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Relocation Assistance: An Open Door Policy to Equal Housing Opportunity

Equal protection of the laws is a crucial guarantee provided each American citizen by the Constitution. In applying federal housing programs, state and local governments are clearly bound by the edict established in the 14th amendment. Equal opportunity to secure adequate housing without regard to an individual's race falls within the confines of the equal protection clause and supplies government with a constitutional requirement to insure that opportunity for racial minorities. Yet in our nation's metropolitan areas today, constant reminders are found that government has failed in this basic mission. Inequality in housing has become an increasingly painful reality and only recently has it sufficiently spurred the American conscience to provide substantive relief. Solutions are offered, but any fair housing program is confronted by a combination of economic and racial discrimination which for years has forced minorities into unequal, inadequate, and environmentally unsuitable housing conditions.

Legions of idle workers have journeyed from rural countryside to the city in search of employment since the days of industrial expansion provoked by the first World War. Especially in the last twenty-five years, a substantial number of these emigrants have been non-white. By 1960, blacks constituted 92 percent of the total non-white population.¹ Of all American blacks, 72 percent were urban dwellers,² of which 32 percent lived in the 25 largest American cities.³ Of the total non-white population residing in all metropolitan areas, over 78 percent lived in the central city.⁴ Forty-six percent lived in unsound housing while only 14 percent of the white population of the same areas lived in similar conditions.⁵ Only eight percent of the non-white population lived in suburban areas.⁶

1. P. HODGE & P. HAUSER, *THE CHALLENGE OF AMERICA'S METROPOLITAN POPULATION OUTLOOK, 1960 to 1985*, 19 (1968).

2. B. WATTENBERG & R. SCAMMON, *THIS U.S.A.* 271 (1965).

3. *Id.*

4. P. HODGE & P. HAUSER, *supra* note 1, at 25.

5. *Hearings on S. 1358, S.2114 and S.2280 Relating to Civil Rights and Housing Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Finance*, 90th Cong., 1st Sess. 5 (1967) (remarks of Att'y Gen. Ramsey Clark).

6. B. WATTENBERG & R. SCAMMON, *supra* note 2.

Figures from the 1970 census depict a continuing trend. In the 66 largest metropolitan areas, accounting for more than one-half the United States population, the core city white population dropped during the sixties by five percent, while the black population increased almost 35 percent. Overall black population in central cities increased from 18 percent in 1960 to 24 percent in 1970. The statistical picture in the suburbs is different. The total black population in the outlying areas of these cities increased only from 4.2 percent in 1960 to 4.5 percent in 1970.⁷

Projected figures for 1985 show that these patterns will continue. The suburbs will gain a 104 percent increase in white population while the central city's share will continue to decline.⁸ The non-white population of central cities will increase by 94 percent while expanding the total non-white population in the suburbs by less than one percent.⁹ Non-whites will continue to be all but lost in a sea of whites.

These figures establish the housing patterns of our metropolitan areas. Well illustrated is the enduring influx of minority group members into the core city and the emigration of whites to suburbia. The nationwide impact of this phenomenon has prompted one expert to advise that "*the poverty and social isolation of minority groups in central cities is the single most serious problem of the American city today.*"¹⁰

One government agency, the Federal Highway Administration, (FHWA), has a unique opportunity and responsibility to help remedy this situation through its relocation assistance program. This article will examine FHWA's statutory and constitutional responsibility in the housing field. Attention will be given to the basic philosophical approaches for the implementation of fair housing programs and focus especially on the method adopted by the Department of Housing and Urban Development. Most importantly, a new policy recommendation will be suggested for the Federal Highway Administration to enable it to fulfill its responsibility in furthering the goal of equal housing opportunity for all Americans.

The Role of the Federal Government

The Supreme Court, Congress and the Executive Branch

The federal government and federal court system play significant roles in the

7. *Federal Policies Relative to Equal Housing Opportunity—Statement by the President*, 7 Weekly Compilation of Presidential Documents 892, 894 (1971) [hereinafter cited as *Statement*].

8. P. HODGE & P. HAUSER, *supra* note 1, at 58.

9. *Id.*

10. Moynihan, *Toward a National Urban Policy*, 17 THE PUBLIC INTEREST 3.8 (1969) (emphasis in original).

battle against discrimination in housing. The critical importance of equal access to decent housing and the need to stimulate low and moderate income housing has been recognized by all three branches of government.

In 1948, the Supreme Court led the way for pronouncements by the other branches when, in *Shelley v. Kraemer*,¹¹ it struck down private racially restrictive covenants as constitutionally unenforceable. By doing so, the Supreme Court plainly asserted the importance of the individual's right to acquire, enjoy, own, and dispose of property.¹²

Twenty years after *Shelley* the Court demonstrated that there were still barriers to equality in housing opportunity. In *Jones v. Alfred H. Mayer Co.*¹³ the Court banned racial discrimination in the sale or rental of all housing, public or private. The decision was based primarily on language found in Section 1 of the Civil Rights Act of 1866¹⁴ which established that black and white citizens should have the same right to purchase and hold real property. The Court found the statute to be within the scope of the 13th amendment and gave the amendment contemporary application in saying that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."¹⁵

One concept emerges with clarity from these decisions: equal housing opportunity is acknowledged by the Court as a matter of utmost social and constitutional concern. "Given the close relationship between residential isolation and vulnerability to governmental and private discrimination, inferior housing and education, and social immobility, this concern does not seem either surprising or misplaced."¹⁶

Following the Supreme Court's advance in *Shelley*, Congress announced the nation's first housing policy when it passed the Housing Act of 1949.¹⁷ The national goal proclaimed in that Act was a basic one: a decent home and

11. 334 U.S. 1 (1948).

12. It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the fourteenth amendment are the rights to acquire, enjoy, own, and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee. *Id.* at 10

13. 392 U.S. 409 (1968).

14. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. 42 U.S.C. § 1982 (1970).

15. 392 U.S. at 442-43.

16. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 790 (1969).

17. 42 U.S.C. § 1441 (1970).

suitable living environment for every American family.

Turning its attention to discrimination in federally assisted programs in 1964, Congress established the Federal Highway Administration's equal rights mandate with language from Title VI of the 1964 Civil Rights Act. "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 601"¹⁸ Section 601 of the Act prohibits discrimination or denial of benefits on racial grounds under any program or activity receiving federal financial assistance.¹⁹ Title VI further provides that each agency is directed to effectuate the non-discrimination policy by "issuing rules, regulations or orders of general applicability. . . ."²⁰

Senator Pastore of Rhode Island, one of the principal spokesmen for the Act, gave this detailed explanation of Title VI:

The next section in Title VI, section 602, is an authorization and a *direction* to the Federal agencies administering a financial assistance program to take action to effectuate the basic principles of non-discrimination

In accordance with the provisions of section 602, each agency affected is required by the term 'shall' to *take action* to *eliminate* discrimination with the programs under its jurisdiction (emphasis added).²¹

Four years after Congress had forbidden discrimination in federally assisted programs, it once again strained to provide greater housing opportunities for the nation's lower income classes. The goal of 1949 had not been attained by 1968. Recognizing the need for more housing programs and desiring that the "highest priority" be given to providing a decent home for those in need, Congress reaffirmed the national housing goal in the 1968 Housing and Urban

18. 42 U.S.C. § 2000d-1 (1970).

