now takes place primarily in the marketplace, where the poor and working classes cannot match the dollars bid for housing by the affluent newcomers. The second stage of gentrification, in which the affluent newcomers seek to homogenize their neighborhoods through the use of the courts, is the focus of this Article.

6. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).

housing projects within or near revitalized areas.[7] The litigation is usually initiated by affluent newcomers who argue that undue concentrations[8] of minority or low income persons in "their" neighborhoods would result if the project were built.[9] Ironically, as the newcomers litigate "against" racial and economic concentration in the name of desegregation, they may prevent the racial and economic reintegration of neighborhoods which have been converted from ethnically and economically diverse communities into upper-middle class preserves. In these cases, gentrification appears as a kind of suburbanization in reverse—the effort to keep low income people and minorities from remaining in their own neighborhoods operating as a type of "reverse exclusionary zoning."[10]

This Article examines four attempts to block the construction or financing of HUD projects in neighborhoods transformed by gentrification. It discusses a housing battle which began on New York City's West Side and was litigated extensively in the federal district[11] and

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7. Business Ass'n of Univ. City v. Landrieu, 660 F.2d 867 (3d Cir. 1981); Munoz-Mendoza v. Pierce, 520 F. Supp. 180 (D. Mass. 1981); Alschuler v. HUD, 515 F. Supp. 1212 (N.D. Ill. 1981).

8. In *Alschuler*, plaintiffs contended that federal assistance to low income tenants under the Section 8 program, *see* note 200 *infra* and accompanying text, would create an "undue concentration" of assisted persons in areas containing a high proportion of low income persons in violation of 24 C.F.R. § 881.206(c) (1981). 515 F. Supp. at 1220-22. The court rejected plaintiffs' argument, finding no evidence that the subsidies would create "a minority, low-income ghetto" in the immediate area. *Id.* at 1223.

9. For example, the plaintiff business groups in *Business Ass'n of Univ. City* argued:

> The statutory standard of the 1974 Act is clearly violated by the selection of the site in this case. Rather than deconcentrate housing opportunities for persons of lower income, the selection of the site here serves only to further concentrate lower income persons by placing one of their scarce new housing opportunities directly adjacent to five hundred and thirty-two units of federally assisted housing. It is difficult to imagine the creation of housing opportunities for lower income persons which would achieve a greater concentration.

Brief for Appellants at 27.

10. Exclusionary zoning "typically refers to zoning intended to exclude persons unable to afford detached, single family residences on large lots . . . ," Willemsen & Phillips, *Down-Zoning and Exclusionary Zoning in California Law*, 31 HASTINGS L.J. 103, 122 (1979), although the law may be formulated to exclude other groups, such as mentally retarded persons, from a community, *see* Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URB. L. ANN. 47 (1980). The author intends "reverse exclusionary zoning" to connote a partial shift in values: now small, inner-city lots represent the prime acreage, but the attempt to exclude minorities and low income persons remains the same.

11. Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974).

circuit[12] courts. On appeal the United States Supreme Court held in *Stryker's Bay Neighborhood Council v. Karlen*,[13] that HUD's decision-making process relating to the placement of low income housing is beyond judicial review as long as it complies with applicable federal statutes and regulations.

The Article reviews recent litigation in Philadelphia, Chicago and Boston in light of *Stryker's Bay*. In Philadelphia and Chicago, efforts by HUD to provide low income housing in gentrified neighborhoods have been opposed as an abuse of its administrative discretion. In Boston, HUD funding of a business and residential complex is being challenged by low income residents concerned with the displacement effect the project would have. Despite the Supreme Court's criticism of judicial intervention, protracted litigation continues to frustrate federal efforts to preserve the integrated character of inner-city neighborhoods. Nevertheless, the courts must remain involved particularly where suits are brought to enforce substantive obligations imposed on HUD by the Civil Rights Acts. If HUD adopts regulations which reflect the need to maintain the integrated character of urban housing in gentrifying neighborhoods, the courts would be more likely to defer to agency decision-making. Thus undue delays in the implementation of HUD programs could be avoided.

II. New York City: *Strycker's Bay Neighborhood Council v. Karlen*

The West Side Urban Renewal Area (WSURA) is a twenty square block area with approximately 35,000 residents located on Manhattan's West Side.[14] In 1956, New York City applied for and received federal funds, under the Housing Act of 1954,[15] to undertake a dem-

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12. Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975), *rehearing sub nom.* Trinity Episcopal School Corp. v. Harris, 445 F. Supp. 204 (S.D.N.Y.), *rev'd and remanded sub nom.* Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978).

13. 444 U.S. 223, 227-28 (1980).

14. 387 F. Supp. at 1047. The area stretches between West 87th and West 97th Streets and between Central Park West and Amsterdam Avenue. *Id.* The WSURA represents the northern anchor of the renewal program for the entire West Side of Manhattan. Lincoln Center represents the southern anchor. Thousands of Latin Americans, particularly Puerto Ricans, were displaced in the past few decades as a result of the renewal program and have joined the swelling ranks of the dispossessed in East New York, Ocean Hill, Brownsville, and the South Bronx. *See generally* LYFORD, THE AIRTIGHT CAGE (1966), which traces the history of Manhattan's West Side from a wealthy preserve in the post-Civil War era to the socially and racially mixed area that it is today.

15. 42 U.S.C. § 1453 (1976), authorizes grants for urban renewal projects.

onstration study of the neighborhood now known as the WSURA.[16] James Felt, Chairman of the New York City Planning Commission, directed the study (Felt Study), which was published in 1958.[17] The Felt Study reported that the neighborhood enjoyed excellent transportation, cultural, business and recreation facilities,[18] and recommended that existing brownstones and some multi-family dwellings be rehabilitated.[19] Thus, the study viewed the preservation and improvement of the existing community, and not the creation of a new one, as the primary objective of any renewal plan for the neighborhood.[20] A key focus of neighborhood preservation was the maintenance of the residential pattern of economic and ethnic integration which is part of the tradition of the West Side.[21]

Opponents of the original WSURA Plan submitted by the Urban Renewal Board in 1959[22] argued at public hearings that the plan failed to provide sufficient housing for low and middle income families.[23] As a consequence, the WSURA Plan was amended to increase the number of planned low income units from 400 to 1,000 and the number of tax-abated, middle income units from 2,400 to 4,200.[24] Later, as a result of continued community pressure, the Board of Estimate further increased the number of planned low income units to 2,500.[25]

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16. 387 F. Supp. at 1049.

17. NEW YORK CITY PLANNING COMM'N, A REPORT ON THE W. SIDE URBAN RENEWAL STUDY (1958) [hereinafter cited as the Felt Study].

18. *Id.* at 11.

19. *Id.* at 5. Thus, the more affluent members of the community could become owner-occupants of the brownstones and benefit from living in an economically and ethnically integrated neighborhood. *See* Note, *NEPA, Tipping and Low-Income Housing*, 6 COLUM. J. OF ENVT'L L. 31, 33 (1979) [hereinafter cited as *Tipping*].

20. Felt Study, *supra* note 17, at 4-5.

21. The Felt Study declared:

> A reduction of the abnormal population turnover and elimination of the excessive overcrowding which contribute so greatly to the Area's decline [is our objective.] Maintenance of the economic and ethnic integration which is part of its tradition, is in accord with accepted City policy . . . which will take into account the needs of the present population.

Id. at 12. *See also Tipping*, *supra* note 19, at 33 and n.10.

22. The Urban Renewal Board was appointed by Mayor Robert Wagner upon the Felt Study's recommendation that such an agency be created to facilitate planning for the WSURA. 387 F. Supp. at 1049.

23. *Id.* at 1050.

24. *Id.*

25. The breakdown was as follows: 1,010 low income units in new public housing, 280 units in rehabilitated brownstones, and 210 units in a public housing site adjacent to the WSURA. *Id.* at 1051-52.

All of the public housing projects provided for in the WSURA Plan were completed by 1965.[26] The next group of planned buildings completed were four Mitchell-Lama cooperatives and a Mitchell-Lama rental building.[27] By the time the Mitchell-Lama buildings opened in 1967, however, construction costs had increased to a point which made it unlikely that the city's commitment to 2,500 units of low and moderate income housing in the WSURA could be fulfilled.[28] The increase in Mitchell-Lama costs, compounded by the phasing out of rent supplement programs,[29] specifically threatened that portion of the 2,500 low income unit minimum which depended upon "skewed rentals"[30] in the Mitchell-Lama projects.[31]

By 1968, construction starts of low income units had stalled completely,[32] and community representatives began to realize that the 2,500 unit minimum was in danger. In the spring of 1970, an organized group of squatters took over several vacant buildings in the WSURA awaiting demolition,[33] including a building on Site 30,[34] a lot located near several low income apartment buildings.[35] In response to the squatters' demands the city changed its plans for Site 30 from middle income to low income housing.[36] This decision gave rise to litigation which remained in the courts for ten years.[37]

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26. *Id.* at 1053.

27. "Mitchell-Lama is the generic or common term used for moderate and middle income housing developed pursuant to Article II of the Private Housing Finance Law of the State of New York and assisted by state or municipal mortgage loans and real estate tax exemption." *Id.* at n.11.

28. *Id.* at 1054.

29. *Id.*

30. "Skewed rentals" result from a "procedure whereby rents in a particular building are arbitrarily varied so that some are for higher income and some are for lower income families, the overall average being fixed at the level required to operate the building economically." *Id.* at 1051 n.7.

31. *Id.* at 1054.

32. *Id.*

33. *Id.* at 1056. The city discovered that there were still 274 squatter families in the area in 1974. *Id.*

34. *Id.* Site 30 is located on the west side of Columbus Avenue between West 90th and West 91st Streets. Statement on behalf of CONTINUE by Eugene J. Morris before the New York City Planning Commission, Appendix I, Part 1 (Sept. 5, 1979) (Eugene J. Morris was the attorney for CONTINUE, an acronym for Committee of Neighbors to Insure Normal Urban Environment) [hereinafter cited as Statement on behalf of CONTINUE].

35. The largest low income housing project in the WSURA, Wise Towers, is situated next to Site 30. Four other low income or subsidized buildings are located on West 91st Street in the two block area between Central Park West and Amsterdam Avenue. *Id.*

36. 387 F. Supp. at 1056.

37. *See* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).

