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## HUD's Obligation to "Affirmatively Further" Fair Housing: A Closer Look at Hope VI

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## HUD'S OBLIGATION TO "AFFIRMATIVELY FURTHER" FAIR HOUSING: A CLOSER LOOK AT HOPE VI

### I. INTRODUCTION

The Fair Housing Act of 1968 ("FHA") mandates that the Department of Housing and Urban Development ("HUD") must "affirmatively further" fair housing.<sup>1</sup> While the FHA prohibits HUD from discriminating in the administration of the nation's housing, it also requires that HUD take positive action to provide for sound development of the nation's distressed communities.<sup>2</sup> In 1993, HUD created the Urban Revitalization Demonstration project, which became known more commonly as Homeownership and Opportunity for People Everywhere ("HOPE VI").<sup>3</sup> This program makes federal grants available for local housing authorities to revitalize their "severely distressed" public housing.<sup>4</sup> In the past decade, HOPE VI projects almost invariably have involved the eradication of older, larger housing developments in favor of significantly smaller, mixed-income communities.

Reaction to HOPE VI has been mixed. While advocates point to the program's ability to replace dilapidated housing super-structures with more attractive communities,<sup>5</sup> critics have argued that HOPE VI has contributed to the decline in the supply of affordable housing.<sup>6</sup> Overwhelmingly, the class of

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1. 42 U.S.C. § 3608(e)(5) (2000).

2. *See, e.g.*, *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987).

3. Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571 (1993).

4. *Id.*

5. *See* Patrick E. Clancy & Leo Quigley, *HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO J. ON POVERTY L. & POL'Y 527 (2001) (arguing that HOPE VI provides substantial resources that may actually increase the number of moderate and low income families receiving assistance and can "help those families most at risk of failure under welfare reform advance toward self-sufficiency in supportive, mixed-income, well-managed settings").

6. *See* National Housing Law Project, *False Hope: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program*, (2002), *available at* <http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf> (noting that HOPE VI and other HUD programs have been responsible for a net loss of over 107,000 public housing units through demolition in recent years); *see also* Christopher Swope, *Rehab Refugees*, GOVERNING MAG., May 2001, at 40-41, *available at* <http://governing.com/archive/2001/may/housing.txt> (last visited

people most displaced by the destruction of existing housing projects is poor African-Americans. As such, some have argued that HOPE VI projects may violate the Fair Housing Act if the displacement of public housing residents has a disparate impact on an FHA-protected class.<sup>7</sup> Challenges to HOPE VI have been largely unsuccessful, primarily because HUD enjoys broad discretion in its funding decisions and the standard of review for judicial intervention is high. Trial courts generally review a HOPE VI program only for abuse of discretion or egregious error.<sup>8</sup> As such, HUD can almost always demonstrate that its projects satisfy the legal requirements of the FHA and that it has met its obligation to “affirmatively further” fair housing.

This Comment explores what it means to “affirmatively further” fair housing. Specifically, it examines the role of the judiciary in narrowing the range of HUD’s discretion in the HOPE VI context and ensuring that HUD fulfills its obligation to affirmatively further fair housing. The analysis will center on the case of *Darst-Webbe Tenant Association Board v. Saint Louis Housing Authority*,<sup>9</sup> in which a public housing tenant’s association challenged the implementation of a HOPE VI grant. The Comment ultimately concludes that it is unlikely the judiciary will be effective in producing significant change in the way HUD administers HOPE VI, given the deference afforded to government agencies and the lack of substantive requirements for HOPE VI proposals. It first provides a brief history of U.S. housing policy in Part II and

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Jan. 15, 2005) (noting that in the 1990s, of the approximately 100,000 public housing units destroyed under HOPE VI, only 60,000 were scheduled to be replaced).

While the causes of the decline in the public housing supply are subject to debate, no one can dispute that a shortage does in fact exist for those families with the lowest incomes. The number of public housing units affordable to those with “very low incomes,” at or below 50% of area median income, fell by 1.3 million between 1991 and 1999—an 8% loss overall. *See What do we know about shortages of affordable rental housing?: Testimony before the House Committee on Financial Services, Subcommittee on Housing and Community Opportunity* (2001) (testimony of Kathryn P. Nelson, Office of Policy Development and Research), available at <http://financialservices.house.gov/media/pdf/050301ne.pdf>. For “extremely low income renters” (at or below 30% AMI), units decreased by 940,000— a 14% loss. *Id.* According to data published in a separate 2001 HUD report, for every 100 very low income families, there were only 70 units affordable and actually available to them. *See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A REPORT ON WORST CASE HOUSING NEEDS IN 1999: NEW OPPORTUNITY AMID CONTINUING CHALLENGES*, 8-9 (Jan. 2001), available at <http://www.huduser.org/publications/affhsg/wc99.pdf> (last visited Jan. 31, 2006). Only 40 units were affordable and available for every 100 extremely low income households. *Id.*

7. This paper will explore in greater detail a case in which a public housing tenant board filed a disparate impact claim against the St. Louis Housing Authority for using a HOPE VI grant to demolish their complex. *See infra* Part V.

8. *See N.A.A.C.P.*, 817 F.2d at 157.

9. *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth. (Darst Webbe I)*, 202 F. Supp. 2d 938 (E.D. Mo. 2001), *aff’d in part and remanded in part* by 339 F.3d 702 (8th Cir. 2003), *remanded to* 299 F. Supp. 2d 952 (E.D. Mo. 2004), *aff’d* 417 F.3d 898 (8th Cir. 2005).

discusses the impact of the FHA in Part III. Following a more detailed examination of the HOPE VI program in Part IV, the Comment shifts its focus to the *Darst-Webbe* case in Part V.

This analysis focuses primarily on the role of the judiciary in HOPE VI and stops short of asserting that HUD is failing to satisfy its fair housing obligation. Nonetheless, it concludes by noting that HUD should do more to ensure that HOPE VI actually provides for those residents most in need of its advocacy and protection. At a minimum, HUD should undertake a critical and comprehensive review of HOPE VI to analyze its role in reducing the supply of available affordable housing.

## II. HISTORY OF U.S. HOUSING POLICY

### A. *The Origins of Public Housing*

The federal government first became significantly involved in public housing with the passage of the 1937 Wagner-Steagall Act ("United States Housing Act of 1937").<sup>10</sup> This Depression-era legislation was designed to create jobs and to serve as a slum clearance plan.<sup>11</sup> The bill would provide financial assistance for housing "to alleviate present and recurring unemployment and to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income."<sup>12</sup> The housing component of the program was directly tied to the creation of jobs and sought to prepare workers for industrial and service employment.<sup>13</sup> Local public housing authorities ("PHAs") were organized and worked to plan and construct housing developments using federal grant money. These local PHAs also assumed responsibility for administering the developments. The original bill provided that operating expenses would be paid for with the rents collected from tenants.<sup>14</sup> This initial phase of public

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10. Wagner-Steagall Housing Act, Ch. 896, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. § 1437 (2000)). The federal government was involved in public housing projects prior to the Housing Act of 1937, albeit on a much smaller scale. See Michael S. FitzPatrick, Note, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD'S Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421, 424-25 (2000) (discussing early federal housing support, including a federal initiative to build housing for factory workers involved in the war effort during World War I).