19. At this point a brief explanation of the basic Federal Aid Highway Program within its federal-state context is called for. State highway departments select the highway locations, conduct required public hearings, select the contractors, oversee hiring practices, supervise actual physical construction, and, following completion of the project, perform all maintenance operations. The two essential functions of FHWA are 1) providing federal financial assistance and 2) establishing standards to regulate the state highway departments in most operational areas. The amount of financial aid varies with the type of project; *i.e.*, whether it is part of the primary system, the urban system, the secondary system or the Interstate system. *See* 23 U.S.C. § 103 (1970).

20. 42 U.S.C. § 2000d-1 (1970).

21. 110 CONG. REC. 7058 (1964). The Senator added that:

The enactment of Title VI will insure for all time that the financial resources of this government will play no part in subsidizing racial discrimination. That part of the bill is right legally; it is right constitutionally; and it is right morally. *Id.* at 7064.

Development Act.²²

Congress drew even greater attention to inequality in housing by enacting the 1968 Civil Rights Act.²³ Title VIII of that Act declared:

Sec. 801. It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

* * *

Sec. 808(d). *All* executive departments and agencies *shall* administer their program and activities relating to housing and urban development in a manner *affirmatively* to further the purposes of this title and shall cooperate with the Secretary [of Housing and Urban Development] to further such purposes.²⁴

In summary, Congressional action as it applies to the Federal Highway Administration requires this agency to *take action* to eliminate discrimination in the administration of its programs by the Civil Rights Act of 1964. To fulfill the requirements of the fair housing decree, FHWA as an executive agency is obligated to assume a positive, *affirmative* role in promoting fair housing.

Pursuant to the fair housing directive, George Romney, Secretary of Housing and Urban Development, has announced that his Department's goal is the 'creation of open communities . . . by increasing housing options for low-income and minority families.'²⁵

But the most important pronouncement in the Executive Branch has come from the President. In his policy statement on equal housing opportunity, the President has interpreted the fair housing mandate to mean that the:

[A]dministrator of a housing program should include, among the various criteria by which applications for assistance are judged, the extent to which a proposed project, or the overall development plan of which it is a part, will in fact *open up new, nonsegregated housing opportunities* that will contribute to decreasing the effects of past housing discrimination.

. . .

[The Departments and agencies] will administer their programs in a way which will advance equal housing opportunity for people of

22. 68 Stat. 413, 42 U.S.C. § 1441a (1970); 12 U.S.C. § 1701t (1970).

23. 82 Stat. 73 (codified in scattered sections of 18, 25, 42 U.S.C.).

24. 42 U.S.C. §§ 3601, 3608(c) (1970) (emphasis added).

25. Letter from George Romney to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 10, 1970.

all income levels on a metropolitan areawide basis.²⁶

The Importance of Federal Highway Administration Efforts in Expanding Housing Opportunity

That the Federal Highway Administration,²⁷ and its Administrator, fall within the ambit of the President's language relating to a "housing program," and the words of Title VIII pertaining to "housing and urban development," is shown in part by resort to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.²⁸ That act requires that each federal agency assure the availability of decent, safe and sanitary housing prior to displacement by construction; that no person shall be required to move unless the federal agency head is satisfied that replacement housing is available to such person;²⁹ and should the federal project not be able to proceed to actual construction because comparable replacement housing is not available, the agency head may take such action as is necessary to provide such housing.³⁰ Moreover, according to the House Public Works Committee Report³¹ on this legislation, "a major public project—be it a highway, urban renewal project, or hospital—*inevitably* involves the acquisition and clearance of sites which now provide . . . residential services."³² And if it is "inevitable," the Federal-Aid Highway Program most assuredly is involved in housing and urban development. In short, when one person is displaced by highway construction, FHWA is involved in a housing program. The accuracy of the Committee's assessment of the impact of the highway is substantiated further by statistics derived from FHWA's relocation assistance program.

26. *Statement, supra* note 7, at 901 (emphasis added).

27. The Federal Highway Administration is an operating administration within the Department of Transportation. Pursuant to 49 U.S.C. § 1655 (1970), all functions, powers and duties relating to the administration of highway laws under 23 U.S.C. were transferred to the Secretary of the Department of Transportation. The Secretary, by 49 C.F.R. § 1.48 (1971), has delegated his authority to administer the laws of 23 U.S.C. to the Administrator, Federal Highway Administration. This delegation included the authority to administer Chapter 5 of Title 23, the portion pertaining to relocation assistance. On May 20, 1971, after passage of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, the Secretary issued regulations delegating his authority under that Act to the head of each operating administration to include the Federal Highway Administration. 36 Fed. Reg. 9178, 9180 (1971).

28. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894 [hereinafter cited as *Uniform Act*]. For an excellent discussion of the Act, and relocation generally, see Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745 (1971).

29. *Id.* at § 205.

30. *Id.* at § 206.

31. H.R. REP. NO. 1656, 91st Cong., 2d Sess. (1970) [hereinafter cited as *REPORT*].

32. *Id.* at 2 (emphasis added).

From October 1966 to September 1970, the construction of Federal-Aid highways displaced over 100,000 individuals. In the period October 1969 through September 1970 alone, over 20,000 dwelling units and 59,000 persons were relocated, 75 percent of them in urban areas.³³

Relocation of displaced persons is but one aspect of the highway's impact on our nation's urban centers. The question often becomes one of drawing a line between what may truly be called the "primary" effects of highway construction and those which are merely "accidental to the plan." This article must assume the broader view of the highway's impact. It must emphasize the overwhelming derivative effects of highway construction and the highway's lasting mark on the community. New transportation facilities attract business enterprises which in turn create jobs. The influx of workers responding to the new industry creates the need for more housing: a need which should be anticipated by highway officials.

From a negative view, new highways may create new minority residential patterns or isolate existing ones. An ill-conceived choice of location could dissolve neighborhood homogeneity. At best, however, the highway can *increase* access for all persons to all community facilities and job sources. It can assist in providing new housing opportunities for those to be displaced by the plain facts of land acquisition and highway construction.³⁴ Roadbuilding does not take place in a vacuum. By recognizing the impact of its programs on displaced persons, FHWA was one of the first federal agencies to provide relocation assistance under authority granted by the 1962 Federal-Aid Highway Act.³⁵

In administering its relocation program, FHWA abides by at least the statutory minimum with regard to fair housing in that "all replacement housing must be fair housing—open to all persons regardless of race, color, religion,

33. SECRETARY OF THE DEP'T OF TRANSPORTATION HIGHWAY RELOCATION ASSISTANCE STUDY, REPORT TO THE HOUSE COMM. ON PUBLIC WORKS, 92d CONG., 1st SESS. 15 (Comm. Print 1971).