The new plan for Site 30 called for a 17-story public housing project, containing 160 dwelling units and housing for up to 576 persons.[38] First priority for residence at Site 30 was to be given to those tenants displaced by urban renewal who had remained in the WSURA and were now residing in temporary quarters.[39] Second priority was to go to tenants directly displaced by urban renewal who had been forced to leave the WSURA entirely, but who had expressed a desire to return.[40]

It was only after federal funds were committed to the Site 30 project, however, that HUD conducted a Special Environmental Clearance study.[41] HUD had already determined that the environmental impact of the project was not so great as to require a full-blown Environmental Impact Statement.[42] The HUD study indicated that low income housing was needed,[43] that ready access to community services was available,[44] that the project would not unduly burden existing services,[45] and that the project would not adversely affect the environment.[46] In all respects HUD gave Site 30 a superior or adequate rating.[47] HUD predicted that even a 100% low income project would have only a minimal effect on the economic balance of the WSURA's population,[48] estimating the increase of low income families in the area to be less than two percent.[49]

The Trinity Episcopal School Corporation (Trinity), an elementary and secondary educational institution located directly across the street

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38. 387 F. Supp. at 1080.

39. 42 U.S.C. § 1455(c) (1976), provides that no local public agency will receive a loan or grant for urban renewal until it has formulated "a feasible method for the temporary relocation of individuals and families displaced from the urban renewal area. . . ." The section further requires that the temporary housing be in clean and safe quarters "in the urban renewal area or in other areas not generally less desirable. . . ." *Id.*

40. 445 F. Supp. at 213.

41. 387 F. Supp. at 1079-80. HUD may require compliance with either a Normal Environmental Clearance, or a Special Environmental Clearance, or an Environmental Impact Statement, depending on the type of project involved. 38 Fed. Reg. 19,182 (1973).

42. 387 F. Supp. at 1080. *See* 38 Fed. Reg. 19,182 (1973).

43. 387 F. Supp. at 1073-74.

44. *Id.* at 1074.

45. *Id.*

46. *Id.*

47. *Id.* In no instance did HUD receive a poor rating which "results in automatic disapproval of the project." *Id.*

48. 445 F. Supp. at 213.

49. *Id.*

from Site 30,[50] brought suit against HUD in 1971 to enjoin the construction of the proposed project.[51] Trinity had publicly considered moving its physical plant outside New York City in 1962 because of neighborhood deterioration.[52] In response, Trinity alleged, city officials and a local judge had assured it not only that 2,500 low income units was the limit for the WSURA, but also that in middle income buildings such as originally proposed for Site 30, no more than 30% of the housing units would be reserved for low income tenants.[53] Trinity maintained that its commitment to remain in the neighborhood was made in reliance upon these assurances.[54] It further argued that the project was illegal: it violated the requirements of the National Environmental Policy Act of 1969[55] by creating a "pocket ghetto"[56] which would contribute to neighborhood tipping within the meaning of *Otero v. New York City Housing Authority*.[57]

Several parties intervened in the action. The Committee of Neighbors to Insure a Normal Urban Environment (CONTINUE), advocates for some of the neighborhood's more affluent residents, intervened on the side of the plaintiffs.[58] Two other intervenors on the plaintiff's side, Karlen and Hudgins, were brownstone owners who had invested $148,000 and $265,000 respectively in their brownstones

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50. Trinity School was founded in 1709 as a companion to Columbia College. Site 24 is located at 100 West 92nd Street; Site 30 is located at 100 West 93rd Street. Statement on behalf of CONTINUE, *supra* note 34.

51. 387 F. Supp. at 1047 n.2.

52. 523 F.2d at 90.

53. 387 F. Supp. at 1060.

54. 523 F.2d at 90. Trinity had invested in the community by building an annex to the school and granting the air rights over the annex for the construction of a residential tower for middle income tenants. *See Tipping*, *supra* note 19, at 34 n.14.

55. 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979).

56. 387 F. Supp. at 1074.

57. 484 F.2d 1122 (2d Cir. 1973). In *Otero*, the district court had granted summary judgment permanently enjoining the New York City Housing Authority from renting apartments in a public housing project until all persons who were displaced from the site with a promise they could return were afforded leases in the project. Otero v. New York City Hous. Auth., 354 F. Supp. 941, 957 (S.D.N.Y. 1973). The circuit court reversed and remanded, holding that the Housing Authority "may limit the number of apartments to be made available to persons of white or non-white races, including minority groups, where it can show that such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community." 484 F.2d at 1140. *See* Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377 (1980); Note, *The Benign Housing Quota: A Legitimate Weapon to Fight White Flight and Resulting Segregated Community?* 42 FORDHAM L. REV. 891 (1974).

58. 387 F. Supp. at 1047 n.2.

in the WSURA.[59] They asserted that when they purchased and rehabilitated their brownstones they relied on city representations identical to those cited by Trinity: that the number of low income units would not exceed 2,500 and that no more than 30% of the units in any WSURA middle income building would be reserved for low income tenants.[60] Strycker's Bay Neighborhood Council,[61] intervenors on the side of the defendants, took a contrary position, maintaining that Site 30 must be converted from a mixed middle and low income project to a 100% low income project in order to protect the 2,500 low income unit goal and also to house former WSURA residents who had been displaced by urban renewal.[62]

A. The District Court Decision

In *Trinity School v. Romney*,[63] the District Court for the Southern District of New York approved the use of Site 30 for a low income apartment building.[64] The court discerned four major issues: (1) whether the City Housing Authority had breached any contract with Trinity or the plaintiffs-intervenors; (2) whether the current Site 30 proposal conformed to the West Side Urban Renewal Plan; (3) whether the development of Site 30 as 100% low income would create a "pocket ghetto"; and (4) whether HUD had complied with the relevant provisions of the Natural Environmental Policy Act (NEPA).[65] The court ruled in favor of the defendants on each of the four issues.[66]

District Judge Cooper held that the 2,500 low income unit figure was not an irrevocable commitment, but a goal, or "political judgment," permissibly balanced against the economic integration of the area and the underlying purpose of the WSURA Plan.[67] The key objective, according to the court, was striking a balance between available services and facilities and the need of low income persons seeking relocation within the WSURA.[68] Judge Cooper dismissed the

59. *Id.* at 1053.
60. 523 F.2d at 90.
61. The Strycker's Bay Neighborhood Council, a public interest group of community residents and organizations, was formed in 1958. LYFORD, *supra* note 14, at 121. Strycker's Bay is an umbrella organization for community groups, schools, anti-poverty organizations, and the local branch of the National Welfare Rights organization. Interview with Doris Rosenbloom, former president of Strycker's Bay, July 7, 1980.
62. 523 F.2d at 90-91.
63. 387 F. Supp. 1044 (S.D.N.Y. 1974).
64. *Id.* at 1085.
65. 387 F. Supp. at 1048. The National Environmental Policy Act is codified at 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979).
66. 387 F. Supp. at 1085.
67. *Id.* at 1058-59.
68. *Id.* at 1065.

plaintiffs' contentions that the project would create a pocket ghetto.[69] The court was not persuaded that the construction of public housing on Site 30 would cause the neighborhood to tip[70] and further held that the law is concerned with tipping only as it relates to racial, and not to economic, imbalance.[71]

The plaintiffs' arguments that HUD had not conducted an adequate environmental review also were dismissed by the court.[72] The court acknowledged that NEPA requires HUD to consider physical factors such as the size of a neighborhood's minority population, the proximity of public housing projects to upper income areas, and the availability of public services when evaluating environmental impact.[73] Consideration of such factors, however, should not be confused with prohibited consideration of the *subjective attitudes* of the resident population as to environmental impact.[74] For example, in *Nucleus of Chicago Homeowners Association v. Lynn*,[75] the plaintiffs requested a court interpreting NEPA to accept the proposition that low income people, as contrasted with the more affluent, "possess a higher propensity toward criminal behavior and acts of physical violence, a disregard for the physical and aesthetic maintenance of real and personal property, and a lower commitment to hard work."[76] The *Lynn* court refused to accept such a blatantly prejudicial view and rejected the plaintiffs' claim.[77] Perhaps the real question which the district court had to decide was whether it would permit the more affluent WSURA residents to use NEPA machinery to block the construction of a public housing project.

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69. *Id.* at 1074-75.

70. *Id.* at 1073. The court stated "that the tipping point of a community is that point at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of instability which result in the deterioration of the neighborhood environment." *Id.* at 1065-66. *See* Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974).

71. 387 F. Supp. at 1064. The court expressly rejected the proposition that anti-social behavior and the propensity to induce neighborhood deterioration could be associated with low income families. *Id.* at 1065.

72. *Id.* at 1079, 1083.

73. *Id.* at 1078. The court stated, "[T]he quality of community services such as the degree of crime, police protection, schools, hospitals, fire protection, recreation, transportation, and commercial establishments are essential to a NEPA study." *Id.*

74. *Id.* at 1078-79. *See Tipping*, *supra* note 19, at 44.

75. 372 F. Supp. 147 (N.D. Ill. 1973), *aff'd*, 524 F.2d 225 (1975), *cert. denied*, 424 U.S. 967 (1976).

76. *Id.* at 149.

77. *Id.* at 150.

The district court in *Trinity School*, citing with favor the result in *Lynn*,[78] held that "neither the alleged antisocial propensities of low income persons nor the fears which their increasing presence may engender are objective criteria of community stability and as such do not fall within the ambit of a NEPA study."[79] As a result, the court upheld HUD's determination that the conversion of Site 30 to public housing would have a minimal environmental impact and found that such determination was neither arbitrary nor capricious.[80]

B. The Court of Appeals Decisions

In the first appeal from the district court opinion, the Court of Appeals for the Second Circuit[81] upheld the district court on the tipping,[82] breach of contract,[83] and the WSURA Plan compliance issues,[84] but reversed and remanded on the environmental issue.[85] On remand, the district court was directed to require that HUD study alternatives, consistent with the WSURA Plan, to the proposal to change Site 30 to 100% low income housing.[86] Even though upholding HUD's determination that an Environmental Impact Statement was not required,[87] the court of appeals found that HUD's acceptance of the Housing Authority's conclusion that no alternatives existed to the proposed development of Site 30 failed as a matter of law to meet NEPA directives[88] because "unresolved conflicts" remained concerning "alternative uses of available resources."[89]

While the court of appeals expressly rejected the tipping argument, it appeared to sympathize with the plaintiff's position. In what

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78. 387 F. Supp. at 1079.
79. *Id. See Tipping, supra* note 19, at 44.
80. 387 F. Supp. at 1079.
81. Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975).
82. *Id.* at 92.
83. *Id.* at 91.
84. *Id.*
85. *Id.* at 95.
86. *Id.* The court indicated that HUD should consider alternative locations for the project, the dispersal of the low income units throughout the area, the possibility of rehabilitating existing buildings, and the alternative of not building the project at all. *Id.* at 92.
87. *Id. See* note 65 *supra.*
88. 42 U.S.C. § 102(2)(E) (1976). When the court of appeals rendered its decision in 1975, the section was codified at 42 U.S.C. § 4332(2)(D). The section was redesignated by Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424. The section requires HUD to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."
89. 523 F.2d at 93, 95.

seemed like a pouring of the old "tipping" wine of *Otero*[90] into a new environmental bottle, the court held that NEPA gave the plaintiffs the substantive right to live in an integrated community and that integration must be consistent throughout the WSURA.[91] This right could not be realized by concentrating low income housing on one street and "compensating for this segregation by an equal concentration of middle-income housing" on another street.[92] The court of appeals thus not only interpreted NEPA as granting substantive, rather than merely procedural rights, but also transposed the *Otero* standard, used in limiting racial segregation, to a case involving limits on economic segregation.