11. Wagner-Steagall Housing Act, Ch. 896, 50 Stat. 888 (stating that the goals of the legislation were job creation, slum clearance, and to provide housing).

12. *Id.*

13. See Harry J. Wexler, *HOPE VI: Market Means/Public End—The Goals, Strategies, and Midterm Lessons of HUD's Urban Revitalization Demonstration Program*, 10 J. AFFORDABLE HOUS. & CMTY. DEV. L. 195, 199 (2001) (noting that "[t]he 1937 Housing Act . . . acknowledged federal responsibility for providing housing for the poor, but linked this social purpose to a larger political and economic mandate . . . to create jobs . . . and stimulate the economy").

14. See FitzPatrick, *supra* note 10, at 428.

housing lasted through the 1950s and was, in many ways, part of a larger system of public welfare.<sup>15</sup>

### B. *The 1960s: Super-Structure Model of Public Housing*

The 1960s brought a boom in public housing development, centered on the construction of high-density, high rise facilities.<sup>16</sup> The high rise model was popular because it enabled PHAs to keep land and construction costs down in the face of limited budgets and ever increasing need.<sup>17</sup> This high-density model, however, was poorly conceived and under funded.<sup>18</sup> Drugs, violence, and poor upkeep quickly led to rapid deterioration.<sup>19</sup> Apart from maintenance and safety issues, the failures of the high-rise developments were exacerbated by the fact that the sites led to isolation and detachment from the existing community,<sup>20</sup> as well as the fact that the structures were built almost

15. See Wexler, *supra* note 13, at 199 (noting that public housing “include[d] settlement houses and other social agencies, intended to prepare entry-level workers for the lower rungs of industrial and service employment”).

16. See R. ALLEN HAYS, *THE FEDERAL GOVERNMENT AND URBAN HOUSING* 97 (1995) (noting that in the 1960s, the Kennedy and Johnson administrations authorized the construction of more than 700,000 units of public housing).

17. LAWRENCE FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 120 (1968).

18. Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 501, 501-06 (1993) (discussing the financial constraints on HUD and housing authorities and their effect on construction and maintenance decisions).

19. Wexler, *supra* note 13, at 198 (noting that various factors such as urban poverty, drug-related crime, poor and discriminatory location decisions by local PHAs, excessively high density, and poor property management all combined to increase distress of the public housing stock); see also EUGENE J. MEEHAN, *THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING*, 27-30, 59-60 (1979) (noting that a combination of scarcity of funds and failed management led to poor upkeep); FitzPatrick, *supra* note 10, at 428-29 (noting that as “[d]enser populations paying less and less in rent moved i[n],” operating expenses could not be met).

20. Perhaps the most poignant example of high rise isolation was the Robert Taylor Homes on Chicago’s south side. When it was completed in 1962, Robert Taylor was the largest public housing complex in the world, housing more than 18,000 people in 4,300 units. Chicago Housing Authority, Robert Taylor Homes, [http://thecha.org/housingdev/Robert\\_taylor.html](http://thecha.org/housingdev/Robert_taylor.html); Devereux Bowley, *Architects and Residents of Public Housing*, PERSPECTIVES ON THE PROFESSION, Dec. 1983, available at [http://ethics.iit.edu/perspective/pers3\\_4dec83\\_2.html](http://ethics.iit.edu/perspective/pers3_4dec83_2.html). The apartments were arrayed in a lineal series of 28 16-story high rises that stretched for more than two miles. *Id.* The towers protruded from the middle of an industrial wasteland near Lake Michigan, while the decent, white working class bungalows lie to the west- separated by the massive ten-lane Dan Ryan Expressway. *Id.*

Most of the high rises have now been demolished and the Chicago Housing Authority is transforming the property into a mixed-income development with the assistance of several HOPE VI Revitalization grants. Robert Taylor Homes HOPE VI Site Profile, [http://www.housingresearch.org/hrf/hrf\\_SiteProfile.nsf/0/6af186cae30586e5852569d5004d1744?OpenDocument](http://www.housingresearch.org/hrf/hrf_SiteProfile.nsf/0/6af186cae30586e5852569d5004d1744?OpenDocument) (last visited Feb. 12, 2006); see also Michael Schill & Susan M. Wachter, *The*

exclusively in urban city-centers while jobs and growth migrated to the suburbs.<sup>21</sup>

With the booming economy and housing market in the decades following World War II, "public housing "quickly became the housing of last resort, segregated to the lowest-income populations and ghettos for racial minorities."<sup>22</sup> The physical isolation of the overwhelmingly minority-inhabited housing projects was not unintentional, as public housing authorities often bowed to intense local opposition and political pressure not to build developments in working and middle class neighborhoods.<sup>23</sup> HUD attempted to remedy the effects of discrimination in the selection process by imposing site selection standards in the 1970s.<sup>24</sup> The standards prevented the construction of new developments "in neighborhoods with high concentrations of low income minority residents," but as HUD was effectively powerless to override local opposition and the decisions of local PHAs, the effect was to even further limit the number of possible sites for projects.<sup>25</sup>

### C. The 1970s: Section 8

Intending to remedy the failure of past programs and move away from the disastrous high rise model for public housing,<sup>26</sup> the federal government introduced Section 8 in 1973.<sup>27</sup> Section 8 was a subsidy program designed to create a "free market system for affordable housing" by providing incentives for developers to enter the public housing market.<sup>28</sup> The goal was to move housing construction and management responsibilities to the private sector through the use of subsidies. Two types of subsidies were created: project-based and tenant-based.<sup>29</sup> Project-based subsidies allowed developers to create

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*Spatial Bias of Federal Housing Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1300-08 (1995) (discussing a study on the impact of high levels of public housing on the neighborhood).

21. See Schill & Wachter, *supra* note 20, at 1295.

22. FitzPatrick, *supra* note 10, at 430.

23. See Wexler, *supra* note 13, at 200. As Wexler notes, "HUD had the power to prevent further segregation (in public housing), but it lacked the authority or tools to override local opposition to the placement of public housing in working and middle class neighborhoods or in suburban areas." *Id.*

24. *Id.*

25. *Id.*

26. FitzPatrick, *supra* note 10, at 432 (citing R. ALLEN HAYS, THE FEDERAL GOVERNMENT AND URBAN HOUSING 139-42 (1995)).

27. See Housing and Community Development Act of 1974, Pub. L. No. 93-383 § 201(a), 88 Stat. 633, 662 (1974) (codified as amended at 42 U.S.C. § 1437(f) (2000)).

28. See FitzPatrick, *supra* note 10, at 431-32.

29. *Id.* at 432 (citing R. ALLEN HAYS, THE FEDERAL GOVERNMENT AND URBAN HOUSING 148-49, 153 (1995)).

new or rehabilitate existing private housing reserved for low income families.<sup>30</sup> The tenant-based subsidy provided eligible tenants with a voucher to pay for private market housing.<sup>31</sup> While these private market programs were designed around the proposition that private intervention would reduce the inefficiency and mismanagement inherent in earlier public housing programs, they generally did not succeed in producing a large scale increase in home ownership among the very poor.<sup>32</sup>

*D. The 1980s: Budget Cuts, Scandal, and Continued Decay*

The 1980s brought even worse developments for affordable housing programs as President Reagan sharply cut spending on domestic and social welfare initiatives. Public housing spending decreased drastically, stretching already thin budgets at HUD and at local PHAs. Of the funding available, most was for Section 8 tenant vouchers, as opposed to the construction of new public housing.<sup>33</sup> HUD's already weakened image was further tarnished when scandal rocked the agency at the end of the Reagan administration.<sup>34</sup> HUD's Secretary had used money appropriated for Section 8 new construction as a personal slush fund.<sup>35</sup> By the end of the decade, public housing faced insurmountable challenges: a deteriorated stock of developments, incompetent management, budget shortfalls, animosity between PHAs and the residents they were supposed to serve, and public distrust of the agency charged with providing for the housing needs of the urban poor.<sup>36</sup>

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30. *Id.*

31. *Id.*

32. HAYS, *supra* note 16, at 113-21 (discussing the failures of the program).

33. *Id.* at 238-41.