34. Despite this fact, many have recently urged that no highway be constructed in any urban area because, among other factors, it will cause displacement. Yet once the local community has decided in favor of the highway, there have been numerous occasions where individuals have been removed from substandard housing and relocated in decent, safe, and sanitary dwellings that at least fulfill the minimum requirements of the local housing code.

35. Federal-Aid Highway Act of 1962, § 5(a), Pub. L. No. 87-866, 23 U.S.C. § 133 (1970) (repealed effective 1970). The Federal-Aid Highway Act of 1968, § 30, Pub. L. No. 90-495, added 23 U.S.C. §§ 501-511 (1970). The Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, added 23 U.S.C. § 510 (1970), renumbering former 23 U.S.C. §§ 510, 511 (1970). The *Uniform Act* § 220 repealed 23 U.S.C. §§ 501-512 (1970), effective no later than July 1, 1972. As a result, no later than July 1, 1972, all federal agencies, including FHWA, will administer relocation assistance programs under the *Uniform Act*.

sex or national origin.”³⁶ However, little attention has been given to providing increased access to a broader range of housing; to using the relocation program to “open up *new*, nonsegregated housing *opportunities* that will contribute to decreasing the effects of past housing discrimination.”³⁷

Having illustrated the great impact highway construction has upon housing and urban development, the opportunity thus afforded FHWA to assist the nation in its goal of providing equal housing opportunity must be recognized and actively pursued. This article's prime purpose is to provide an answer to this critical question: how may FHWA most vigorously, and effectively, seize this opportunity and thereby fulfill its responsibility in promoting fair housing?

Present Day Solutions

General Concepts

Two fundamental approaches emerge from a survey of the broad spectrum of proposals for implementing fair housing. The first view would apparently welcome the persistent placing of replacement housing, public housing and displacees in the ghetto. This approach has a significant following within that portion of the black community which rejects integration and embraces black solidarity as a means to gather and maintain political and economic strength. The drawbacks of this view arise because of the present slum conditions which characterize the ghetto. These conditions are slowly being corrected but until they disappear, a black family can obtain immediate relief only by escaping to better living conditions in suburban areas. In addition, there is the court enforced, constitutional mandate that government itself not promote, encourage, or perpetuate residential segregation;³⁸ all of which would be the result of the total concentration of federally assisted housing in the ghetto.

The second approach envisions the dispersal of non-whites into previously all white suburban areas. Proponents of this approach would utilize such programs as rent supplement payments, Sections 235³⁹ and 236⁴⁰ of the Housing and Urban Development Act of 1968, and other programs to disperse inner city residents into previously all white areas. In conjunction with these programs, public housing projects would be scattered throughout the suburbs. For exam-

36. Replacement Housing Policy, DOT Order 5620.1 (June 24, 1970).

37. *Statement*, *supra* note 26 (emphasis added).

38. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); Exec. Order No. 11,063, 3 C.F.R. 652 (1959-63 Comp.); 42 U.S.C. § 3601 (1970).

39. 12 U.S.C. § 1715z (1970) (a program of subsidizing home purchase by low and moderate income families).

40. 12 U.S.C. § 1715z-1 (1970) (a program of reducing the housing developer's mortgage interest payment which is passed onto the tenant in the form of lower rental payments).

ple, New York has a State Urban Development Corporation⁴¹ which possesses the statutory power of eminent domain.

This permits the state to assemble large tracts of land for packaging development of low and moderate income housing in the suburbs and promoting dispersal by acting as a release valve for residents of the inner-city ghetto.⁴²

Strong opposing forces seek to frustrate any program devised in this vein. Exclusionary zoning,⁴³ white middle class opposition,⁴⁴ local land use policies,⁴⁵ the reluctance of local realtors to provide opportunities for non-whites, and the inherent financial limitations of the lower income classes combine to deter any integration of the suburbs. This opposition has provided fertile ground for past and present litigation, and through this litigation comes much of the hope for solution of the malady in the future.

These are the basic philosophical considerations and the forces of opposition sparked by them. They provide the necessary backdrop for the discussion of HUD's solution and the approach recommended for the Federal Highway Administration.

Approach Adopted by the Department of Housing and Urban Development

"What is clearly needed is a *balanced* program of central city improvement and a national housing policy that develops opportunities in the suburbs"⁴⁶ Implicit in this statement is an acknowledged concept of fair housing: that each American live where he chooses without regard to his race.

The Department of Housing and Urban Development (HUD) has recently adopted new "Project Selection Criteria"⁴⁷ to guide its personnel in appraising applications for federal financial assistance under various HUD programs. A proposed project will be rated "superior," "adequate," or "poor" after evaluation with respect to criteria ranging from "Minority Housing Opportunities"

41. See Reilly & Schulman, *The State Urban Development Corporation: New York's Innovation*, 1 URBAN LAWYER 129 (1969).

42. Freilich & Seidel, *Recent Trends in Housing Law: Prologue to the 70's*, 2 URBAN LAWYER 5 (1970).

43. See, e.g., article cited note 16 *supra*.

44. See, e.g., *Public Housing and Integration: A Neglected Opportunity*, 6:2 COLUM. J.L. & SOC. PROB. 253 (1970).

45. See, e.g., *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733 (1969).

46. Freilich & Seidel, *supra* note 42, at 6.

47. 37 Fed. Reg. 203 (1972). Separate evaluations will be accorded each project depending on the HUD program under which it is submitted. The criteria do not apply to rehabilitation projects, section 235 existing housing, public housing acquisition, or leasing of existing housing of fewer than 25 units not requiring rehabilitation. 37 Fed. Reg. 205 (1972).

to "Relationship of proposed project to physical environment." One "poor" rating under any of the eight criteria⁴⁸ will result in immediate disapproval of the project.⁴⁹

When HUD first proposed the plan in June of 1971,⁵⁰ Secretary Romney explained that "projects outside areas of minority concentration will be given preference."⁵¹ HUD has retained that preference in the plan's final form with the result that inner city development appears almost impossible. Further, as will be shown by examination of two of the criteria, the concept of balancing housing construction between suburb and city has been ignored.

Under criterion number two, "Minority Housing Opportunities,"⁵² a proposed project will receive a "superior" rating if it will be located

[s]o that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racially mixed.⁵³

A project will be located *inside* an area of minority concentration and receive the "superior" rating *only* if

the area is part of an official State or local agency development plan, and sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration.⁵⁴

Few urban area proposals will qualify for a superior rating under this second contingency. In light of the housing patterns found in the major cities today, the number of urban areas with "sufficient housing opportunities" outside areas of minority concentration (the city) within the income range of those to be affected is so small as to be inconsequential. In summary, under this criterion a project receives a "superior" rating only if it is located outside the inner city.