On remand,[93] the district court examined a revised Special Environmental Clearance submitted by HUD and declared itself satisfied that HUD had complied with the mandate of the court of appeals.[94] HUD's principal arguments were, as before, that a transfer of the Site 30 project to an alternative site would unduly delay the commencement of construction and that middle class resistance to low income housing would be equal or greater at all alternative sites.[95] The district court accepted HUD's arguments, finding no abuse of discretion within the meaning of the Administrative Procedure Act.[96] The court granted HUD's motion for summary judgment, lifted the injunction against low income development of Site 30, and dismissed the complaint.[97]

The plaintiffs appealed once again to the Second Circuit. In *Karlen v. Harris*,[98] the court of appeals, in an extraordinary intervention in agency decision making processes, stated that NEPA's substantive requirements would be disserved by the city's decision to build a "17-story apartment building exclusively for low-income tenants in an area already containing a high percentage of low-income housing."[99] The court stated that the city's proposed development of Site 30 would

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90. Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973); *see* note 57 *supra* and accompanying text.

91. 523 F.2d at 94.

92. *Id.* at 95.

93. Trinity Episcopal School Corp. v. Harris, 445 F. Supp. 204 (S.D.N.Y. 1978).

94. *Id.* at 217-18.

95. *Id.* at 216.

96. *Id.* at 220. The relevant section of the Administrative Procedure Act is codified at 5 U.S.C. § 706(2)(A) (1976).

97. 445 F. Supp. at 223.

98. 590 F.2d 39 (2d Cir. 1978).

99. *Id.* at 43. By its decision, the court of appeals clearly incorporated a "substantive aim of dispersal of low-income housing" into NEPA law in the Second Circuit. *See Tipping*, *supra* note 19, at 38.

create an undue concentration of low income housing in the immediate area, creating an impermissible alteration of the environment within the meaning of NEPA.[100] Because HUD, solely in order to avoid construction delay,[101] had chosen Site 30 over two sites which the court of appeals considered environmentally superior, the court considered HUD's decision an abuse of discretion.[102] The court of appeals again remanded the case to the district court, with instructions that HUD take steps to alleviate the shortage of low income housing in a manner that would avoid the "concentration" of such housing on Site 30.[103]

C. The Supreme Court Decision

The defendants appealed the court of appeals decision directly to the Supreme Court. The Supreme Court's *per curiam* summary reversal of *Karlen* in *Strycker's Bay Neighborhood Council v. Karlen*[104] was startlingly brief. Holding that the court of appeals had departed from the confines of the Administrative Procedure Act, the Court stated that NEPA created procedural, not substantive, rights.[105] A reviewing court's only role under NEPA is to insure that the agency has "considered" the environmental consequences.[106] Under no circumstances may a reviewing court "interject itself within the area of discretion of the executive as to the choice of the action to be taken."[107]

The Supreme Court, commenting on an ambiguous record, interpreted the court of appeals holding not as overturning an arbitrary or capricious decision by HUD,[108] but rather as an attempt by the court

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100. *Id.* at 43-44. *See* Douw, *Poor People as Environmental Hazards*, 10 SOC. POLICY 29 (1979).

101. 590 F.2d at 44.

102. *Id.* at 45.

103. *Id.*

104. 444 U.S. 223 (1980).

105. *Id.* at 227.

106. *Id.*

107. *Id.* at 227-28, *citing* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976), *citing* National Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972). *See* Note, *The Decline of the Environmental Mandate: Strykers' Bay—A Modern West Side Story*, 41 LA. L. REV. 1354 (1981) [hereinafter cited as *West Side Story*] for a review of the standards governing NEPA law prior to the *Stryckers' Bay* decision. *Cf.* Aertsen v. Landrieu, 488 F. Supp. 314, 322-23 (D. Mass. 1980) (interpreting the standards governing NEPA and Title VIII).

108. 444 U.S. at 228 n.2. Although the court of appeals carefully avoided stating that HUD's decision was arbitrary and capricious, the court did find the decision reversible as a matter of law. "We find that HUD's acceptance of the 'no alternatives' conclusion as a matter of law fails to meet the directive of 102(2)(D) of NEPA." 523

to impose its own priorities on HUD's decision-making process. The court of appeals had refused to accept HUD's elevation of other, admittedly legitimate considerations, over environmental concerns.[109] According to the Supreme Court, such a "reordering of priorities by a reviewing court" was impermissible.[110] The Court held that NEPA required no more of HUD than that it "consider" the environmental consequences of its decisions and that NEPA was concerned with procedural inputs rather than substantive outcomes.[111]

The ideologies of the protagonists in the Site 30 case seem ironically inverted. On the one hand, an organization dedicated to the economic and ethnic integration of the West Side took an "anti-integration" stance: it was necessary to build a 100% low income project on Site 30 in order to insure a minimum number of low income persons in the WSURA as a whole. On the other hand, persons and organizations opposed to the construction of new low income units in the WSURA, attempted to block the 100% low income project under the banner of "integrated housing" in order to promote residential class segregation in the WSURA as a whole.[112]

Raising the banner of integration, the conservative forces in the Site 30 case were rewarded with a dissent from Justice Marshall.[113] Marshall's opinion, while taking a liberal view on challenges to agency decision-making, would help preserve the environment that the plaintiffs sought to maintain.[114] The majority opinion is just the opposite—the decision removes an obstacle to the ethnic and economic

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F.2d at 95. A decision "not in accordance with law," however, is as violative of the Administrative Procedure Act as one which is arbitrary and capricious. 5 U.S.C. § 706(2)(B) (1976).

109. 444 U.S. at 228 n.2. Thus, the Court's decision constitutes an "implict acquiescence in the view that the concept of the 'environment' contemplated by NEPA is broad enough to include the issue of whether or not low-income public housing sites are sufficiently dispersed." *Tipping, supra* note 19, at 39. *But see West Side Story, supra* note 107, which concludes that *Strycker's Bay* transforms the "laudable goals" of NEPA into "merely empty aims." *Id.* at 1374.

110. 444 U.S. at 228 n.2.

111. *Id.* at 227.

112. It is perhaps for this reason that one commentator has called upon the Supreme Court to rule NEPA wholly inapplicable to issues of low income and minority housing concentration. *See Tipping, supra* note 19, at 32. The commentator argues that the inclusion of such concerns constitutes an unprecedented extension of the statute, *id.* at 39-45, is unsupported by its plain meaning or by the legislative history, *id.* at 45-46, and is inadvisable as a matter of policy. *id.* at 46-60.

113. 444 U.S. 223, 228 (1980) (Marshall, J., dissenting).

114. Justice Marshall never expressly supported plaintiffs' position in favor of maintaining the status quo in the WSURA. If the Court had adopted Justice Marshall's position on the procedural law, however, the effect would have been to maintain the status quo for several more years while HUD was forced to reconsider its options.

integration of the WSURA—its interpretation of environmental law, however, is quite conservative in that it discourages judicial review of the administrative process.[115]

Justice Marshall sought to distinguish the case relied upon by the majority, *Vermont Yankee Nuclear Power Corp. v. NRDC*,[116] as a case which did no more than prohibit a court from substituting its judgment for that of an administrative agency.[117] According to Marshall, the reviewing court's duty to insure that an agency's decision is not arbitrary or capricious requires it to review the standards for decision-making established by relevant legislation and to determine that the agency has in fact conformed to those standards.[118] Such a review would necessarily involve an independent examination by the appellate court and would go beyond a cursory glance to see if the agency had complied with the minimum necessary formalities.[119] The reviewing court's examination would still be "essentially procedural,"[120] according to Marshall, but would permit the reviewing court to require the agency to take a "hard look" at the environmental consequences of its actions.[121] Justice Marshall argued that if HUD had decided to reject environmentally preferable alternatives solely to avoid delay, such a decision was *prima facie* arbitrary and capricious and, therefore, of sufficient controversy to merit plenary consideration by the Court.[122]

Despite HUD's "victory" at the Supreme Court level, construction of the Site 30 project has yet to begin. The plaintiffs in this protracted litigation may have succeeded in their goal of blocking construction simply by creating so many delays[123] that HUD and the city can no

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115. 444 U.S. at 227-28.

116. 435 U.S. 519 (1978).

117. 444 U.S. at 229-31. Plaintiffs in *Vermont Yankee* sought to block the construction of nuclear power plants by challenging the Atomic Energy Commission's procedures in granting licenses. In an opinion written by Justice Rehnquist, the Court held that "[a]bsent constitutional constraints or extremely compelling circumstances," federal agencies must be left free to conduct their proceedings within the guidelines set for them by Congress and the agencies themselves. 435 U.S. at 543.

118. 444 U.S. at 230-31.

119. *Id.*

120. *Id.*

121. *Id.* at 231. *See, e.g.*, Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C.C. 1971) (consideration of environmental matters must be more than a "*pro forma* ritual"). *See also West Side Story*, *supra* note 107, at 1358, 1364, 1368.

122. 444 U.S. at 231.