34. *Id.* at 252.

35. *Id.* at 252-55.

36. Wexler, *supra* note 13, at 200-01.

E. *The 1990s: HUD Reforms and HOPE VI<sup>37</sup> Emerges*

It was in this climate<sup>38</sup> that Congress formed a commission in 1989 to study the housing crisis and propose reforms in the government's role in and administration of public housing.<sup>39</sup> The National Commission on Severely Distressed Public Housing - comprised of eighteen members appointed by the House, Senate, and HUD - was charged with developing a plan for handling the nation's deteriorated housing stock.<sup>40</sup> The Commission met for a year and issued its final report in August of 1992.<sup>41</sup> The report recommended the eradication of the nation's "severely distressed public housing" as a means of freeing up resources for HUD and local PHAs to more effectively manage new and existing projects.<sup>42</sup> Specifically, the Commission suggested that six percent of the nation's 1.4 million "severely distressed" housing units should be destroyed by the year 2000.<sup>43</sup> The Commission's recommendations led Congress to appropriate \$300 million in the fall of 1992 to create the Urban Revitalization Demonstration project, which became known more commonly as HOPE VI.<sup>44</sup> The program was designed to help local PHAs eliminate their large, expensive, deteriorated developments through the use of federal grants.<sup>45</sup> With the elimination of these failed budget-busting units, local housing authorities would have more funds to administer existing units while simultaneously adding new, more successful developments as part of a system of urban renewal in America's cities.<sup>46</sup>

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37. HOPE is an acronym for Homeownership and Opportunity for People Everywhere. *See, e.g.*, Homeownership and Opportunity Through HOPE Act, Pub. L. No. 101-625, 104 Stat. 4148 (1990); *see also* Wexler, *supra* note 13, at 228 n.9. It was initially enacted as part of the Cranston-Gonzales National Affordable Housing Act of 1990, which consisted of three homeownership programs: HOPE I (Indian Housing tenants), HOPE II (sale of units in multifamily projects owned by HUD or other government agencies), and HOPE III (sale of single-family units in scattered site projects). Pub. L. No. 101-625, 104 Stat. 4148, 4162, 4172 (1990); *see also* Wexler, *supra* note 13, at 228 n.9. The Act also contained HOPE IV (elderly housing vouchers) and HOPE V (job training for disadvantaged youth), which were enacted in 1992 as part of the Housing and Community Development Act of 1992. 104 Stat. at 4317; *see also* Wexler, *supra* note 13, at 228 n.9.

38. As Wexler notes, "[a]wareness of the problems of severely distressed public housing had been bubbling up for a decade." Wexler, *supra* note 13, at 198. In 1979, a HUD commissioned study (Jones et al. 1979) had concluded that seven percent of public housing units were troubled on four primary counts: social, physical, financial, and managerial. *Id.* Ten years later, a second HUD study (Abt Associates 1988) reported that five to eight percent of the nation's public housing stock needed substantial renovation and redesign - at an estimated cost of \$22 billion. *Id.*

39. Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, tit. V, 103 Stat. 1987, 2048-49 (1989).

40. Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, §§ 501, 503, 103 Stat. 1987, 2048-49 (1989). Specifically, Congress asked the Commission to identify projects in distress, assess the most promising strategies for eliminating unfit living conditions, and to develop a national action plan for the eradication of unfit living conditions in public housing by the year 2000. Department of Housing and Urban Development Reform Act of

In 1998, Congress passed the Quality Housing and Work Responsibility Act of 1998 (“Public Housing Reform Act of 1998”).<sup>47</sup> The bill authorized multi-year funding for HOPE VI.<sup>48</sup> It also provided additional guidelines for

1989, Pub. L. No. 101-235, § 504, 103 Stat. 1987, 2048-49 (1989); *see also* Wexler, *supra* note 13, at 197-98.

41. NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING, THE FINAL REPORT OF THE NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING: A REPORT TO THE CONGRESS AND THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 38, xiii (1992) [hereinafter FINAL REPORT].

42. *Id.* at 36-37.

43. *Id.* at 2.

44. Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571, 1579 (1993).

45. In determining which developments were “severely distressed” and thus eligible for elimination under the program, Congress used the criteria recommended by the Commission. Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571, 1580 (1993). Their definition and rating system focused on four conditions: “[i.] families living in distress; [ii.] rates of serious crime in the development or surrounding neighborhood; [iii.] barriers to managing such developments (e.g. high vacancy and turnover rates, low rent collection, and high rate of rejection of unit by prospective tenants); and, [iv.] physical deterioration of buildings. *See* FINAL REPORT, *supra* note 41, App. B, B2. These criteria were further refined and codified in section 535 of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461, 2518, 2584-2585 (1998) (codified in various sections of 42 U.S.C.).

46. As Henry Cisneros, former HUD Secretary under President Bill Clinton from 1993 to 1997, noted, HOPE VI aims to revitalize the worst of public housing by replacing it with “smaller-scale, economically integrated housing that is an anchor for neighborhood renewal.” Wexler, *supra* note 13, at 196.

47. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461, 2518, 2584-2585 (1998) (codified in various sections of 42 U.S.C.).

48. Prior to the Public Housing Reform Act, HOPE VI was administered by annual appropriations. Section 535 of the Public Housing Reform Act extended funding for the program through September 30, 2002. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 535, 112 Stat. 2461, 2585 (1998) (codified in various sections of 42 U.S.C.). Congress appropriated more than \$574 million for fiscal year 2003 and signed legislation reauthorizing the program through fiscal year 2006. 42 U.S.C.A. § 1437v(m)(l) (2005); HOPE VI Program Reauthorization and Small Community Mainstreet Rejuvenation and Housing Act of 2003, Pub. L. No. 108-186, §§ 401-402, 117 Stat. 2693, 2693-2694 (2003). However, President George Bush has expressed little interest in funding the program. Both his FY2004 and FY2005 budgets proposed no new appropriations for HOPE VI. COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, FY 2004 OMNIBUS, CONTAINING HUD FUNDING, RELEASED, <http://www.clpha.org/page.cfm?pageID=49>; COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, CLPHA CONCERNED BY HUD FY05 BUDGET, <http://www.slpha.org/page.cfm?pageID=440>. On January 22, 2004, Congress passed a FY2004 consolidated appropriations bill that included \$150 million for HOPE VI. COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, FY 2004 OMNIBUS, CONTAINING HUD FUNDING, RELEASED, <http://www.clpha.org/page.cfm?pageID=49>. While this is certainly better than zero funding, it is a sharp drop from previous HOPE VI appropriations that hovered in the \$550 million annually range. *Id.*; *see also* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOPE VI

authorizing funding and administering the program.<sup>49</sup> HOPE VI currently operates according to a patchwork of regulations.<sup>50</sup> Among these is the actual appropriations bill from Congress, which is often short and unremarkable in description or assistance.<sup>51</sup> Additionally, guidelines are derived from the annual Notice of Funding Availability ("NOFA") that HUD issues each year after receiving the appropriations from Congress.<sup>52</sup> The NOFA essentially outlines the amount of grant money earmarked for HOPE VI that year, spells out the program requirements and guidelines for applicants, and requests housing authorities to submit proposals for grant consideration.<sup>53</sup> Each NOFA also outlines the ranking structure used to score the applications during the highly competitive review process.<sup>54</sup> HUD has tailored the program with each subsequent NOFA, including altering the selection criteria, adjusting the scoring, and capping the amount of possible awards.<sup>55</sup>