HUD dropped a provision for building housing inside areas of minority concentration if "[P]rospective residents of the project or residents of the project area express a desire for it . . ." because in its opinion such provision was

48. The eight criteria are as follows: 1. Need for low(er) income housing; 2. Minority Housing opportunities; 3. Improved location for low(er) income families; 4. Relationship to orderly growth and development; 5. Relationship of proposed project to physical environment; 6. Ability to perform; 7. Project potential for creating minority employment and business opportunities; 8. Provision for sound housing management. 37 Fed. Reg. 205-09 (1972).

49. 37 Fed. Reg. 209 (1972).

50. 36 Fed. Reg. 12032 (1971).

51. Statement at press conference by George Romney, June 14, 1971.

52. 37 Fed. Reg. 206 (1972).

53. *Id.*

54. *Id.*

"unworkable" and subject to "abuse."⁵⁵ By deleting an "expression of desire," HUD has denied the essence of fair housing because the choice of residence by the citizen is denied. It is now unlikely that those who wish to remain in the city and see it improved by better housing conditions will be afforded the opportunity to do so.

HUD's most glaring dismissal of projects located in the core city occurs under Criterion Five "Relationship of proposed project to physical environment."⁵⁶ A project will receive a poor rating if it will "be subject to serious environmental conditions which cannot be corrected." Some of these conditions, as established by HUD under the same subject heading, include:

instability, sewage hazards, harmful air pollution, smoke or dust; excessive noise, vibration or vehicular traffic; unsanitary rodent or vermin infestation; or dangerous fire hazards.⁵⁷

In other words, all these conditions characterize the inner city today. Even if each of these hazards can be "corrected," the present financial crisis in our major cities makes correction in the near future highly unlikely.

If one agrees that government assistance in providing equal housing opportunity must consist of a balanced program within the framework of freedom of choice, the HUD "Project Selection Criteria" are unacceptable. The plan's preoccupation with suburban construction *prima facie* negates any of the desired balance. It places HUD in the position of demanding that non-whites, and lower income persons generally, find improved living conditions *only* outside the city thereby disallowing significant numbers of minority group members the choice of remaining within the city. Necessarily, then, the HUD approach is neither feasible nor desirable for FHWA.⁵⁸

55. *Id.* at 204.

56. *Id.* at 207.

57. *Id.* at 208.

58. If state highway officials or FHWA itself were to dictate that displaced persons must live outside areas of minority concentration or risk disapproval of the entire project, no displacee would have a choice of residence. Rather, the individual relocatee would be confronted with the federal government, or its state counterpart, commanding him to live where the government thought best. Secondly, if the criteria were applied to highway location *per se* in order to obtain project approval, all roadbuilding would have to take place outside areas of minority concentration. This result would be achieved with great satisfaction by those persons who oppose any urban highway. Yet one must look to the broader view of development of the city. If highways are to be kept out of the inner city by application of criteria similar to the HUD approach, they would then be built only in the suburbs, and consequently provide increased transportation facilities only for suburban residents. In addition, highways would serve only to create yet another artificial barrier encircling minority concentrations. Lastly, because there would be no contact between highway officials and minority groups, there would be no opportunity for highway officials to assist in providing expanded equal housing opportunity and for FHWA to fulfill its responsibility in this area.

*New Policy for the Federal Highway Administration
Congressional Requirements and Guidance on Relocation Assistance*

For all types of Federal-Aid Highway Projects,⁵⁹ FHWA is required to provide relocation assistance for those persons displaced by highway construction. Prior to displacement, it must assure that each displacee has been relocated in a decent, safe, and sanitary dwelling in an area not generally less desirable than the area from which he is displaced.⁶⁰ In the Uniform Relocation Assistance Act, Congress instructs the federal agencies administering programs which can assist in the housing of displaced persons to cooperate with the displacing agency to assure that those persons receive the *maximum assistance available*.⁶¹

To better cope with situations where there is a lack of adequate replacement housing, the Act authorizes⁶² heads of federal or state displacing agencies to actually construct replacement housing.⁶³ Under this authorization, the agency head has broad discretion in providing replacement housing. The House Public Works Committee provided guidance for the agency in implementing this section by declaring that:

[O]pportunities should be *sought out* for jointly financed projects

59. 23 U.S.C. § 103 (1970).

60. *Uniform Act* § 205 assures that:

[P]rior to displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe and sanitary dwellings . . . equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment

According to the desires of Congress to treat displacees equitably and fairly, the "within the financial means" provision of § 205 should be interpreted to mean *after* the additive payments have been allocated according to §§ 202, 203 and 204. See note 68 *infra*.

61. *Uniform Act* § 205(b). See REPORT *supra* note 31, at 13 discussing requirements under § 205. For example, HUD is directed to cooperate with FHWA when the latter agency causes displacement. It is suggested by the Committee that the heads of Federal agencies utilize the services of state or local housing agencies. REPORT 14.

62. *Uniform Act* § 206 provides: "If a Federal project cannot proceed to actual construction because comparable replacement housing is not available . . . [he] may take such action as is necessary or appropriate to provide such housing by use of funds authorized for such project." The actual construction phase of the program involves direct construction of new housing, the acquisition and rehabilitation of existing housing, or the relocation of existing housing. REPORT 15.

63. *Uniform Act* § 206. This section has been labeled "Last Resort Housing Replacement by Displacing Agency". See 37 Fed. Reg. 3633 (1972). Contained therein are HUD regulations for administering § 206 Last Resort Housing. Agencies will be authorized to construct housing with relocation assistance funds only after a determination has been made that suitable housing is not available. If the number of units to be constructed is under 25, the agencies have considerable latitude in providing the housing and may conduct their own hiring and contracting. If the units will total more than 25, an area task force will be established. This task force will consist of local housing officials, the displacing agency, private agencies, and other interested groups. Of major significance in § 206 is the fact that federal funds may be used to construct replacement housing.

which could aggregate rental housing requirements into feasible units. This would seem to be possible in an area where several agencies administer programs causing displacement, or the Department of Housing and Urban Development . . . may be assisting in the construction of housing for low or moderate income families and individuals.⁶⁴

In summary, strict standards are provided with respect to the living conditions of the new housing. However, within the instruction requiring inter-agency cooperation, FHWA is given considerable latitude in selecting the means by which replacement housing will be provided.

A New Policy Recommendation

Given a zone of operational discretion by Congress in administering its relocation program, FHWA has the authority within which an effective equal housing policy may be implemented to fill the present void. Congress has directed this agency to affirmatively promote fair housing; the President has ordered it to establish a program which will open up new housing opportunities for citizens of minority races. The demand for a new policy is inescapable.

Implementation of the policy urged herein involves two basic steps:

1. Prior to submitting a proposed project for funding and FHWA review, the state highway department will be required to conduct an "Urban Housing Impact Assessment." Of primary importance in that Assessment will be the "documented meaningful choice" of residence offered to each minority displacee. To fulfill the requirement of a documented meaningful choice, the locations offered must include some which will allow the displacee to relocate in predominantly white residential areas, as well as the opportunity to remain in or near his present neighborhood.
2. Upon evaluating the choices of location offered the displacee, the Federal Highway Administration will either approve or disapprove the proposed project based on the nature of the choices offered, all other factors being equal. If a meaningful choice is not offered to the displacee, one which will increase the minority member's access to the suburbs, the project will be denied federal funding.