123. One indication that plaintiffs were well aware of the delays they were causing appeared in plaintiff Trinity School's newspaper shortly after Judge Cooper rendered his first decision in 1974. The article stated that Trinity School had yet to decide whether to appeal the decision, but noted "[a]n appeal by Trinity to a higher

longer afford to finance the project.[124] Such a result would be unfortunate. HUD predicted in 1978 that the failure to provide low income housing on Site 30 would "unquestionably lead to inter-group tension in the neighborhood which would be a potential adverse social environmental impact of greater magnitude than the more limited potential adverse effects of public housing construction on Site 30."[125]

III. Philadelphia: *Business Association of University City v. Landrieu*

Attempts to construct housing for low income families in Philadelphia often have been met by challenges from area residents and businessmen.[126] Although the challenges usually fail,[127] they do suc-

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court would delay construction for an estimated two more years. . . ." The Trinity Times, Dec. 19, 1974, at 1.

124. Furthermore, the Reagan Administration has indicated that HUD will no longer supervise the implementation of the WSURA Plan. N.Y. Times, Dec. 11, 1981, at B3, col. 3. Construction may therefore begin on fair market rental buildings without guarantees that low income units will also be built. *Id.*

125. 445 F. Supp. at 218.

126. The opposition to HUD projects in two neighborhoods illustrates some of the problems Philadelphia has had. In the Whitman Park section of Philadelphia, HUD has been attempting to construct a public housing project since 1956. Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 995 (E.D. Pa. 1976), *aff'd in relevant part*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). Whitman Park is a predominantly white neighborhood which once housed a greater proportion of black residents. 425 F. Supp. at 1009. From 1956 to 1976, Whitman Park residents managed to block the construction of the housing project by challenging HUD's every move, engaging the support of city government, and organizing mass demonstrations at the housing site. *Id.* at 993–1006. In 1976, a federal judge, noting that "The City of Philadelphia is today a racially segregated city" *id.* at 1006, ordered construction to begin on the Whitman Park project. *Id.* at 1029. After Whitman Park residents had unsuccessfully pressed their appeal to the Supreme Court, 435 U.S. 908, they attempted to block construction by arguing, as had the plaintiffs in New York's Site 30 case, *see* Section II *supra*, that HUD had not complied with the National Environmental Policy Act, 42 U.S.C. §§ 4321–4361 (1976 & Supp. III 1979). Sworob v. Harris, 451 F. Supp. 96 (E.D. Pa. 1978), *aff'd*, 578 F.2d 1376 (3d Cir.), *cert. denied*, 439 U.S. 1089 (1979). The court held that the plaintiffs' claim was barred by res judicata and the doctrine of laches. 451 F. Supp. at 101. After unsuccessfully pressing their appeal to the Supreme Court a second time, 439 U.S. 1089, Whitman Park residents picketed the construction site. When several picketers blocked entrances in defiance of an injunction, they were arrested by police. United States v. Pyle, 518 F. Supp. 139 (E.D. Pa. 1981). The picketers were convicted of criminal contempt, *id.* at 143, and their convictions were upheld on appeal, *id.* at 162 (one defendant was acquitted on appeal). Construction has yet to be completed on the project, *id.* at 141, more than 25 years after the site was approved.

In the Washington Square West area of Philadelphia, low and moderate income persons, predominantly nonwhite, were displaced by urban renewal activities in the 1960's. Fox v. HUD, 468 F. Supp. 907, 909–10 (E.D. Pa. 1979). When HUD and the city failed to provide replacement housing in the neighborhood for low and moderate

ceed in delaying the construction of the housing for several years.[128] In *Shannon v. HUD*,[129] however, neighborhood residents and businessmen in an urban renewal area successfully blocked federal subsidies to a low income housing project on the ground that further assistance could result in an undue concentration of minorities in the neighborhood.[130] When businessmen in the University City section of Philadelphia, a neighborhood now being gentrified, recently challenged HUD's plan to construct low income housing in that area, they naturally relied on *Shannon* in support of their position.[131]

A. The Third Circuit's Decision in *Shannon*

The plaintiffs in *Shannon* were residents, businessmen and representatives of private civic organizations based in an urban renewal

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income persons, the displacees sought to enjoin further urban renewal activities in the area, alleging that HUD had "transformed a formerly racially and economically integrated community into a predominantly white, affluent one." *Id.* at 910. After 10 years of litigation, a federal court approved a settlement in 1978 whereby HUD agreed to fund new housing for the displacees in the Washington Square West area. *Id.* at 910-11.

The challenges to the construction of low income housing in Philadelphia have extended well beyond the Whitman Park and Washington Square West neighborhoods. The *Resident Advisory Bd.* court observed, "In the years between 1967 and 1972, several public housing projects, in addition to the Whitman Park Townhouse Project, were proposed for construction in predominantly White areas, but were never completed because of public opposition." 425 F. Supp. at 1009. As a community group representing low income persons argued in Business Ass'n of Univ. City v. Landrieu, 660 F.2d 867 (3d Cir. 1981), "The City of Philadelphia has had a long history of abysmal performance in providing housing opportunities for low-income minority families. . . ." Brief for Appellees, Resident Advisory Bd. and Tenant Action Group at 1.

127. *See, e.g.*, Sworob v. Harris, 451 F. Supp. 96 (E.D. Pa. 1978), *aff'd*, 578 F.2d 1376 (3d Cir.), *cert. denied*, 439 U.S. 1089 (1979) (second challenge to Whitman Park project barred on res judicata and laches grounds); Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976), *aff'd in relevant part*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (first challenge to Whitman Park project defeated).

128. In the Washington Square West neighborhood, *see* note 126 *supra*, plaintiffs seeking relief against discriminatory practices by HUD were not afforded relief until 10 years had passed. Fox v. HUD, 468 F. Supp at 909. In the Whitman Park neighborhood, *see* note 126 *supra*, construction has yet to be completed on a project delayed since 1956. United States v. Pyle, 518 F. Supp. at 141.

129. 436 F.2d 809 (3rd Cir. 1970). *See* notes 132-140 *infra* and accompanying text.

130. 436 F.2d at 822-23.

131. Brief for Appellants at 13-14, Business Ass'n of Univ. City v. Landrieu, 660 F.2d 867 (3d Cir. 1981) (arguing that under *Shannon*, "[i]t is now well settled that HUD has an affirmative duty to promote racial integration through its housing policy," *id.* at 13).

area of Philadelphia.[132] They sought to enjoin HUD not only from providing mortgage insurance[133] to a subsidized housing project in the neighborhood, but also from making rent supplement payments[134] to the project's tenants.[135] The plaintiffs argued that the project would increase "the already high concentration of low income black residents"[136] in the neighborhood. They further contended that HUD should be required to consider the effects its selection of a housing site would have on any racial concentration in the surrounding area.[137] The district court dismissed the complaint.[138] The Third Circuit vacated the order of dismissal and instructed the district court to enjoin further HUD assistance to the project[139] until HUD considered the effects that its decision would have on racial concentration in the area.[140] The court of appeals acknowledged the need to continue building housing for low and moderate income persons, but recognized a concurrent need to promote racially and economically integrated housing. It determined that HUD must adopt some institutionalized method for including the goal of integrated housing in its planning and decision-making process, but stopped short of deciding what priority that goal should have.[141]

Pursuant to *Shannon* and the Second Circuit's decision in *Otero*,[142] Congress incorporated into the Housing and Community Develop-

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132. 436 F.2d at 811. According to the court, the plaintiffs included both white and black residents and both homeowners and tenants. *Id.* The urban renewal area was the East Poplar Urban Renewal Area, a neighborhood containing a number of public housing projects at the time of the litigation. *Id.* at 819.

133. Mortgage insurance is available under the National Housing Act of 1934, 12 U.S.C. § 1715l (1976 & Supp. III 1979).

134. For a discussion of HUD's program for making rent supplement payments, *see* note 144 *infra*.

135. The housing project, Fairmont Manor, was completed before the Third Circuit rendered its decision, but HUD had yet to issue a mortgage insurance contract for the project. 436 F.2d at 812.

136. *Id.*

137. *Id.* Thus plaintiffs challenged not only HUD's substantive decision, but also its decision-making process.

138. *Id.*

139. *Id.* at 822-23. The court prohibited further assistance to the project as a whole and expressly exempted from its order rent supplement payments made directly to qualified tenants in the project.

140. *Id.*

141. *Id.* at 820-23. The court cited Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3610-3613 (1976 & Supp. III 1979), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1976), in support of its position. *Id.*

142. Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973). *See* note 57 *supra* and accompanying text.

ment Act of 1974,[143] requirements that HUD officials consider the impact that Section 8 housing subsidies[144] may have on the racial and economic concentration of a neighborhood.[145] The administrative regulations adopted in the wake of the 1974 Act left no doubt that Congress sought to promote integrated neighborhoods as part of the nation's housing policy.[146]

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143. 88 Stat. 633 (codified in scattered sections of 5, 12, 20, 31, 40, 42, 49 U.S.C. (1976 & Supp. III 1979)).

144. The original Section 8 of the United States Housing Act of 1937, Pub. L. No. 75-412, § 8, 50 Stat. 888, 891, authorized the United States Housing Authority to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act." The Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201 (a) (codified at 42 U.S.C. §§ 1437-1437j (1976 & Supp. III 1979)), amended the 1937 Act and added a new Section 8 (codified at 42 U.S.C. § 1437f (1976 & Supp. III 1979)). The purposes and scope of the new Section 8 are broad: "For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this section." 42 U.S.C. § 1437f(a) (1976). Under the current law, the Secretary of Housing and Urban Development may enter into "annual contribution contracts" with local public housing agencies, or if no public housing agency is qualified, with private owners of buildings. *Id.* § 1437f(b). These contracts guarantee that HUD will pay owners the difference between the maximum monthly rent which the owner is entitled to receive (based on fair market rental rates in the area) and the amount which a low income family can afford to pay. *Id.* § 1437f(c) (1976 & Supp. III 1979). The contracts permit owners to select their tenants, but owners must give "preference to families which occupy substandard housing or are involuntarily displaced at the time they are seeking assistance under this section." *Id.* § 1437f(d)(1)(A). *See generally Section 8 Leased Housing Assistance Program: Hearings Before a Subcomm. of the Comm. on Government Operations*, 95th Cong., 1st & 2d Sess. (1977-78).

145. *See, e.g.*, 42 U.S.C. § 1437d(c)(4)(A) (1976 & Supp. III 1979), which requires local housing agencies dispersing Section 8 subsidies to establish "tenant selection criteria designed to assure that, within a reasonable period of time, the project will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious social problems. . . ."