The original goals of HOPE VI centered largely on 1) eliminating the most blighted housing projects and pockets of despair and 2) creating environments that would encourage self-sufficiency and support family movement out of public housing.<sup>56</sup> "From its initial focus on [transforming] the very worst public housing developments in the largest U.S. cities," HUD significantly broadened HOPE VI's scope and purposes throughout the late 1990s.<sup>57</sup>

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FISCAL YEAR 2003 FUNDING INFORMATION, available at <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/fy03/index.cfm> (last visited Jan. 31, 2006).

49. See Department of Housing and Urban Development, About HOPE VI, History and Background, <http://www.hud.gov/offices/pih/programs/ph/hope6/about/> (last visited Jan. 31, 2006).

50. The Public Housing Reform Act of 1998, annual NOFAs, and the individual contracts between HUD and the grantees all govern HOPE VI projects. FitzPatrick, *supra* note 10, at 437. As Congress has not passed authorizing legislation, HUD has not issued programmatic regulations governing HOPE VI; rather, each annual NOFA specifies the guidelines for that particular year. *Id.*

51. *Id.* (noting that in most cases, the relevant language in the appropriations bill is little more than a paragraph long).

52. See, e.g., Funding Availability for Urban Revitalization Demonstration: Notice, 58 Fed. Reg. 435, 436-50 (Jan. 5, 1993) (Notice of Funding Available for the program); Fiscal Year 1998 Notice of Funding Availability for the Demolition of Severely Distressed Public Housing (HOPE VI Demolition) 63 Fed. Reg. 29,851, 28,852-29,857 (June 1, 1998).

53. See, e.g., Funding Availability for Urban Revitalization Demonstration: Notice, 58 Fed. Reg. 435, 436-47 (Jan. 5, 1993).

54. For a more thorough description of HUD's scoring criteria and the review process, see *infra* Part IV.

55. FitzPatrick, *supra* note 10, at 437; see, e.g., Funding Availability for Urban Revitalization Demonstration: Notice, 58 Fed. Reg. 435, 436-47 (Jan. 5, 1993); Fiscal Year 1998 Notice of Funding Availability for the Demolition of Severely Distressed Public Housing (HOPE VI Demolition) 63 Fed. Reg. 29,851, 28,852-29,856 (June 1, 1998).

56. See Wexler, *supra* note 13, at 201.

57. These purposes included: lessening the concentration of very poor residents; creating mixed income communities for a diverse range of households; fostering partnerships to leverage

Among the more celebrated goals of the current HOPE VI program is to increase “home ownership possibilities for low- and moderate-income people.”<sup>58</sup> According to HUD, HOPE VI envisions public housing as part of a community-based process towards self-sufficiency and thus focuses on creating a supportive and sustainable living environment for residents.<sup>59</sup>

### III. HOPE VI AND THE FAIR HOUSING ACT

As the federal agency charged with overseeing the nation’s public housing, HUD must ensure it acts in accordance with federal law in administering the HOPE VI program. The Fair Housing Act of 1968 is the most significant piece of federal legislation relating to housing discrimination and imposes restrictions and obligations that affect both private and public housing.<sup>60</sup> By the terms of the FHA, HUD must “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies” of the FHA.<sup>61</sup>

The FHA originated during the civil rights era and was intended to ameliorate the rampant discrimination that had plagued both the private housing market and the administration of public housing.<sup>62</sup> As such, the FHA

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additional resources in the community; providing opportunities for family self-sufficiency; building sustainable housing designed to blend into and enrich the urban landscape; and, ensuring meaningful involvement of affected residents community members in the planning and implementation of the revitalization effort. *See id.*

58. FitzPatrick, *supra* note 10, at 436.

59. *See id.*

60. 42 U.S.C. § 3601 (2000). The Fair Housing Act prohibits discrimination in all housing by making it illegal to “make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” *Id.* at § 3604. Amendments in 1988 significantly expanded the scope of the FHA’s protections to include persons with disabilities and families with children. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 800, 102 Stat. 1619-1620, 1622 (1988).

61. 42 U.S.C. § 3608(e)(5) (2000).

62. What is commonly referred to as the Fair Housing Act is contained in Title VIII of the Civil Rights Act of 1968. 42 U.S.C. § 3601-3619 (1988). The Bill was passed within a week of Dr. Martin Luther King, Jr.’s assassination in 1968. U.S. Department of Housing and Urban Development, Celebrating Fair Housing, <http://www.hud.gov/offices/fheo/aboutfheo/history.cfm> (last visited Sept 22, 2005). “Since the 1966 open housing marches in Chicago, Dr. King’s name had been closely associated with fair housing legislation.” *Id.* Congress regularly considered such legislation throughout 1966 and 1967, but never garnered a strong enough majority to pass a bill. *Id.* President Johnson saw the legislation as a fitting tribute to Dr. King’s legacy and pushed the legislation through Congress with amazing speed amid civil unrest, signing the legislation into effect on April 11, 1968 - a mere week after King’s death and before his funeral in Atlanta. *Id.* *See also* Tracey McCartney and Sara Pratt, *The Fair Housing Act: 35 Years of Evolution*, (Mar. 2003), available at <http://www.fairhousing.com/include/media/pdf/35years.pdf>. For a contemporaneous account of the political and social context of the passage of the Fair Housing Act, see Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8

was designed to promote integration and prohibit discrimination in the nation's housing.<sup>63</sup> This includes both intentional, overt discrimination and actions that may have a discriminatory effect.<sup>64</sup> Thus, at a minimum, "affirmatively furthering" fair housing requires HUD to administer its programs in a manner that seeks to reduce segregation and discrimination in the nation's public housing supply.<sup>65</sup> In the context of HOPE VI, this means that HUD must fund projects that aim to reduce segregation and do not have a discriminatory design. Additionally, HUD is responsible for ensuring that a HOPE VI revitalization project does not have a discriminatory effect.<sup>66</sup>

Beyond that, it is unclear what exactly HUD must do to "affirmatively further" public housing in the HOPE VI context. HUD has not issued detailed regulations on HOPE VI that identify certain threshold requirements a project must meet to satisfy its FHA obligation.<sup>67</sup> Quite the contrary, while HUD

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WASHBURN L.J. 149 (1969), available at <http://www.fairhousing.com/include/media/pdf/dubofsky.pdf>.