This recommendation, of prime importance from a policy standpoint fits squarely within the Presidential directive which ordered that programs given federal financial assistance shall contribute to the expansion of equal housing

64. REPORT 15.

opportunity.⁶⁵ The President further suggested that "in choosing among the various applications for federal aid, consideration should be given to their impact on patterns of racial concentration."⁶⁶

Approval of an application for federal highway funds is an intricate, lengthy process. A wide range of engineering, social, and environmental factors must be considered. Incorporating the "meaningful choice" doctrine will add to the process but will make one significant difference: if the choice does not fulfill the requirements established herein, the project will be immediately disapproved.

Providing the meaningful choice is the threshold inquiry. Each relocatee should first be offered housing in a predominantly white residential area, presumably suburban in most metropolitan areas. This requirement will not be satisfied should the location offered be within a minority "pocket" of residences such as those found in some suburban areas. Rather, the residence must be outside any areas of minority concentration. The location may be deemed satisfactory if the area is already to some extent integrated. However, the plan will not measure up if the relocation of a substantial number of displacees would result in an undue concentration of minority residents in the relocation area.

A second opportunity should also be presented. As an alternative, the displacee must be offered housing within the approximate area in which he lives. Assuming the construction will take place in an area primarily inhabited by minority residents, which will be the case with most urban highways, the displacee must be provided the chance to remain in that minority area. Another nearby area of similar racial composition will fulfill this requirement if satisfactory to the displacee.

The FHWA will review the sufficiency of the opportunities offered. Disapproval will not result should all displacees choose to remain within their present neighborhood or another nearby area. However, disapproval will result should the choice of leaving that area not be presented. State highway officials are expected to document the choices offered. This authentication should include, but not be limited to, addresses offered, certification of availability of each residence, and a sworn statement, signed by the displacee, indicating the choices of locations offered and the one which he has selected. The statement submitted by state officials must further document efforts by those officials to utilize the programs under the cognizance of the local housing authorities and relocation agencies to provide the displacee with a broad range of housing.

65. *Statement, supra* note 7, at 901.

66. *Id.*

The documented meaningful choice requirement must, of course, be fulfilled within the framework of standards established in the Uniform Act. Included therein are the essential demands that local officials provide current and continuing information on the availability of comparable housing; assure that housing be generally not less desirable with respect to certain municipal facilities; and that replacement housing be reasonably accessible to the displacee's place of employment.⁶⁷ Under the accessibility to employment requirement, state officials will be expected to indicate the various modes of transportation available in the relocation area. Whether employment is in fact reasonably accessible will be gauged according to such factors as availability of mass transportation facilities nearby and the cost of commuting. Noting industry's recent tendency to move to the suburbs, offering a choice of residence in areas outside the city will more easily satisfy this requirement.

It is anticipated that on many occasions state highway officials will not have an easy task in providing displacees with a meaningful choice. Vacancy rates in most of our major cities rarely surpass one percent and often a portion of that housing which is available does not meet the statutory standard of decent, safe, and sanitary. Local officials will have further difficulty in securing housing in suburban areas due to the general opposition of the present inhabitants of those areas to accept what frequently will be low and moderate income housing. Due to dollar discrimination in suburban areas, available housing may generally be beyond the financial means of the displacees. If that is the case, additive payments⁶⁸ authorized under the Uniform Act should be utilized to bring housing within the financial capability of the displacee.

Further aid for state officials is authorized in the form of seed money loans under Section 215 of the Act.⁶⁹ The loans are designed to stimulate the construction or rehabilitation of sale and rental housing to meet the needs of displaced families and individuals. Funds may be made available for up to 80 percent of the reasonable expenses, prior to construction, for planning and obtaining federally insured mortgage financing for such housing. As urged by the House Public Works Committee, "[t]his section can be used very effectively by Federal and State agencies, at moderate cost, to give a significant assist to housing activities. . . ."⁷⁰ Aside from monies provided under the

67. *Uniform Act* § 205.

68. *Uniform Act* §§ 202-204. Section 202 authorizes payments for moving and related expenses; section 203 allows up to \$15,000 towards the purchase of replacement housing for a homeowner; section 204, designed for tenants, allows up to \$4000 for four years to allow a tenant to lease or rent replacement quarters and up to \$4000 towards the down payment on a dwelling matched in equal shares by the tenant.

69. *Uniform Act* § 215.

70. REPORT 20. Loans may be made by the head of either the state or federal agency involved and funds may be used for planning (to include preliminary surveys, analyses of market needs,

Act, this situation calls for the most dedicated efforts of state officials to provide housing under HUD programs through cooperation on the local level.

The obstacles noted herein are not insurmountable. If the state highway department is intent on building a highway which will displace a minority resident, it must use initiative, ingenuity, and imagination in pursuing opportunities which will enable it to provide displacees with a documented meaningful choice of residence. Regardless of the barriers encountered in the effort to provide equal housing opportunity, the choice must be offered.

It is submitted that this policy corrects the major deficiencies noted in the HUD approach by providing the opportunity for balance: some will wish to remain in their present habitat, others will seek the opportunities of the suburbs. Either decision will accomplish the essence of fair housing: that an individual has the opportunity to choose his place of residence without regard to his race. By successfully employing the means of providing additional financial resources to the displacee suggested herein, the economic bar of the suburbs will drop. And through the initiative and planning of state highway officials in providing a range of housing in all metropolitan areas, new non-segregated housing opportunities will be afforded those persons affected by highway construction.

Documented Meaningful Choice as a Requirement for Federal Financial Assistance

May the Federal Highway Administration condition financial assistance upon state compliance with the meaningful choice requirement? Yes! As standard procedure, new regulations are incorporated into financial assistance contract agreements between FHWA and the state highway departments. According to traditional contract law, the government, like any offeror, may attach reasonable conditions to its grant of financial assistance.

In extending financial assistance, Congress unquestionably has power to impose such reasonable conditions on the use of the granted funds or other assistance as it deems in the public interest.⁷¹ Since the recipients are under no legal obligation to accept Federal assistance on the terms prescribed by Congress, there is no invasion of powers reserved to the states by the 10th amendment.

preliminary site engineering etc.), and obtaining federally insured mortgage financing for non-profit, limited dividend, cooperative organizations, and public bodies. The Committee notes that "a similar provision in the Appalachian Regional Development Act has been very useful in stimulating development of federally insured sale and rental housing for low and moderate income families and individuals in the Appalachian region." *Id.* at 19, 20.

71. See, e.g., *United States v. San Francisco*, 310 U.S. 16 (1940); *Oklahoma v. Civil Service Commission*, 310 U.S. 127 (1942).