146. 24 C.F.R. § 880.206(c)(1) (1981), for example, requires that no site for a Section 8 "new construction" project may be located in:

> An area of minority concentration unless (i) sufficient, comparable opportunities exist for housing minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area.

The regulation further provides that the second exception does not apply if the lack of feasibility is due to discrimination in other neighborhoods. *Id.* The regulations also require that the site "avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons." *Id.* § 880.206(d). The site selection criteria for Section 8 "substantial rehabilitation" projects are less stringent but reveal a similar purpose. *Id.* § 881.206(c) (site must avoid "undue concentration," but no requirement comparable to § 880.206(c)(1)).

B. The Third Circuit and Gentrification

In *Business Association of University City v. Landrieu*,[147] two local business organizations sought to enjoin HUD from providing Section 8 rental subsidies[148] to a low income private housing project scheduled for construction in a gentrified neighborhood.[149] The project was to be built within the gentrified area surrounding the University of Pennsylvania, but adjacent to a black ghetto.[150] Pursuant to HUD guidelines,[151] a Fair Housing/Equal Opportunity specialist reviewed 1970 census data and other information[152] concerning the area surrounding the project and determined that even if the area had been "racially impacted"[153] in 1970, it was no longer impacted at the time of his review.[154] The specialist concluded that the neighborhood's minority population had decreased significantly since 1970 because of gentrification and the general redevelopment of the area.[155]

The plaintiffs alleged that HUD did not fulfill its responsibilites under the Section 8 program[156] and Title VIII of the Civil Rights Act of 1968[157] when it failed to adequately consider the increased concen-

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147. 660 F.2d 867 (3d Cir. 1981).

148. 42 U.S.C. § 1437f (1976 & Supp. III 1979). *See* note 144 *supra*.

149. 660 F.2d at 871, 874.

150. The 1970 census indicated that the University City area (Census Tract 88) had a 13.9% non-white population. *Id.* at 871. Two communities abutting University City and located close to the proposed project, Census Tracts 91 and 92, had minority populations of 65.3% and 98.4% respectively. *Id.*

151. 24 C.F.R. § 880.206 (1981).

152. The specialist inspected the site, spoke with local realtors, and reviewed statistics concerning students at the local elementary school. 660 F.2d at 873. The specialist had been a resident of the area for almost 20 years, *id.* at 872, and used his personal knowledge of housing patterns to supplement his findings, *id.* at 873.

153. The court found that HUD's internal guidelines indicate that a racially impacted area is one in which minorities represent more than 40% of the total population. *Id.* at 872.

154. *Id.* at 873.

155. *Id.* at 873-74. The court never required HUD to specify the boundaries of the non-impacted area. The court stated, "[t]he definition of the relevant 'area' is necessarily a highly subtle judgment which can be formed through an assessment of past, existing and future housing patterns, social interaction betweeen members of the community, and economic development." *Id.* at 874. The HUD specialist's conclusion that the site was situated in a gentrified and "increasingly white middle class section of the City" was sufficient for the court. *Id.*

156. *See* notes 144-46 *supra* and accompanying text.

157. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3631 (1976 & Supp. III 1979)) declares: "It is the policy of the United States to provide, within constitutional limitation, for fair housing throughout the United States." Accordingly, Title VIII prohibits discrimination on the basis of race, color, religion, sex, or national origin in the sale or rental of housing, 42 U.S.C. § 3604, the financing of housing, *id.* § 3605, and the provision of

tration of minorities and low income persons that would result from the construction and rental of the subsidized units.[158] They further argued that placement of a low income housing project next to a racially impacted area constituted an impermissible racial concentration as a matter of law.[159] The plaintiffs also contended that HUD should be required to review whether the project "constituted a rational utilization of land and resources."[160] The district court rejected the plaintiffs' arguments and denied their request for an injunction.[161]

On appeal, the court of appeals reviewed HUD's procedure for approving Section 8 projects[162] and found that HUD had not abused its discretion in selecting the University City site.[163] The court held that HUD had adequately considered whether the project would be built in an area of minority concentration, even though HUD had not made a formal study of the changes which had occurred in the neigh-

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brokerage services, *id.* § 3606. HUD's duty to promote fair housing extends to "prospective situations as well as to past or continuing practices in the private and public sector." Munoz-Mendoza v. Pierce, 520 F. Supp. 180, 185 (D. Mass. 1981). 24 C.F.R. § 105 is the enabling regulation for Title VIII and sets forth HUD procedures with respect to discriminatory housing practice complaints filed under Section 810 of Title VIII. 24 C.F.R. § 106 provides for HUD administrative meetings to carry out the fair housing objectives of Title VIII.

158. 660 F.2d at 869.

159. *Id.* at 871-72.

160. *Id.* at 872.

161. *Id.*

162. *Id.* at 873-75. A developer seeking to build new rental housing under the Section 8 program must comply with a number of agency procedures before construction may begin. *See* Section 8 Housing Assistance Payments Program for New Construction, 24 C.F.R. §§ 880.102, .301-.311 (1981). HUD's selection process begins with its publication of a "notification of funds availability" (NOFA), informing local developers of a planned Section 8 project. *Id.* § 880.102(b). The developers obtain a detailed "developer's packet" at their HUD field office. *Id.* Each developer then submits a preliminary proposal which must contain, *inter alia*, sketches of the proposed housing, descriptions of the proposed site and neighborhood, the projected rent per unit, information about any persons who will be displaced by the new housing, and the proposed methods and terms of financing the project. *Id.* § 880.305. The developer must also certify in his preliminary proposal that he intends to comply with a number of fair housing statutes. *Id.* § 880.305(h) (1981). Once HUD receives and reviews the preliminary proposal, it ranks them and selects the highest ranking proposals. 24 C.F.R. § 880.102(c) (1981). The developers who submitted selected preliminary proposals must then submit final proposals. *Id.* § 880.102(d). These final proposals must contain more detailed architectural drawings, site plans, and cost estimates. *Id.* § 880.308. When HUD approves a final proposal, the developer must then submit its architect's working drawings for review. *Id.* § 880.102(d). Once HUD finds everything in order, it enters into an agreement with the developer which states that the parties will enter into a contract on the successful completion of the project which will provide the owner of the project with housing assistance payments. *Id.*

163. 660 F.2d at 869.

borhood since the 1970 census.[164] The court also rejected the plaintiffs' argument that mere proximity to a racially impacted area should defeat the project.[165] Furthermore, the court held that while HUD should promote rational land use, Congress did not intend "to require HUD to consider the site's most economically rational land use in each housing decision."[166]

The court of appeals distinguished its present decision to deny the plaintiffs' request for an injunction from its decision eleven years earlier in *Shannon*, which granted injunctive relief to plaintiffs representing similar interests.[167] *Shannon*, according to the court, "only required housing officials to thoughtfully weigh the question of racial impact."[168] In interpreting *University City*, however, it is important to note that the fact pattern was somewhat different from *Shannon*. The *University City* court acknowledged that HUD had been withholding $21,000,000 in block grants to Philadelphia because of the city's poor record in constructing low income units in non-impacted areas.[169] These circumstances lent additional credence to HUD's analysis of racial factors.[170]

As in *Strycker's Bay*, the plaintiffs in *University City* opposed the construction of low income housing on the ground that it would not

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164. The court stated that in view of the specialist's experience in the area, no formal study was required. *Id.* at 874.

165. Plaintiffs had argued that if the site for the project were moved across the street into Census Tract 91, then it could not be built because it would be located in an impacted area. *Id.* at 875. Plaintiffs also contended that the project's tenants "would much more likely relate to the neighborhood directly across the street" than the gentrified University City neighborhood. *Id.* The court politely rejected plaintiffs' view, stating, "[w]e declined to hold as a matter of law that the population of proposed projects will necessarily become part of nearby racially concentrated communities." *Id.*

166. *Id.* at 877. Plaintiffs made a final claim on appeal, which the court rejected. They argued that the district court's expedited hearing schedule was an abuse of discretion because it limited their ability to prepare for trial. *Id.* The court of appeals found no serious prejudice to the plaintiffs. *Id.* at 878.

167. *See* notes 132-140 *supra* and accompanying text.

168. 660 F.2d at 874. The court correctly stated that *Shannon* "did not mandate the adoption of extensive procedures to investigate all housing possibilities which would result in undue delay to the start of construction." *Id.* (citation omitted). In *Shannon*, the court stated, "[w]e hold only that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration." 436 F.2d at 822.

169. 660 F.2d at 871, 878.

170. The court was reluctant to impose any requirements which would further delay the construction of low income housing, "a critical factor in this case in light of the withholding of federal funds." *Id.* at 874.

serve the purposes of integration. If the plaintiffs' arguments were accepted, however, a gentrified community would succeed in impeding the forces of economic and racial integration throughout the city. The Third Circuit appreciated the irony of the plaintiffs' position when it noted that "under the guise of their concern about the poor and minorities, business interests would probably acquire this land, and the poor and minorities might be forced to live in areas far more racially concentrated and poverty-stricken. . . ."[171] The court properly refused to expand the *Shannon* doctrine "beyond the limits of its logic."[172]

In a concurring opinion,[173] Judge Adams stated that the issue before the court should have been limited to whether HUD had abused its discretion under the Administrative Procedure Act.[174] Citing *Citizens to Preserve Overton Park v. Volpe*,[175] Judge Adams argued that HUD's decision should not be set aside without a showing "that HUD has acted arbitrarily or capriciously, has abused its discretion, or committed a clear error of judgment. . . ."[176] The *Volpe* decision, however, was cited by Justice Marshall in the dissenting opinion in *Stryker's Bay* as standing for the proposition that "the arbitrary or capricious standard prescribes a 'searching and careful' judicial inquiry designed to ensure that the agency has not exercised its discretion in an unreasonable manner."[177] Although the majority opinion in *Stryker's Bay* called for a less strict standard, it did so in the context of a NEPA claim and not pursuant to an action brought under Title VIII as in *University City*.