63. See *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong. Rec. 3422 (statement of Sen. Mondale)) (noting that Congress' intent in passing the Federal Fair Housing Act was to replace the ghettos "by truly integrated and balanced living patterns" and "to remove the walls of discrimination which enclose minority groups").

64. The Fair Housing Act "[has] been interpreted to prohibit facially neutral policies that have a disproportionate effect on individuals who are members of a protected class, regardless of the defendant's subjective intent." See Dana L. Miller, Comment, *HOPE VI and TITLE VIII: How a Justifying Government Purpose Can Overcome The Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277, 1291 (2003) (discussing the "disparate impact" theory of liability in a HOPE VI challenge) (citing Christopher P. McCormack, Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 563-64 (1986)). This "disparate impact" theory of liability has been applied to the Fair Housing Act largely by analogy to case law interpreting Title VII (employment discrimination) of the Civil Rights Act of 1968. See Kristopher E. Ahrend, *Effect, or No Effect: A Comparison of Prima Facie Standards Applied in "Disparate Impact" Cases Brought Under the Fair Housing Act (Title VIII)*, 2 RACE & ETHNICITY ANC. L. DIG. 64, 73 (1996); Christopher P. McCormack, Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 563-64 (1986); see also *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 645-46 (1989) (explaining that a facially neutral employment practice may be unlawful because it has a disparate impact on a member of a protected class).

65. See, e.g., *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (explaining that HUD's duty under the Fair Housing Act requires the agency to "refrain from discriminating [itself] ([or] from purposely aiding discrimination by others)"). To satisfy its duty, HUD must make its program decisions by utilizing an institutionalized process to gather relevant racial and socioeconomic data and then to weigh alternatives in light of that information and the FHA mandated policy against discrimination in federally assisted housing. See, e.g., *Shannon v. United States Dept. of Hous. & Urban Dev.*, 436 F.2d 809, 821-22 (3d Cir. 1970).

66. For a thorough examination of the disparate impact theory of liability in a HOPE VI case, see Miller, *supra* note 64, at 1291-1307.

67. For example, HUD could mandate a minimum public and private unit mix percentage, a minimum number of public units that must be made available in each new development based on the number of public units destroyed, or a minimum percentage of displaced families that must be

provides some basic guidelines, PHAs craft their plans from scratch - working with private developers, consultants and city planners to prepare a proposal.<sup>68</sup> These parties determine the details of the proposed project and HUD signs off on the award if the plan receives a sufficiently high score. The process does not lend itself to an effective calculus of whether the project satisfies HUD's duty to affirmatively further fair housing. Moreover, the judicial process has afforded little guidance as to what it means to affirmatively further fair housing because there have been relatively few cases challenging HOPE VI awards.<sup>69</sup> Those trial courts that have heard HOPE VI challenges have not substantively analyzed the individual components of the revitalization plan.<sup>70</sup> Thus, there is little, if any, precedent to guide HUD and local housing authorities - and those wishing to challenge the actions of housing authorities - in determining whether a project satisfies HUD's FHA obligation.

#### IV. THE HOPE VI PROGRAM IN DETAIL: MAJOR ELEMENTS

The application process for HOPE VI funding is highly competitive.<sup>71</sup> As discussed earlier, each year HUD publishes a NOFA announcing the amount of grant money to be distributed and outlines the selection criteria and ranking

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permitted to return to the completed HOPE VI development. *See infra* pp. 21-23 (discussing 2004 Notice of Funding Availability). To date, HUD has avoided creating any such thresholds, preferring instead to allow individual applicants discretion to determine the appropriate quantity and mix of public housing units. *See id.*

68. For a more detailed discussion of the guidelines, criteria, and scoring and review processes employed by HUD, see *infra* Part IV.

69. To be sure, some tenants and tenant associations have filed claims. *See, e.g., GAUTREAUX v. CHICAGO HOUS. AUTH.*, 178 F.3d 951, 952, 954 (7th Cir 1999); *Reese v. Miami-Dade County*, 210 F. Supp 2d 1324, 1327-28 (S.D. Fla. 2002); *Cabrini-Green Local Advisory Council v. Chi. Hous. Auth.*, No. 04-C3792, 2005 WL 61467 at \*1 (N.D. Ill. 1997).

70. Although this discussion will be more fully developed *infra* Parts V & VI, a brief mention of several factors that are likely responsible for the lack of substantive analysis is appropriate here. First, cases may be disposed of on procedural grounds before the court even gets to the merits. *See infra* p. 29 (discussing *Darst-Webbe Tenant Ass'n v. St. Louis Hous. Auth. (Darst Webbe I)*, 229 F. Supp. 2d 952, 966-67 (E.D. Mo. 2004). Also, HUD has not issued specific regulations or requirements for the specific components of a HOPE VI plan, as noted in, *supra* note 67. Additionally, the standard of review for an administrative agency is high—usually “abuse of discretion” or “arbitrary or capricious”—and courts afford HUD considerable deference as a government agency charged with a specialized function. 5 U.S.C. § 706(2)(a) (1994).

71. Since its inception in 1993 through fiscal year 2003, HUD's HOPE VI Revitalization Grant program has awarded 217 grants totaling more than \$5.5 billion to PHAs in 118 cities. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, NATIONAL FACT SHEET, FY 2003 HOPE VI REVITALIZATION GRANT AWARDS, available at <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/03/nationalfactsheet.pdf> (last visited Jan. 15, 2005) [hereinafter NATIONAL FACT SHEET]. HUD estimates that the grants have leveraged an additional \$10.7 billion in public and private funds. *Id.*

structure used to score each application.<sup>72</sup> Local housing authorities submit proposals and HUD selects the winning plans based on the factors identified in the annual NOFA. These factors have traditionally included: the level of obsolescence of the current project, resident consultation and involvement, density and income mix of the proposed project, leveraging of outside resources, resident self-sufficiency plans, and the need for funding.<sup>73</sup> The most recent NOFA retains most of these factors in at least some form.<sup>74</sup> Under the present scheme for evaluating and scoring HOPE VI applications, HUD also considers the capacity of the development team, the soundness of the project's overall approach, and the proposal's likelihood of creating a well functioning community.<sup>75</sup>

#### A. *Need for funding*

The HOPE VI program is centered on the goal of improving the living conditions of public housing residents by replacing the nation's most "severely distressed" public housing projects with more sustainable communities.<sup>76</sup> As such, the "need" component of a HOPE VI plan focuses primarily on the extent of the severe physical distress of the particular development marked for demolition.<sup>77</sup> Loosely characterized, the more dilapidated the existing project, the greater the "need" for grant assistance. To even qualify for HOPE VI funding, a project must first be declared "severely distressed".<sup>78</sup> As spelled out in the 2004 NOFA, a severely distressed project is one that: 1) requires

72. See, e.g., Notice of Funding Availability for Revitalization of Severely Distressed Public Housing, HOPE VI Revitalization Grants Fiscal Year 2004, 69 Fed. Reg. 64,136, (Nov. 3, 2004) [hereinafter 2004 NOFA]."