[T]he powers of the State are not invaded since the statute imposed no obligation but simply extends an option which the State is free to accept or reject.⁷²

In the matter of housing discrimination, Congress has chosen to impose these conditions by enacting the Civil Rights Acts of 1964 and 1968, thereby placing an affirmative obligation upon federal agencies to insure that programs receiving federal financial assistance be operated without discrimination as to race, color, or national origin. *Oklahoma v. Civil Service Commission*⁷³ has been consistently cited as authority for the position that conditions and procedures may be attached to the grant of Federal funds. The Supreme Court held in this decision that:

While the United States is not concerned with, and has no power to regulate, local political activities, as such, of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.⁷⁴

In addition, Congress has the power to prohibit racial discrimination in those programs which it authorizes. For example, under its power to regulate commerce, Congress has prohibited racial discrimination by railroads, buslines, and air lines.⁷⁵ Construed so as to prohibit discrimination, each of those legislative mandates has been upheld by the Courts.

72. *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923). See *James v. Valtierra*, 402 U.S. 137 (1971). This latter case involved a low rent housing project under the Housing Act of 1937, 42 U.S.C. § 1401 (1970). Justice Black, writing for the majority, discussed the Supremacy Clause argument urged by the plaintiffs to declare a local referendum unconstitutional by saying:

The three judge court found the Supremacy Clause argument unpersuasive and we agree. By the Housing Act of 1937 the Federal Government has offered aid to States and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted. 402 U.S. at 140.

73. 330 U.S. 127 (1947).

74. *Id.* at 143. Senator Pastore, during debate on the 1964 Civil Rights Act also discussed the power of the federal government to attach conditions to grants of financial assistance:

Under Federal assistance programs, the Federal Government is giving something away. Clearly, it should be able to fix the conditions under which money and goods are distributed No one is required to accept Federal assistance or Federal funds. If anyone does so voluntarily he must take it on the conditions on which it is offered. Certainly no one can claim that it is arbitrary for the Federal Government to insist that its funds not be put to a use which is unconstitutional or contrary to public policy. A California Court put it graphically but accurately when it said: 'When one dips one's hands into the Federal Treasury, a little democracy clings to whatever is withdrawn.' *Ming v. Horgan* 3 R.R.L.L. 693, Superior Court, Sacramento (1958). 110 CONG. REC. 7063 (1964).

75. *Mitchell v. United States*, 313 U.S. 80 (1941) (railroads); *Boynton v. Virginia*, 364 U.S. 454 (1960) (buslines); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956) (airlines).

The executive branch, acting pursuant to congressional grants of authority, has through its administrative agencies taken a number of actions to prohibit racial discrimination in programs authorized for financial assistance.⁷⁶ It is well settled that, except to the extent Congress may have required or prohibited certain action, the executive branch has discretion to impose such conditions and requirements as it deems appropriate in entering into contracts and agreements.⁷⁷

Thus the authority exists for the Department of Transportation, acting through FHWA as the implementing administration with delegated authority to administer the relocation assistance program, to impose any reasonable criteria which it deems appropriate and in the public interest. In assigning housing a place in the sphere titled "public interest," Justice Holmes described its importance:

Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present.⁷⁸

Congress, in 1968, finalized housing's place within the public interest with its decree that it was the public policy of the United States to provide fair housing.

Guidance From the Courts to Establish FHWA's Mandate to Provide an Equal Housing Policy

The evils of relocating housing solely within the ghetto have been forcefully pointed out by the Third Circuit in *Shannon v. HUD*.⁷⁹ In that case, HUD changed the type of housing to be utilized in a certain project by following a procedure which concentrated solely on land use factors. The procedure for change failed to inquire into what effect the change in type of housing had on the racial concentration in the renewal area or in the city as a whole. The Court held the change void for failure to comply with the 1949 Housing Act and the

76. By § 602, Civil Rights Act of 1964, Congress directed each federal department and agency to issue rules and regulations to implement the policy of non-discrimination. *See, e.g., Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964*, 49 C.F.R. § 21.5 (1971).

77. *See, e.g., Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 116 (1954); *Muschany v. United States*, 324 U.S. 49, 63 (1945); *In Arizona v. California*, 373 U.S. 546 (1963), the Court noted that:

The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than general authority, unless Congress has placed some limit on it. 373 U.S. at 580.

The Federal Highway Administration has been granted such authority by 23 U.S.C. § 110 (1970) and by delegation from the Secretary, 49 C.F.R. § 1.48 (1971).

78. *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

79. 436 F.2d 809 (3rd Cir. 1970).

1964 and 1968 Civil Rights Acts on the ground that HUD had not considered the project's impact on racial concentrations. It acknowledged that an agency has discretion in selecting from among various housing programs. However, it required this discretion to be exercised within the framework of the national policy against discrimination in federally assisted housing and in favor of fair housing. The Court found that a project could have the effect of subjecting persons to racial discrimination by virtue of the "undue concentration of persons of a given race, or socio-economic group, in a given neighborhood."⁸⁰ While admitting that prior to passage of the 1964 Civil Rights Act the administrators of federal housing programs could concentrate solely on land use patterns and related factors, it is now "impermissible"⁸¹ to remain blind to the substantial effect that:

racial discrimination has had in the development of urban blight Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.⁸²

Applying this language to the location of replacement housing, and to the site selection process, it appears that the Third Circuit deems the location of housing solely within areas of racial concentration unacceptable on its face.

But *Shannon* does not stand for the proposition that integration of housing by dispersal is the *only* goal of the national housing policy. Near the end of its opinion, the court noted that there would be times when rebuilding of a ghetto area itself could take place. The agency doing so, however, was cautioned that it must make an informed decision, weighing the alternatives, and then find 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.⁸³

Logically extending these requirements and commands to any displacing agency makes it clear that present disregard of these factors is unacceptable. An agency *must* consider patterns of racial concentration and make decisions in light of the national housing policy. In fact, failure to consider these factors and locating housing solely within the ghetto is prima facie at variance with the congressional decree found in the 1968 Civil Rights Act. Compliance with the statute may be assured, however, by offering balanced housing opportunities so that not only is there a chance to remedy the evils of racially concen-

80. *Id.* at 820.

81. *Id.*

82. *Id.* at 820-21.

83. *Id.* at 822 (emphasis added).

trated housing, but there is also the concomitant opportunity for locating replacement housing elsewhere. Should the displacee wish to remain in or near his own neighborhood, it is suggested that this fact would "clearly outweigh" any disadvantage of his doing so. Indeed, there is the greater disadvantage of his being told that he *must* leave or stay. The opportunity to make that choice, rather than being contrary to the national housing policy, fulfills the spirit and substance of the goal of equal housing opportunity.