IV. Chicago: *Alschuler v. HUD*

As in New York[178] and Philadelphia,[179] the placement of low income housing in some of Chicago's more affluent neighborhoods has

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171. *Id.* at 878.
172. *Id.*
173. *Id.* at 879-80 (Adams, J., concurring).
174. 5 U.S.C. § 706 (1976). The Act requires reviewing courts "to hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." *Id.* § 706(2)(A).
175. 401 U.S. 402 (1971).
176. 660 F.2d at 880.
177. Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 231 (1980) (Marshall, J., dissenting) (*citing* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).
178. *See* note 5 *supra*.
179. *See* notes 126-28 *supra* and accompanying text.

often been met with resistance.[180] The courts have found that even the Chicago Housing Authority, the agency responsible for implementing fair housing programs in the city, has promoted segregationist policies.[181] Opposition to economic and racial integration continues today in Chicago's Uptown, where representatives of a gentrified community seek to enjoin HUD from providing assistance to an apartment rehabilitation project for low income tenants.[182]

Chicago's Uptown is a large[183] and diverse[184] community in need of low income housing.[185] A section of the Uptown area has been gentri-

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180. *See, e.g.*, Gautreaux v. Chicago Hous. Auth., 436 F.2d 306 (7th Cir.), *cert. denied*, 402 U.S. 922 (1971), in which the court approved of deadlines set for the placement of low income housing in middle class neighborhoods. The court rejected arguments that plans to promote racially integrated low income housing would result in "racial tension in the city to the point of strife" and the "acceleration of an already alarming flight to the suburbs by middle class White families." 436 F.2d at 309.

181. Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969) (ruling that Housing Authority had denied entry to blacks in four predominantly white, low income housing projects because of racial quotas). A line of *Gautreaux* (name of a black resident of a housing project in Chicago) cases since the district court's decision in 1969 illustrates the problems Chicago has had in providing integrated low income housing. In Gautreaux v. Chicago Hous. Auth., 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir.), *cert. denied*, 402 U.S. 922 (1971), the courts formulated an affirmative plan to remedy the effects of past discrimination, Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), held that HUD's acquiescence to the Chicago Housing Authority's discriminatory policies violated civil rights laws and the due process clause of the fifth amendment. In Gautreaux v. Romney, 332 F. Supp. 366 (N.D. Ill. 1971), *rev'd*, 457 F.2d 124 (7th Cir. 1972), the district court attempted to enjoin HUD's payment of "model cities" funds to Chicago until the city complied with fair housing standards, but the court of appeals reversed, holding that the lower court had abused its discretion. Gautreaux v. Chicago Hous. Auth., 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd sub nom.* Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974), required the city to accelerate its implementation of fair housing programs. In Gautreaux v. Chicago Hous. Auth., 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976), the district court's decision not to expand the remedial housing plan beyond Chicago's city limits to include the greater metropolitan area was rejected on appeal. The most recent decision, Gautreaux v. Pierce, 524 F. Supp. 56 (N.D. Ill. 1981), held that HUD's final report on Chicago's efforts to comply with fair housing goals was deficient and that HUD must file a "revised final report."

182. Alschuler v. HUD, 515 F. Supp. 1212, 1215 (N.D. Ill. 1981), *appeal docketed*, No. 81-1904 (7th Cir. June 9, 1981).

183. Uptown is the largest, in terms of both population and housing units, of Chicago's 76 communities designated for census purposes. *Id.* at 1218.

184. One commentator views the area as "a lively multiracial neighborhood, a new kind of urban melting pot." Schept, *The Fight for City Turf*, Nat'l L.J., July 13, 1981, at 1, col. 1. Some Uptown residents, however, consider themselves part of older and smaller neighborhoods within the Uptown area. 515 F. Supp. at 1219, *citing* E. WARREN, CHICAGO'S UPTOWN: PUBLIC POLICY, NEIGHBORHOOD DECAY, AND CITIZEN ACTION IN AN URBAN COMMUNITY 15 (1979).

185. 515 F. Supp. at 1218, 1224.

fied in recent years as "upper middle class and middle class individuals have moved into the neighborhood, have rehabilitated existing housing stock and have encouraged new private investment."[186] In 1979, a developer responded to a HUD notice of funds availability[187] and proposed to rehabilitate the Monterey Apartments, two buildings located inside the gentrified community,[188] with funds provided by the Section 8 program.[189] Under the proposal, all tenants of the Monterey Apartments would be eligible for rent subsidies.[190] Although the developer could not state for certain what the racial mix of the tenants would be, he estimated that one half of the tenants would be non-white.[191] HUD conducted an extensive review of the developer's proposal and granted an initial endorsement of the project in 1980.[192]

A community organization, whose membership consists primarily of affluent whites[193] who live in the gentrified area surrounding the Monterey Apartments, sought to enjoin HUD's funding of the project.[194] In *Alschuler v. HUD*,[195] the plaintiffs[196] argued that HUD's

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186. *Id.* at 1223. The court described the process as "an urban phenomenon that has come to be known as 'gentrification.' " *Id.*

187. 24 C.F.R. § 881.102(b) (1981), requires HUD to issue a notice of funds availability (NOFA) whenever it seeks to solicit bids for a Section 8 rehabilitation project.

188. One of the buildings was constructed in the 1920's and served as an apartment hotel for transients. The developer plans to convert this building, now vacant, into an apartment house with 33 one bedroom, 44 two bedroom and 2 three bedroom apartments. A second and smaller building, also vacant, contains 3 three bedroom apartments. Thus a total of 82 units are planned for Monterey Apartments. 515 F. Supp. at 127-18.

189. *See* 42 U.S.C. § 1437f (1976 & Supp. III 1979) (authorizes Section 8 rehabilitation projects); 24 C.F.R. § 881.101-.709 (1981) (regulations applicable to Section 8 rehabilitation projects); notes 144-46, 162 *supra* on Section 8 generally.

190. 515 F. Supp. at 1218.

191. *Id.* "The proposed target level for the racial and ethnic integration of the rehabilitated Monterey buildings: 41 white families, 17 black families, 12 Hispanic families, 7 Oriental families and 4 American Indian families." *Id.*

192. *Id.* at 1224.

193. The organization, the Hutchinson—Hazel—Junior Terrace Association, represents over 60 families, all of whom are white except for one black member and one Oriental member. *Id.* at 1216-17. Most members live in large, single family homes. *Id.* at 1217.

194. *Id.* at 1215.

195. 515 F. Supp. 1212 (N.D. Ill. 1981), *appeal docketed*, No. 81-1904 (7th Cir. June 9, 1981).

196. Plaintiffs included the Hutchinson—Hazel—Junior Terrace Association, *see* note 193 *supra*, and three of its individual members: Frank Alschuler, Morton Weisman, and Diane Sokolofski. *Id.* at 1216-17. The value of the individual plaintiffs' homes were estimated to be in the $150,000 to $250,000 range. *Id.* at 1217.

provision of housing assistance payments[197] and mortgage insurance[198] to the Monterey project would constitute an abuse of discretion within the meaning of the Administrative Procedure Act.[199] They contended that the project would cause "an undue concentration of assisted persons" in the Uptown area in violation of HUD's own regulations under the Section 8 program[200] and create a racially segregated neighborhood in contravention of Title VIII of the Civil Rights Act of 1968.[201]

The court examined HUD's conclusion that no "undue minority concentrations" would result from the project.[202] Using 1970 census figures, a HUD official had calculated the number of assisted housing units in tract 321 (the location of the Monterey Apartments), the immediately surrounding tracts, and the Uptown community as a whole.[203] The official testified that "he would begin to look closely at the percentage of assisted housing units as it approached 25% of all units in an area,"[204] but that even this percentage was flexible.[205] In none of the census tracts he examined did the percentage of assisted housing units exceed eighteen percent.[206] Accordingly, the court agreed with HUD's conclusion that the rehabilitation of the Monterey Apartments for low income tenants would not cause an undue concentration of assisted persons in the surrounding area.[207]

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197. Housing assistance payments under the Section 8 rehabilitation program, *see* 42 U.S.C. § 1437f(a) (1976 & Supp. III 1979) and 24 C.F.R. §§ 881.501-.507 (1981), are comparable to those available under the Section 8 new construction program, *see* note 162 *supra*.

198. Mortgage insurance is available under the National Housing Act of 1934, 12 U.S.C. § 1715e(i) (1976 & Supp. III 1979).

199. 5 U.S.C. § 706(2)(A) (1976). *See* notes 96, 174 *supra*.

200. 24 C.F.R. § 881.206(c) (1981), requires that "[t]he site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons."

201. 42 U.S.C. §§ 3601-3631 (1976 & Supp. III 1979). *See* note 157 *supra*.

202. 515 F. Supp. at 1230-32.

203. *Id.* at 1231.

204. *Id.*

205. *Id.*

206. *Id.* at 1221. The official calculated the number of subsidized units as of July 1, 1979 and divided that figure by the total number of housing units as of the 1970 census. Although the 1970 census figures were clearly outdated, the court noted that because of new construction in the Uptown area during the 1970's, the percentages of subsidized units were probably higher than actually existed in 1979. *Id.* at 1231.

207. *Id.* at 1232. The court never defined the "relevant area" for purposes of undue concentration, probably because it did not find a high percentage of assisted housing units in *any* area near the Monterey Apartments. The court acknowledged that such definitions are based on "highly subjective judgments" and observed that "[i]n many instances the court was left with the firm conviction that boundaries of the relevant area were directly correlated to the witnesses' interest in having this court decide that relevant statistics would show a greater or lesser concentration of poor or minority residents." *Id.* at 1220.