73. While not all of these factors are listed as individual criteria in the 2004 NOFA, this list is representative of the types of factors HUD has traditionally looked at when reviewing applications. See e.g., Notice of Funding Availability for the Revitalization of Severely Distressed Public Housing; Fiscal Year 1997, 62 Fed. Reg. 18,242, 18,248-18,249, 18,251-18,252, 18,254 (April 4, 1997); Notice of Funding Availability for the Revitalization of Severely Distressed Public Housing; Fiscal Year 2002, 67 Fed. Reg. 49,766, 49,774-49,785 (July 31, 2002). Some of these categories are further sub-divided and not all criteria are included in this list.

74. See 2004 NOFA, *supra* note 72, at 64,155-64,164 pt. V(A). The 2004 NOFA lists ten separate criteria (of varying importance) for assessing a HOPE VI application: Capacity, Need, Leveraging, Resident Involvement, Community Support Services, Relocation, Fair Housing and Equal Opportunity, Well-Functioning Community, Soundness of Approach, and Incentive Criteria on Regulatory Barrier Removal. These ten criteria are further subdivided to create a range of factors that are considered during the review process. *Id.*

75. *Id.* at 64,155 pt. V(A)(1), 64,161-64,162 pt. V(A)(8)-(9).

76. *Id.* at 64,136 pt. I(A)(1).

77. *Id.* at 64,157 pt. V(A)(2)(a). Relevant indicators of distress include deficiencies in infrastructure, poor heating, cooling, plumbing or electrical systems, poor drainage and sewers, major design deficiencies, and high levels of lead-based paint, PCBs, mold, or asbestos. *Id.*

78. *Id.* at 64,136 pt. I(A)(1) (identifying severe distress as a threshold requirement).

major redesign, reconstruction, or demolition to correct serious design, maintenance, or other physical deficiencies; 2) is a significant contributing factor to the physical decline and disinvestment in the surrounding neighborhood; 3) is occupied by predominantly very low-income families with children or unemployed persons dependent on various forms of public assistance or has high rates of crime and vandalism relative to other housing in the neighborhood or is lacking in sufficient social and civil services resulting in severe distress; 4) cannot be revitalized through assistance from other programs due to cost and inadequacy of funding; and 5) the building is sufficiently separable from the rest of the project so as to make revitalization feasible.<sup>79</sup> The need for revitalization also includes a consideration of the negative impact that the existing development has on the surrounding neighborhood.<sup>80</sup> A grant recipient may utilize HOPE VI funds for a range of purposes to revitalize the “severely distressed” project, including relocation of residents, demolition, development, rehabilitation and improvement, and community supportive services.<sup>81</sup>

In addition to the need for revitalization based on physical deterioration, the need requirement also considers the amount of capital funding available for the project from sources other than HOPE VI.<sup>82</sup> HUD evaluates the extent to which the local PHA could utilize other resources and undertake the proposed redevelopment activities absent federal grant assistance.<sup>83</sup> The applicant must also demonstrate a need for affordable accessible housing in the community.<sup>84</sup> HUD measures this need by looking at the Housing Choice Voucher program utilization rates and public housing occupancy rates for the local PHA’s housing inventory.<sup>85</sup>

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79. 2004 NOFA, *supra* note 72, at 64,136-64,137 pt. I(C)(4)(a)(1)-(5). The definition of “severely distressed” that HUD uses in administering HOPE VI is contained in the Public Housing Reform Act. See Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461, 2518, 2584-2585 (1998) (codified in various sections of 42 U.S.C.).

80. 2004 NOFA, *supra* note 72, at 64,157 pt. V(A)(2)(b)(1). In determining the impact on the surrounding neighborhood, HUD will evaluate crime statistics, socio-economic data, trends in property value, and indications of disinvestment, among others. *Id.*

81. *Id.* at 64,137 pt. I(D). HUD lists additional uses, including disposition of the housing site, acquisition of land for the new site, homeownership activities, management and administration costs, and leveraging of additional resources. *Id.* at 64,137-64,138.

82. *Id.* at 64,158 pt. V(A)(2)(c)(1).

83. *Id.* As HUD notes in the NOFA, “[l]arge amounts of available Capital Funds indicate that the revitalization could be carried out without a HOPE VI grant. Available Capital Funds are defined as non-obligated funds that have not been earmarked for other purposes in your PHA Plan.” *Id.*

84. *Id.* at 64,158 pt. V(A)(2)(d).

85. 2004 NOFA, *supra* note 72, at 64,158 pt. V(A)(2)(d)(2).

### B. Leveraging of Outside Resources

Another criterion for evaluating HOPE VI proposals is the ability of the applicant to secure additional financing from outside resources to supplement the amount of federal grant money requested.<sup>86</sup> Since 1997, leveraging of resources has played an increasingly important role in shaping HOPE VI proposals.<sup>87</sup> The current structure effectively requires local PHAs to secure funding from outside resources.<sup>88</sup> For a single HOPE VI development, these financing sources may include federal funds, bonds, conventional mortgage financing, tax-exempt financing, foundation grants or loans, pension funds, private equity, corporate contributions, and local government funding.<sup>89</sup> The transactions can be quite complicated and often involve private developers forming limited partnerships to facilitate tax credits and tax-exempt bond financing.<sup>90</sup> In many cases, these partnerships will be responsible for the development, ownership, and management of the new property.<sup>91</sup> While many observers applaud leveraging as an innovative way to create successful long term communities, some have criticized the mixed finance model for permitting for-profit private developers to take advantage of public housing subsidies.<sup>92</sup> Despite the dispute, several things are clear: leveraging is a powerful tool for local PHAs (not to mention a profitable mechanism for savvy developers) and a distinct feature of current HOPE VI projects.<sup>93</sup> In many cases, the amount of leveraged funding totals three to four times the amount of the HOPE VI award.<sup>94</sup>

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86. *Id.* at 64,158 pt. V(A)(3).

87. See generally Notice of Funding Availability (NOFA) for the revitalization of Severely Distressed Public Housing (HOPE VI); Fiscal Year 1997, 62 Fed. Reg. 18,242, 18,253 (Apr. 14, 1997).

88. Leveraging accounts for 16 points out of a possible 125. 2004 NOFA, *supra* note 72, at 64,158 pt. V(A)(3), 64,164 pt. (V)(B)(2)(a)(4). An applicant must demonstrate they have obtained firm commitments of funds and other resources from outside sources and points are awarded based on the ratio of the amount of funds requested to the amount of funds leveraged. *Id.* at 64,158 pt. (V)(A)(3).

89. McCormack, Baron and Salazar, Overview, Finance, <http://www.mccormackbaron.com/HTML/overview.html> (last visited Jan. 7 2005).

90. See Wexler, *supra* note 13, at 214-15 for a more detailed description of how private developers are able to take advantage of the Low Income Housing Tax Credit. As Wexler notes, the leading model for mixed finance developments is the one designed by St. Louis-based McCormack, Baron and Salazar. *Id.* at 215.