The Third Circuit has been joined by at least one other court in drawing the parallel between discrimination and site selection for housing. A Louisiana Federal District Court⁸⁴ maintained that it would be "totally unrealistic"⁸⁵ to say that the location of public housing is not relevant to the issue of discrimination. While that court stopped short of saying that location of housing in areas of minority racial concentration is a violation of the 1968 Civil Rights Act *per se*, it did assert that such location "creates a strong inference, which if unexplained, may be sufficient to support that conclusion."⁸⁶

An analogy may be drawn between discrimination in housing and similar conditions found in the nation's schools. One of the bonds linking the two conditions is site selection. Therefore, one may turn to the remedies employed by courts in school desegregation cases for legal reasoning in order to apply the same solutions to the housing field. In *United States v. Board of Public Instruction of Polk County*,⁸⁷ the Fifth Circuit enjoined the construction of new schools until the Board undertook its affirmative obligation to locate a new school building in a manner that would assist in eliminating the old dual system.⁸⁸ There the court foresaw that the location of schools could be one of the most effective means of eradicating the effects of past discrimination. In addition, in a landmark Supreme Court decision last term, site selection choices were emphasized as critical in disestablishing patterns of segregation.⁸⁹

84. *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969).

85. *Id.* at 622-23.

86. *Id.* at 623.

87. 395 F.2d 66 (5th Cir. 1968). *See generally* *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc* 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom.* 389 U.S. 840 (1967). At the rehearing *en banc*, the court held that: "boards and officials administering public schools in this circuit have the affirmative duty under the 14th Amendment to bring about an integrated . . . school system . . ." 380 F.2d at 389.

88. *Id.* at 70. The court cited with approval the standard applied in *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 481 (M.D. Ala. 1967), where it was stated that sites for the construction or expansion of schools should not be approved "if, judged in light of the capacity of existing facilities, the residence of the students, and the alternative sites available, the construction will not . . . further the disestablishment of state enforced or encouraged public school segregation and eliminate the effects of past state enforced or encouraged racial discrimination . . ." *But see* *Broussard v. Houston Independent School District*, 395 F.2d 817 (5th Cir. 1968).

89. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court, in

Thus it would seem that the location of housing could similarly be arranged so as to break down entrenched racially oriented housing patterns. Allowing minority displacees the opportunity of relocating in predominantly white residential areas offers at least one mode of accomplishing this goal.⁹⁰

These cases do not, however, merely *suggest* solutions. Dismantling segregation where it is found has in fact been *demande*d by the courts. In *Gautreaux v. Chicago Housing Authority*,⁹¹ the court found discrimination in the administration of a public housing program and assumed a major role in implementing desegregation by issuing a comprehensive and specific order for integrating the public housing system. In *Hadnot v. City of Prattville*,⁹² the court found discrimination in the provision of various facilities in municipal parks. That decision ordered the city to equalize the equipment facilities provided in a park located in a black neighborhood with those provided in parks located in white neighborhoods.

The Fifth Circuit, in *Hawkins v. Town of Shaw*,⁹³ ordered the local jurisdic-

discussing remedies where legally imposed segregation has been established, emphasized that:

. . . it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system. 402 U.S. at 21.

90. "Indeed, integrated housing is even more fundamental than integrated schooling; if we enjoyed the former, we would have less difficulty securing the latter." Roisman, *The Right to Public Housing*, 39 Geo. Wash. L. Rev. 691, 712 (1971).

91. 304 F. Supp. 736 (N.D. Ill. 1969). *Gautreaux* began in 1966 with an action by negro tenants in, or applicants for, public housing against the Chicago Housing Authority challenging the Constitutional validity of site selection procedures. Judge Austin held in the first case, 265 F. Supp. 582 (N.D. Ill. 1967) that plaintiffs had failed to prove that the defendants were prompted in their selection of sites at least in part by a desire to maintain concentration of Negroes in particular areas or to prevent them from living in other areas. Therein, the court required a showing of affirmative discriminatory state action. 265 F. Supp. at 584. In 1969, on motions for summary judgment, Judge Austin held that evidence established that the housing authority chose sites for the purpose of maintaining existing patterns of residential separation of the races. 296 F. Supp. 907 (N.D. Ill. 1969). The Judge stated that "a deliberate policy to separate the races cannot be justified. . . . [The Aldermen] cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing." 296 F. Supp. at 914. The order to desegregate the system was handed down in 304 F. Supp. 736 (N.D. Ill. 1969) with the command that

CHA (Chicago Housing Authority) shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures.

304 F. Supp. at 741.

CHA was further prohibited from placing housing in areas of minority concentration unless it subsequently began construction of a greater percentage of units outside the area of minority concentration. Stay of the order was denied, 401 U.S. 953 (1971).

92. 309 F. Supp. 967 (D.C. Ala. 1970) cited with approval in *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

93. 437 F.2d 1286 (5th Cir. 1971).

tion to equalize the disparities between whites and blacks in a wide range of municipal services. That court noted that “. . . a relationship otherwise rational may be insufficient in itself to meet constitutional standards—if its effect is to freeze in past discrimination.”⁹⁴ Within the confines of the language used by this court, should housing be located in such a manner as to augment patterns of minority racial concentration, and thereby “freeze in past discrimination,” the proposed project could be struck down for failure to comply with “constitutional standards.”

The defense that administrators of a housing program may not “intend” to promote segregation by not offering housing outside areas of racial concentration is irrelevant. Rather, court decisions emphasize the *results* and *effects* of official conduct. These far reaching standards are designed, at least in part, to require officials to take a broader view of a project's impact and its potential discriminatory effect. These standards also make the burden of proof easier for those alleging racial discrimination. Therefore, it is urged that seemingly benign action taken by state highway officials in providing replacement housing may be declared void should they fail to consider all racial implications in site selection decisions. Recently courts have cited with approval⁹⁵ the statement originally made in 1967⁹⁶ that

. . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.⁹⁷

The Second Circuit⁹⁸ has affirmed that government action “must be assessed not only in its immediate objective but its historical context and ultimate effect.”⁹⁹ This concept was also recently upheld in a Fifth Circuit decision¹⁰⁰ which held that, despite the failure of any direct evidence to show ill will or overt purpose on the part of the public officials to discriminate, the law clearly stated that, in a suit alleging racial discrimination in contravention of the fourteenth amendment, “actual intent or motive need not be directly

94. *Id.* at 1290. Affirming a principle previously applied in *Henry v. Clarksdale*, 409 F.2d 682, 688 (5th Cir. 1969).

95. *See, e.g., Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) (equal protection of the laws means more than merely the absence of governmental action designed to discriminate); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

96. *Hobsen v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

97. *Id.* at 497.

98. *Kennedy Park Homes Assoc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied* 91 S. Ct. 1256 (1971).

99. *Id.* at 112.

100. *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

proved.”¹⁰¹ The test, as noted above, was the *result* of government action.

In considering the most fundamental non-discriminatory principles,¹⁰² the Federal Highway Administration's authority and duty to condition receipt of funds upon the State's compliance with those principles becomes clear. The most basic statutory and constitutional mandates require that public officials not act in such a way as to promote, encourage, or perpetuate residential segregation. FHWA must insure that none of its housing related funds go to programs whose officials are acting in a manner inconsistent with these principles. If a replacement housing project amounts to the encouragement and perpetuation of segregation, unless by choice of displacees, then the withholding of funds for such project is required. Moreover, should the project fail to implement the national goal of equal housing opportunity, there are further grounds for the denial of federal participation.