With respect to the plaintiffs' Title VIII claim, the court again deferred to HUD's discretion. The court noted that HUD's Fair Housing Specialist, unlike her counterpart in Philadelphia,[208] had intentionally ignored the racial composition of the local public schools in determining the concentration of minorities in the area.[209] The court agreed with HUD, however, that such data bore little relation to actual neighborhood composition, given the tendency of middle class whites in the vicinity to send their children to private schools.[210] Also, the court observed, HUD had considered several factors apart from census data before determining that the Monterey project was permissible in light of HUD's Title VIII responsibilities.[211] First, HUD had reviewed the developer's "affirmative fair housing marketing plan"[212] and found it in order.[213] HUD's purpose in requiring the plan of every developer is to ensure that all racial and ethnic groups in a given area have an opportunity to learn about new subsidized housing projects.[214] Monterey's developer indicated that he would contact community organizations and advertise in both daily and ethnic newspapers in order to promote the racial and economic integration of the project.[215] Second, HUD had established that the apartments were located in Chicago's "general public housing area."[216] *Gautreaux v. Chicago Housing Authority*[217] defined this area to include those neighborhoods located more than one mile from a census tract with a non-white population greater than 30%.[218] In light of all the evidence, the court concluded that HUD had not erred in finding that the rehabilitation of the Monterey Apartments would not create a racially segregated neighborhood in contravention of Title VIII.[219]

In denying the plaintiffs' request for a preliminary injunction, the court stated that the public interest in providing decent, safe and sanitary housing for Chicago's low income residents, especially those displaced from the Uptown area by gentrification, outweighed any

208. *See* note 152 *supra* and accompanying text.
209. 515 F. Supp. at 1233.
210. *Id.* Only one of the more than 60 families belonging to the Hutchinson—Hazel—Junior Terrace Association had a child attending a Chicago public school. *Id.* at 1217.
211. *Id.* at 1233-34.
212. *See* 24 C.F.R. § 200.625 (1981).
213. 515 F. Supp. at 1233.
214. *Id.* at 1234.
215. *Id.* at 1233.
216. *Id.* at 1234.
217. 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir.), *cert. denied*, 402 U.S. 922 (1971). *See* note 181 *supra* regarding related *Gautreaux* cases.
218. 304 F. Supp. at 737.
219. 515 F. Supp. at 1234.

possible injury to the plaintiff.[220] In fact, the court found no reason to believe that the project would have any adverse impact on the plaintiffs' community.[221] The court noted that many buildings in the gentrified neighborhood had already been rehabilitated with some form of federal aid[222] and observed that the "plaintiffs have expressed no objection to private and federally subsidized development and rehabilitation in their immediate neighborhood which is directed at middle and upper income individuals."[223] As to the plaintiffs' fears that the project would attract criminals and other undesirables,[224] the court declined to accept the proposition that the rehabilitation of apartments for eighty-two low income families would cause the neighborhood to become a ghetto.[225]

The court could have decided the case solely on the basis of judicial restraint in review of agency decision-making.[226] Instead, the court chose to examine the merits of HUD's decision, following the path chosen by the Third Circuit in *University City*[227] and the district court in *Stryckers' Bay*.[228] Upon completion of its examination, the court found "no evidence that HUD committed any error, let alone a clear error, at any stage of its decision making process. . . ."[229] Though it is more important for a court to review HUD decisions where a Title VIII claim is asserted, this unequivocal conclusion raises an important question: how often are lawsuits such as these begun with little hope of success on the merits, but with some expectation of ultimate victory

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220. *Id.* at 1239. The court held that plaintiffs had failed to satisfy any of the requirements for a preliminary injunction, namely, irreparable harm, likelihood of success on the merits, a balance of hardships in plaintiffs' favor, and furtherance of the public interest. *Id.*

221. *Id.* at 1227.

222. *Id.* at 1223. The court did not specify the type of federal aid that most residents had received, but did mention that one real estate developer who was a member of the Hutchinson—Hazel—Junior Terrace Association had benefited from his participation in federal programs. *Id.*

223. *Id.* at 1224.

224. *Id.* at 1227.

225. *Id.* The court commented that "[g]iven the present strong revitalization of the Uptown community, it is also unlikely that the completion of the Monterey rehabilitation project will adversely affect property values or the 'environmental, recreational, cultural, historical, and aesthetic qualities' of the neighborhood." *Id.*

226. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971) (court refused to substitute its judgment for that of an agency); Business Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 879 (3d Cir. 1981) (Adams, J., concurring) (only issue in considering HUD's approval of a housing project should be whether HUD has abused its discretion).

227. *See* notes 147-77 *supra* and accompanying text.

228. *See* notes 63-80 *supra* and accompanying text.

229. 515 F. Supp. at 1225.

through intimidation and delay?[230] A final verdict in *Alschuler* awaits the adjudication of the plaintiffs' appeals.[231]

V. Boston: *Munoz-Mendoza v. Pierce*

The propriety of HUD's discretion in initiating urban development programs and subsidies has been challenged by Boston residents as it has been by individuals and community organizations in New York, Philadelphia and Chicago. Unlike suits brought in the other three cities, however, Boston has witnessed a legal battle by low income residents who seek to enjoin the federal funding of development projects which they argue would result in displacement. Rather than calling for HUD subsidies or grants to stabilize low income residential patterns and *prevent* gentrification,[232] in this case the residents of the South End community of Boston are attempting to block HUD programs which they believe will *cause* gentrification.[233]

The leading Boston area opinion is *Aertsen v. Landrieu*,[234] in which the First Circuit affirmed an order vacating a temporary injunction and dismissing an action brought by affluent residents of South End to enjoin HUD and the Boston Redevelopment Authority (BRA) from developing a low income housing project in the South End. In so doing, the court held that the South End residents had not established an abuse of discretion by HUD.[235] A second suit has been brought recently by low income residents of the South End community claiming that HUD programs will result in displacement and segregation. The litigation is in its formative stages, with the United States District Court for the District of Massachusetts having dismissed HUD's motion for summary judgment in *Munoz-Mendoza v. Pierce*.[236] As the

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230. Although HUD is not likely to be intimidated by such actions, private developers who are named as co-defendants as in *Alschuler* may be reluctant to provide low income housing if they run a risk of incurring losses because of delays and substantial legal fees.

231. Plaintiffs docketed their appeal five days after the district court rendered its decision on June 4, 1981.

232. In New York, Philadelphia and Chicago, low income residents concerned with the displacement effect of gentrification, support HUD subsidies for low income housing. Actions to enjoin HUD efforts were commenced by affluent residents of gentrified communities. *See* notes 50-62 (New York), 147-49 (Philadelphia), and 193-201 (Chicago) *supra* and accompanying text.

233. In Boston, low income residents of South End oppose the award of a HUD urban development action grant because they contend that it will result in displacement. *See* notes 242-43 *infra* and accompanying text.

234. 637 F.2d 12 (1st Cir. 1980).

235. *Id.* at 24.

236. 520 F. Supp. 180 (D. Mass. 1981).

federal district court begins to address the merits of the case, the First Circuit opinion in *Aertsen* will be of importance, but the factual difference between the two South End cases must not be overlooked. It should be noted, further, that the challenges in both cases involve different federal statutes and regulations.

A. The First Circuit Decision in *Aertsen*

The plaintiffs in *Aertsen*, affluent residents of the South End, filed a complaint in district court against the Secretary of HUD and the Director of BRA alleging that "HUD had committed funds to finance a proposed [low income] housing project known as Viviendas La Victoria (Victoria II) in the South End of Boston without complying with certain provisions of NEPA and the 1974 Housing Act and regulations thereunder."[237] Essentially, the complaint sought to enjoin HUD from financing Victoria II and to restrain BRA from demolishing existing structures in connection with the construction of Victoria II.

Although the district court temporarily enjoined HUD and BRA from proceeding with the Victoria II project, HUD's motion to vacate and dismiss was subsequently granted.[238] On appeal, the First Circuit considered "the plaintiffs' contentions that HUD's committment of funds violates subsection (C) and subsection (D) of § 102(2) NEPA and the preamble of the 1974 Housing Act and HUD regulations pursuant thereto."[239] In affirming the district court's order, the circuit court found that the plaintiffs had not established a violation of federal regulations or statutes. Relying on both *Shannon v. HUD* and *Stryker's Bay Neighborhood Council v. Karlen*, the court deferred to the judgment of HUD decision makers with regard to the determination that Victoria II was not a major federal action significantly affecting the quality of the human environment within the meaning of NEPA[240] and with regard to the Housing and Community Develop-

237. 637 F.2d 12, 14-15 (1st Cir. 1980).

238. *Id.* at 17.

239. *Id.* Section 102(2)(C) of NEPA provides that "to the fullest extent possible: . . . (2) all agencies of the Federal Government shall . . . (C) include in . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement [EIS] by the responsible official on . . . (i) the environmental impact of the proposed action." 42 U.S.C. § 4223 (2)(C) (1976). The alleged violation of the Housing and Community Development Act of 1974 involved §§ 101 and 104 of Title I, 42 U.S.C. § 5301 (c)(6) (1976) and 42 U.S.C. § 5304 (a)(4)(C)(ii) (1976), respectively and the regulation adopted by HUD to effectuate § 104(a)(4)(C)(ii), 24 C.F.R. § 800.112 (1981).

240. 637 F.2d at 19 ("[O]n review of an HUD determination that a proposed project does not constitute a major action the judicial function is merely to decide

ment Act requirements that integrated housing be given serious consideration.[241] The court of appeals, noting that the South End is an area of revitalization in which public and private investment is significant, with rising income levels and property values, upheld HUD's finding that the Victoria II project would not cause an "undue concentration" of low income persons.

B. The Copley Place Litigation

In *Munoz-Mendoza v. Pierce*, a low income community organization and several individual plaintiffs seek to enjoin the federal funding of a luxury hotel and convention center complex (Copley Place), to be constructed at the perimeter of Boston's South End district.[242] They argue that Copley Place would result in displacement of neighborhood residents and, because minorities are disproportionately found among low income residents, contend that HUD's award of an Urban Development Action Grant (UDAG) violates Title VI and Title VIII of the Civil Rights Acts of 1964 and 1968 respectively.[243]

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whether HUD has followed a permissible procedure and has reached a substantive conclusion which is not arbitrary.").

241. *Id.* at 22, *citing* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980) ("We are not authorized to overturn such a 'fully informed and well-considered decision' even if it is not the decision we 'would have reached had' we been decision makers at HUD.").

242. 520 F. Supp. at 181.

> Copley Place is a $318 million multi-use development which will include a 712-room luxury hotel, a 960-room convention hotel, a retail center, office space, enclosed parking and 100-150 units of housing, 25% of which are to be subsidized. The site for Copley Place is 9.5 acres of vacant land, cleared . . . for construction of the Massachusetts Turnpike extension. . . . All of the plaintiffs live in neighborhoods close to the project site. The South End [one of the neighborhoods bordering the project] is a fully integrated residential area.

Id. at 181-82.