91. See *id.*

92. See Jerry Salama, *The Redevelopment of Distressed Public Housing*, 10 HOUSING POL'Y DEBATE 95, 119 (1999).

93. HUD reports that from the program's inception through 2003, roughly \$5.5 billion in HOPE VI grants have leveraged an additional \$10.7 billion in public and private funds. See NATIONAL FACT SHEET, *supra* note 71. In 2000 alone, the program averaged \$3 of leverage for every \$1 of grant awarded. See Press Release, HUD Awards \$35 Million Grant to St. Louis, MO

### C. Resident Self-Sufficiency Programs

HOPE VI applications must also address the self-sufficiency issues and challenges of the public housing residents involved in the revitalization effort.<sup>95</sup> The Community and Supportive Services (“CSS”) component of the program encompasses “all activities that are designed to promote upward mobility, self-sufficiency, and improved quality of life for the residents . . . involved.”<sup>96</sup> These services include youth and adult educational activities, employment readiness and skills training, apprenticeship programs, entrepreneurship mentoring, life skills training, credit unions, homeownership counseling, health care and wellness centers, substance abuse counseling, domestic violence prevention, child care, and transportation.<sup>97</sup> Initially, PHAs were allowed to spend up to twenty percent of their total budget on community and resident services.<sup>98</sup> The latest version of HOPE VI mandates that no more than fifteen percent of a grant award may be allotted to CSS.<sup>99</sup> HUD also requires that if more than five percent of a grant is allotted for CSS, the applicant must secure funding from non-HOPE VI sources that match the amount of CSS funding awarded.<sup>100</sup>

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to Transform Public Housing, Help Residents, (Oct. 15, 2001), <http://www.hud.gov/news/release.cfm?content=pr01-099.cfm> (last visited Jan. 7, 2005) [hereinafter HUD Awards].

94. St. Louis is home to several HOPE VI developments that were created with significant amounts of non-federal leveraged funds. HUD Awards, *supra* note 93. In 1995, HUD awarded a \$46.7 million HOPE VI grant to revitalize the Darst-Webbe development. *Id.* That grant was leveraged with funds from the City of St. Louis, Missouri Housing Development Commission, Fannie Mae, St. Louis Equity Fund, Firststar Community Development Corporation, Bank of America, and others to create a \$160 million development. Press Release, St. Louis Housing Authority, Near Southside Redevelopment Area, Groundbreaking Event for “King Louis Square” at Former Darst-Webbe Site is Scheduled Monday, July 24 (July 18, 2000), <http://stlouis.missouri.org/development/hopevi/pressreleases/groundbreaking.html> (last visited Jan. 15, 2005). Similarly, in 2001, HUD awarded a \$35 million grant to the St. Louis Housing Authority to revitalize the Arthur Blumeyer development. HUD Awards, *supra* note 93. Leveraged resources provided an additional \$105 million in public and private funds, including commitments from Bank of America, SunAmerica, the Missouri Housing Development Commission, the City of St. Louis, and the Danforth Foundation Grants and Empowerment Zone. The Housing Research Foundation, Arthur Blumeyer HOPE VI Site Profile, [http://www.housingresearch.org/hrf/hrf\\_SiteProfile.nsf](http://www.housingresearch.org/hrf/hrf_SiteProfile.nsf) (last visited Jan. 15, 2005).

95. See 2004 NOFA, *supra* note 72, at 64,137 pt. I(D)(10).

96. *Id.*

97. *Id.*

98. See FitzPatrick, *supra* note 10, at 439 (citing Gayle Epp, *Emerging Strategies for Revitalizing Public Housing Communities*, 7 HOUSING POL’Y DEBATE 563, 570, 571 (1996)).

99. See 2004 NOFA, *supra* note 72, at 64,138 pt. III(B)(1)(b).

100. *Id.*

#### D. Consultation and Cooperation with Residents and Public

To qualify for funding, a HOPE VI applicant must also consult with the community of residents affected by the development by means of a "resident training session."<sup>101</sup> Specifically, the local housing authority must demonstrate that it has sent out notices informing the residents of its plan and held a meeting where residents could challenge the PHA and express their concerns.<sup>102</sup> In addition to this resident training session, applicants must hold at least three public meetings to involve the broader community in the revitalization plan.<sup>103</sup> Failure to satisfy this public notice requirement can result in the denial of an application.<sup>104</sup>

#### E. Capacity

In addition to the more substantive categories listed above, HUD evaluates HOPE VI proposals according to the quality of the applicant and the experience of the development team assembled.<sup>105</sup> In fact, "capacity" is the first rating criterion listed on the 2004 NOFA and accounts for the largest possible point total of any single criterion.<sup>106</sup> The "team" assembled includes the PHA staff involved in grant administration, any management entity that will manage the property upon revitalization, developers, subcontractors,

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101. *Id.* at 64,143 pt. III(C)(4)(j). "HUD does not prescribe the content of this meeting." *Id.*

102. *See* Super Notice of Funding Available ("SuperNOFA") for HUD's Housing, Community Development and Empowerment Programs and Section 8 Housing Voucher Assistance for Fiscal Year 2000, 65 Fed. Reg. 9322, 9604 pt. IV(C) (2000).

103. *See* 2004 NOFA, *supra* note 72 at 64,143 pt. III(C)(4)(j). The public meetings must address: the HOPE VI planning and implementation process, the physical plan, the extent of demolition, community supportive services, other revitalization activities, relocation issues, re-occupancy policies, and employment opportunities. *Id.* at 64,143-64,144.

104. The 2004 NOFA lists this as a threshold requirement which, if not met, may prevent an application from even being scored. *Id.* at 64,138 pt. III(C)(1). As more than one author has noted, however, this public notice and comment requirement may be overlooked. *See* FitzPatrick, *supra* note 10, at 444 n.243 (commenting that "HUD 'routinely approves grants in which the housing authority has not held a single meeting with residents to determine what input they have on the proposed project'" (citations omitted); *see also* Note, *When Hope Falls Short: HOPE VI, Accountability, and the Privatization of Public Housing*, 116 HARV. L. REV. 1477, 1486 (2003) (noting that in practice, "many PHAs have failed to involve residents as mandated by HUD[] . . . or have done so in a manner that defies the spirit of HUD's promise of "'substantial opportunity'" for resident involvement") (citations omitted). The requirement's relative lack of importance may also be gleaned from the total weight HUD affords "Resident and Community Involvement" in its ranking system: a maximum of 3 points out of a possible 125. 2004 NOFA, *supra* note 72, at 64,159 pt. V(A)(4).

105. *Id.* at 64,155-64,156 Part V(A)(1).

106. *Id.* Capacity accounts for 25 out of a possible 125 points. *Id.* at 64,155 pt. V(A)(1), 64,164 pt. (V)(B). Soundness of approach is also worth a possible 25 points. *Id.* at 64,155 pt. V(A)(9).

consultants, attorneys, financial advisors, and others.<sup>107</sup> The capacity of the developer seems to be HUD's main focus, as points are awarded for developers who have "extensive, recent (within the last five years), and successful experience" in planning, implementing, managing, and constructing projects comparable to the proposed development.<sup>108</sup> This includes experience with low-income tax credits, capital fund projects, financing, leveraging, and home sales.<sup>109</sup> HUD also evaluates the PHA applying for the grant by examining possible gaps in staffing, the program schedule for the various phases of the project, and the ability to promptly commence work upon award of the grant.<sup>110</sup> Finally, HUD considers the applicant's capacity for managing the property. This includes the proposed maintenance budget, the property management plan, and the applicant's past experience managing public housing developments.<sup>111</sup>

#### F. *Soundness of Approach*

The final major criterion that HUD considers when evaluating a HOPE VI proposal is the overall soundness of the approach outlined in the application.<sup>112</sup> The plan must be appropriate and suitable for the community in light of other revitalization options, as well as marketable and financially feasible.<sup>113</sup> HUD also considers the project's sustainability and its effect on the surrounding area, seeking to award grants that will enhance the neighborhood, spur outside investment, enhance economic opportunities for residents, and start a community-wide revitalization process.<sup>114</sup> Further, plans must be actionable. "HUD places "top priority on projects that will be able to commence immediately."<sup>115</sup> The proposal must also demonstrate excellence in design; the new development should be "compatible with and enrich the surrounding neighborhoods" and the final design must incorporate housing, community

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107. *Id.* at 64,155 pt. V(A)(1)(a).