The court decisions discussed above add a number of refinements to this broad outline and provide a framework within which an effective policy may be devised. The guidelines include the requirement for considering the impact a project may have on patterns of racial concentration; the harmful and discriminatory effects of an undue concentration of minority residents; the unquestioned parallel between housing location and discrimination; the affirmative obligation imposed upon some jurisdictions to equalize facilities; and the remedies a court may employ in ordering desegregation where discrimination has been found, whether it exists by purposeful intent or not.

Racial and economic discrimination hold our cities under a tight reign. By offering housing outside the racial ghetto of the inner city, and through initiative of state highway officials who use the financial resources available, the FHWA can fulfill the requirements of law. Unless projects make non-segregated opportunities available, and thereby satisfy the commands of the 1964 and 1968 Civil Rights Acts, there will be continued discrimination in the relocation assistance program even if it is not by design. A policy by which minority residents may be relocated outside the ghetto will help correct the effects of past discrimination and satisfy the affirmative mandate to provide equal housing opportunity. Unless federal participation is denied to projects which fail to satisfy the constitutional obligations imposed, they may well fall short of meeting the burden of justification imposed by the equal housing doctrine.

101. *Id.* at 1291-92. See *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967) (“necessity for a court to assess the potential impact of official action”). *But see* *James v. Valtierra*, 402 U.S. 137 (1971); *Green Street Assoc. v. Daley*, 373 F.2d 1 (7th Cir. 1967).

102. See note 38 *supra*.

Related Inquiries Under the Urban Housing Impact Assessment

In recognizing the total spectrum of events resulting from urban area highway construction, the Federal Highway Administration must require the state highway departments to analyze the project's impact in two related areas. That construction of new transportation facilities attracts business has been noted earlier.¹⁰³ An analysis of this impact should be required in the following form:

- (a) With regard to the proposed project, discuss the possibility of business enterprises locating in the vicinity of the highway in the foreseeable future.
- (b) Discuss any foreseeable increase in employment opportunities according to number and type of new employment.
- (c) What provisions are being made, in conjunction with local housing authorities, for planning housing in the vicinity of the project for low and middle income families which can be expected to seek employment in new business enterprises.

FHWA must require that state highway officials, in cooperation with local government, anticipate this need. At a minimum, local governments may well be required to plan and make provision for housing opportunities for their low and moderate income residents.¹⁰⁴ While this analysis still allows no direct control over land use, it does enable planning to be more effective in anticipating future housing and transportation needs. Its most important effect, however, will be to place housing needs of primarily low income families squarely within the highway planning process. In drawing the planning line further back, highway officials are recognizing that business will be attracted and thereby are anticipating the housing needs of those who will migrate to the new source of employment.

Most considerations to be discussed in the next inquiry are already incorporated into the highway planning process in broad, although somewhat vague language.¹⁰⁵ The proposed question, however, will draw specific attention to the

103. See page 647 *supra*. See also Shieler, *New Highways Shaping Future of City's Suburbs*, N.Y. Times, Aug. 19, 1971, at 1, col. 1. The author asserts that "the power of the highways to determine how land developed, and thus how millions of people will live and where they will work, is surer than all the careful reasoning of government planners . . ." *Id.* at 26, col. 1.

104. See *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (9th Cir. 1970) where the court said that:

Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups. 424 F.2d at 295-96 (dictum).

105. Policy and Procedure Memorandum 20-8, Jan. 14, 1969, 23 C.F.R. ch. 1, pt. 1, app. A (1971) [hereinafter cited as PPM 20-8].

particular effects highway construction may have upon inner city residents:

Discuss the effect the alternate highway locations may have on the following considerations:

- (a) splitting existing neighborhoods with regard to employment, commercial facilities, recreation facilities;
- (b) establishing an artificial boundary, which will encircle areas of minority concentration or serve as a barrier between said areas and areas predominantly white;
- (c) limiting access to the project, by its location, so that minority groups will be adversely affected.

These considerations are already to some extent required of the states by FHWA's Policy and Procedure Memorandum 20-8.¹⁰⁶ This regulation dictates that State highway officials must consider "social, economic, and environmental effects" of the project whether public hearings are held pursuant to 23 U.S.C. § 128 or not.¹⁰⁷ States must consider, among other items, residential and neighborhood character and location.¹⁰⁸ However, officials should be required to examine the more detailed matters established above, for these inquiries plainly fall within the scope of FHWA's 1964 Civil Rights Act obligations. According to DOT Title VI Regulations,¹⁰⁹ the states are prohibited from locating or constructing a highway in such a manner as to deny reasonable access to, and use thereof, to any persons on the basis of race, color, or national origin.¹¹⁰

Further authority for requiring this analysis exists in the principle that no federal funds be used to promote or perpetuate segregation. Highways which would effectively seal off the ghetto, or provide a boundary encircling it, would be in violation of this doctrine. Therefore, these specific factors should be analyzed for any proposed project in an urban area.

106. *Id.*

107. State highway departments must certify that they have conducted public hearings or otherwise afforded the opportunity to consider the economic and social effects of a highway's location. Congress further requires that the certification be accompanied by a report which indicates the consideration given to economic, social and environmental effects of the plan. PPM 20-8 further requires that the public be allowed two hearings: one to consider design, which includes the direct and indirect benefits or losses to the community, and one on location.

108. These requirements are in addition to those imposed by 23 U.S.C. § 134 (1970), which states that urban transportation planning must be a continuing, comprehensive and cooperative process.

109. 49 C.F.R. § 21.5 (1971).

110. *Id.*

Conclusion

Francis C. Turner, the Federal Highway Administrator, recently reaffirmed his agency's "total commitment" to its civil rights programs and noted that this commitment has been strengthened by the "unwavering leadership of Secretary of Transportation John A. Volpe."¹¹¹ In discussing FHWA's efforts in the matter of relocation assistance, the Administrator noted that "[t]he relocation impact is particularly hard on minorities."¹¹²

The policy recommended in this article affords FHWA the opportunity to fulfill that commitment in the field of equal housing opportunity. It is not claimed that the policy will lift the burden imposed on minorities by displacement and relocation. It is maintained that by opening the way to better housing opportunity that burden will be made lighter.

Future projects implemented under this policy will have the effect of reducing any further establishment of the segregated residential patterns found in this nation's major cities. By providing displacees a documented meaningful choice of remaining in the ghetto or abandoning it, the Federal-Aid Highway Program will serve the ghetto rather than isolate it. It grants FHWA and the state highway departments, through the relocation assistance program, a crucially important opportunity to terminate racial segregation and, in its stead, provide minority citizens a previously unknown choice of residence. In doing so, the Federal Highway Administration will be assured of having done its part in fulfilling the national goal of equal housing opportunity as required by law.

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111. FHWA News, Feb. 10, 1972, at 1, col. 1.

112. *Id.* at col. 2.

* This article was prepared during the author's tenure as a law clerk in the Office of the Chief Counsel, Federal Highway Administration, Department of Transportation. The views expressed are solely those of the author.