243. Pursuant to legislation effective October 1, 1978, as amended in 1978, 1979, and 1980, HUD "is authorized to make urban development action grants [UDAG's] to cities and urban counties which are experiencing severe economic distress to help stimulate economic development activity needed to aid in economic recovery." 42 U.S.C. § 5318(a) (Supp. II 1978). UDAG's are available in addition to, and are not exclusive of, other forms of federal assistance. They are to be made to cities and urban counties that have "demonstrated results in providing . . . equal opportunity in housing and employment for low- and moderate-income persons and members of minority groups. 42 U.S.C. § 5318 (Supp. II 1978). *See generally* Comment, *Urban Development Action Grants: A Housing-Linked Strategy for Economic Revitalization of Depressed Urban Areas*, 26 WAYNE L. REV. 1469 (1980). A recent amendment to corresponding federal regulation, incorporated in 24 C.F.R. § 570.458 (c)(16) (1981), requires that all applicants for UDAG grants must certify that their proposed

The plaintiffs' action in federal district court is based primarily on two interrelated claims that HUD failed to study the displacement impact of Copley Place on low income and minority residents of nearby areas, and the increased rents, condominium conversions and threatened evictions it would engender.[244] Procedurally, they complain of HUD's failure to consider the indirect displacement of low income and minority residents due to accelerated gentrification which would occur in neighborhoods surrounding the Copley Place project.[245] Substantively, the plaintiffs claim that the UDAG grant would result in discrimination against the low income, minority group members in the surrounding neighborhoods which would be particularly hard hit by the indirect displacement predicted.[246] Therefore, HUD's

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projects comply with Titles VI and VIII of the Civil Rights Acts of 1964 and 1968, respectively, as well as other federal legislation and executive orders prohibiting discrimination in housing and employment. Moreover, 24 C.F.R. § 570.458(c)(12) (1981), requires that each application contain information about involuntary displacement of low-income minorities and a description of the applicant's efforts to minimize such displacement. Relocation opportunities must be provided for displaced persons and businesses.

Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, *codified* at 42 U.S.C. § 2000d (1976), provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 24 C.F.R. §§ 1.1-1.2 (1981), effectuates Title VI with respect to housing programs receiving federal financial assistance from HUD. This regulation prohibits discrimination in HUD-financed housing programs and sets forth the procedures for conducting HUD investigations and hearings with respect to discriminatory housing practices. HUD has an affirmative duty to further the national housing policy expressed in Title VI. Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp. 1138 (W.D. Tex. 1972). Thus, under Title VI, federally financed public housing may not be constructed in an area of racial concentration. *See* Gautreaux v. Romney, 448 F.2d 731, 739 (7th Cir. 1971) (holding that HUD violated Title VI by knowingly funding a racially discriminatory family housing program). *See also* Hills v. Gautreaux, 425 U.S. 284, 306 (1976) (holding that such violation warranted a remedy affecting HUD's conduct beyond the boundaries of the area in question). For a discussion of Title VIII of the Civil Rights Act of 1968 and the regulations enacted pursuant thereto, *see* note 157 *supra*.

244. 520 F. Supp. at 183. A third claim identified by the court "is that HUD's funding of Copley Place was arbitrary and capricious agency action, subject to review and relief. . . ." *Id.* at 186. The Administrative Procedure Act provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976). Rather than ruling on this claim, the court reserved judgment seeking judicial review because of an ambiguous record and the existence of independent claims.

245. 520 F. Supp. at 183. Plaintiffs "seek a procedural remedy which would mandate the completion of such a displacement study by HUD." *Id.*

246. *Id.* Plaintiffs seek relief which will mitigate the effects of indirect discriminatory displacement. *Id.*

procedural failure to consider the projects' impact on minority residents and its substantive decision to undertake the project despite this impact, constituted a violation of the duties imposed on HUD by Title VI and Title VIII.

The Copley Place litigation reached the Massachusetts federal district court on cross-motions for summary judgment.[247] The court in *Munoz-Mendoza* addressed itself to three threshold issues: the application of the civil rights duties under Title VI and Title VIII to recipients of UDAG grants; whether a private right of action under Title VI against HUD and the city of Boston exists; and whether the plaintiffs have standing under Title VIII based upon the harm of "indirect displacement" which was alleged.[248]

The court found that sufficient standing had been shown for the purposes of withstanding the defendants' motion for summary judgment, but cautioned "the plaintiffs [that they] 'must continue to carry the burden of proof on standing,' " in subsequent motions and at trial.[249] Pursuant to First Circuit precedent, the court noted that in addition to proving HUD's failure to study the indirect displacement impact of Copley Place on surrounding neighborhoods, the plaintiffs must tie the failure to a material harm which they will suffer. After material harm is established the plaintiffs have the burden of proving causation—"that the increased rents and threatened evictions are 'fairly traceable' to the UDAG funding of Copley Place. . . ."[250] Finally, it must be shown that the relief requested can redress the harm.

In its consideration of the applicability of Title VI and Title VIII to UDAG grants, the court found that both civil rights acts impose affirmative duties on HUD. Title VIII requires that HUD promote fair housing opportunities which can only be met if it uses an " 'institutionalized method' to reach an 'informed decision,' based on 'the relevant racial and socio-economic information' "—the test set forth in *Shannon*.[251] In upholding the plaintiffs' private right of action under Title VI, the court stated that this statute imposes a less affirmative but broader ranging duty than that under Title VIII, "designed

247. *Id.* at 181.

248. *Id.* at 182-83.

249. *Id.* at 183, *quoting* NAACP v. Harris, 607 F.2d 514, 527 (1st Cir. 1979).

250. *Id.* at 184. "It is arguable that Copley Place, a $318 million project, would have been built even without the $18.85 million UDAG, and that the South End's ongoing gentrification and displacement of low-income minorities would have continued to accelerate [without federal funding]." *Id.* Nevertheless, the court held that "the plaintiffs have sufficiently personalized issues at stake to further litigate the legal claims presently before the Court." *Id.*

251. *Id.* at 185. *See* note 141 *supra* and accompanying text.

to eliminate racial discrimination in all federally assisted programs or activities."[252] Specifically, HUD must make a project investigation as outlined in the Code of Federal Regulations where, as in this case, it is requested to study the indirect displacement which might result from the project.[253]

Although the court noted that the defendants may succeed in establishing the thoroughness and care of the impact study, it found that the nature and extent of HUD's compliance with civil rights obligations presented a genuine issue of material fact. Accordingly, the court declined to grant summary judgment for the defendants or the plaintiffs.[254]

In the last paragraph of the opinion, the court acknowledged the existence of a claim alleging arbitrary or capricious agency action under the Administrative Procedure Act.[255] The court reserved judgment, however, citing an incomplete record and the existence of independent claims.[256] The extent to which the federal courts in Boston will adhere to the principles articulated by the Supreme Court in *Stryker's Bay* remains to be seen.[257] It is very possible that the courts will distinguish the judicial restraint called for in *Stryker's Bay* and *Aertsen* based on the important differences between the NEPA claims asserted in those cases and the Title VI and Title VIII violations alleged in *Munoz-Mendoza*.

VI. Conclusion

The class conflict over urban space is not confined to competition in the marketplace. As gentrification transforms the character of inner-

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252. *Id.*

253. *Id.* 24 C.F.R. § 1.7(c) (1981) provides that:

> The investigation should include, where appropriate, a review of the pertinent practises and policies of the recipient, the circumstances under which the possible noncompliance with this Part I occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

254. 520 F. Supp. at 186 ("[f]urther exploration of the facts is necessary, and [summary] judgment as a matter of law is unwarranted."). *Id.*

255. 520 F. Supp. at 186 ("The third and final claim of plaintiffs is that HUD's funding of Copley Place was arbitrary and capricious agency action, subject to review and relief under 5 U.S.C. § 706(2)(a) [1976].").

256. *Id.* ("Given the ambiguity of the current record, and the existence of the independent claims, the Court reserves on this claim seeking judicial review.").

257. In *Stryker's Bay*, the Supreme Court called for judicial restraint and deference to the exercise of discretion by an administrative agency. Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980).

city neighborhoods, the courts have concerned themselves with the plight of the displaced. Thus far the courts have upheld HUD's sponsorship or construction of low income housing projects in gentrified neighborhoods, but in many instances only after undue delays have resulted.

Judicial restraint in the review of agency decision-making can help prevent, in appropriate cases, delays caused by protracted litigation. In *Stryker's Bay* and *Aertsen*, for example, courts properly deferred to HUD's discretion as to what satisfies the essentially procedural requirements of NEPA. Title VI and Title VIII, however, impose obligations on HUD which are of a more substantive nature than those imposed by NEPA. In cases such as *University City*, *Alschuler* and *Munoz-Mendoza*, which involve Title VI and Title VIII claims, the courts must take a closer look at HUD's decision-making process, which remains tethered to outdated regulations.[258]

In order to protect federal efforts to maintain the integrated character of inner-city neighborhoods HUD must amend its regulations regarding the racial and economic integration of housing to deal with the reality of gentrification. HUD should define what is meant by "revitalized" or "gentrified" areas and recognize, as one court recently did, that such areas are ideal settings for racially and economically integrated housing.[259] In this way, it would be less necessary for the courts to step in and update, by interpretation, regulations formulated in the context of an earlier phase of the struggle for integrated housing

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258. *See* notes 142-46 *supra* and accompanying text. No substantial changes to HUD regulations regarding site selection for new construction or rehabilitated Section 8 housing have been made since those adopted in the wake of *Shannon* and *Otero*.

259. Gautreaux v. Landrieu, 523 F. Supp. 665 (N.D. Ill. 1981). The court approved, as amended, a consent decree worked out between plaintiffs (approximately 43,000 black tenants of and applicants for public housing in the Chicago area) and HUD, designed to deliver to the plaintiff class the relief from racially discriminatory practices in public housing it has sought during twelve years of litigation. *Id.* at 667. *See* note 181 *supra* for a discussion of the *Gautreaux* litigation. Altering the areas in which public housing could be located in the Chicago area, it reviewed the concept of revitalizing areas introduced in the consent decree: "[a]reas which have substantial minority population and are undergoing sufficient redevelopment to justify the assumption that these areas will become more integrated in a relatively short time. Because these areas are buffer zones . . . with on-going or planned financial reinvestment by private parties, they are considered the most promising neighborhoods for racial and economic residential integration." *Id.* at 669. Although the court acknowledged that the concept of a revitalizing area had been criticized for being too indefinite, it stated that "[t]hose criticisms ignore the fact that ten criteria were developed and applied in identifying [these areas]." *Id.* at 671.

before gentrification became an active force in the nation's inner-city neighborhoods.[260]

260. In addition to the substantive goal of updating HUD regulations, procedural mechanisms should be considered. One of the most important would be public participation in the decision-making process. By institutionalizing public input at an early stage of project development through required public hearings, any resulting delays would not drive up estimated construction costs. Hearings are already required when direct displacement will result from urban renewal. Hearings also should be required when indirect displacement is likely because of gentrification (that is, the presence of a threat that a substantial net reduction in the supply of housing for minority and low income persons in the area would flow from project development).