108. *Id.* at 64,155 pt. V(A)(1)(b).

109. *Id.*

110. 2004 NOFA, *supra* note 72, at 64,155 pt. V(A)(1)(c). If the applicant is an existing HOPE VI grantee, the PHA must demonstrate that they have made adequate progress implementing that proposal. *Id.* at 64,156 pt. V(A)(1)(d).

111. The management plan must detail items such as maintenance, rent collection, tenant grievances, eviction, project budgeting, energy audits, and various other items. *Id.* at 64,157 pt. V(A)(1)(f).

112. *Id.* at 64,162 pt. V(A)(9). As noted *supra* note 104, soundness of approach is a significant rating factor; it accounts for a possible 25 out of 125 points - one-fifth of the total maximum points. *Id.* at 64,162 pt. V(A)(9)(b), 64, 164 pt. V(B)(2)(a)(4).

113. *Id.* at 64,162 pt. V(A)(9)(b).

114. *Id.* at 64,162 pt. V(A)(9)(c).

115. *Id.* at 64,162 pt. V(A)(9)(d).

facilities, and economic development space in a well-integrated fashion.<sup>116</sup> Applicants are encouraged to work with architects and designers who are committed to allowing resident participation.<sup>117</sup> They should also consult with local universities, foundations, and other research institutions to evaluate the impact and performance of the HOPE VI plan over the life of the grant.<sup>118</sup>

### G. Replacement Housing

The HOPE VI program originally called for one-for-one replacement of public housing.<sup>119</sup> For each unit of public housing that a local housing authority demolished, they were required to construct at least one new unit.<sup>120</sup> This one-for-one rule was suspended in the first appropriations bill based on the recommendation of the National Commission on Severely Distressed Public Housing<sup>121</sup> and the elimination was made permanent in 1998.<sup>122</sup> Its abolition has been controversial and cited by HOPE VI critics as a primary cause of the decline in the overall supply of public housing.<sup>123</sup> Rather than

116. 2004 NOFA, *supra* note 72, at 64,162 pt. V(A)(9)(e). This section seems especially tailored to design communities that avoid, or at least diminish, the physical isolation of past housing developments - especially the high rise model. HUD awards points for proposed site plans that are: "compact, pedestrian-friendly, with an interconnected network of streets and public open space"; that are "thoroughly integrated into the community through the use of local architectural tradition, building scale, grouping . . . and design elements"; and that propose "appropriate enhancements of the natural environment." *Id.*

117. 2004 NOFA, *supra* note 72, at 64,163 pt. V(A)(9)(e).

118. *Id.* at 64,162 pt. V(A)(9)(f).

119. *See* Salama, *supra* note 92, at 105. Traditional public housing policy required the replacement of one unit of public housing for every one unit destroyed. *See* Miller, *supra* note 64, at 1288 (citing 24 C.F.R. § 42.375 as an example).

120. Miller, *supra* note 64, at 1288.

121. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE SUBCOMMITTEE ON VA, HUD, AND INDEPENDENT AGENCIES, COMMITTEE ON APPROPRIATIONS, HOUSE OF REPRESENTATIVES, PUBLIC HOUSING: STATUS OF THE HOPE VI DEMONSTRATION PROGRAM, at 16 (1997), *available at* <http://www.gao.gov/archive/1997.rc97044.pdf>; *see* Miller, *supra* note 64, at 1288-89 ("In its Final Report, the Commission noted that the one for one replacement requirement often forced PHAs to retain problematic high density buildings that contributed to distressed conditions because it would be too costly or impractical to demolish and replace every lost unit.").

122. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276 § 535(a), 112 Stat. 2461, 2518, 2584-2585 (1998); *see also* Salama, *supra* note 92, at 113.

123. *See* Eileen M. Greenbaum, *Quality Housing and Work Responsibility Act of 1998: Its Major Impact on Development of Public Housing*, 8 J. AFFORDABLE HOUS. & CMTY DEV. L. 310, 314 (1999); CENTER FOR COMMUNITY CHANGE, A HOPE UNSEEN: VOICES FROM THE OTHER SIDE OF HOPE VI, (August, 2003) (studying seven different HOPE VI sites and arguing that the program and the Public Housing Reform Act only accelerate the trend towards reduction of the affordable housing supply, resulting in the displacement of families and a significant net loss in available units), *available at*

[http://www.communitychange.org/shared/publications/downloads/hope\\_iv/00\\_HOPEVIfull.doc](http://www.communitychange.org/shared/publications/downloads/hope_iv/00_HOPEVIfull.doc) (last visited Jan. 31, 2005).

require one-for-one replacement of public housing units, the current HOPE VI program provides that Section 8 vouchers and eligible homeownership units - in addition to traditional public housing units - may account for the balance of the units demolished.<sup>124</sup>

#### H. *Density and Income Mix*

In past years, HOPE VI proposals were specifically required to address resident density and income mix. “Concentration” was listed as a separate criterion.<sup>125</sup> This reflected one of the program’s central goals: to lessen the concentration of very low income families by demolishing larger, obsolete developments and creating lower density mixed-income developments in their place.<sup>126</sup> The current NOFA, however, does not explicitly list density and income mix as separate criteria.<sup>127</sup> Rather, the mixed-income component is addressed under the category “Well Functioning Community.”<sup>128</sup> HUD maintains that the central purpose of the HOPE VI revitalization program is to assist PHAs “[p]rovid[ing] housing that will avoid or decrease the concentration of very low income families.”<sup>129</sup> However, it is unclear how significant the density and income mix features of a proposed development remain under the current HOPE VI review and scoring process.<sup>130</sup>

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124. The 2004 NOFA defines a HOPE VI replacement housing unit as “any combination of public housing rental units, eligible homeownership units . . . and HCV [Section 8 Housing Choice Voucher] assistance that does not exceed the number of units demolished and disposed of at the targeted severely distressed public housing project.” 2004 NOFA, *supra* note 72, at 64,136 pt. I(C)(3).

125. See JAMES A. HEIST, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AUDIT OF THE FISCAL YEAR 1996 HOPE VI GRANT AWARD PROCESS, 98-FO-101-0001, at 53 (1997), available at <http://www.hud.gov/oig/ig8h0001.pdf>. “Lesson Concentration” was the first factor HUD scored for 1996 applications. *Id.*

126. 2004 NOFA, *supra* note 72, at 64,136 pt. I(A). Indeed, one of the central problems identified by the National Commission on Severely Distressed Public Housing - whose report led to the creation of HOPE VI - was the physical and socioeconomic isolation experienced by public housing residents living in a small site with a high concentration of low income families. See FINAL REPORT, *supra* note 41, at app. B, B-3. As such, the Commission “strongly recommended that HUD reduce the concentration of very low income, minority families in public housing projects.” See Wexler, *supra* note 13, at 203. As Wexler noted, HOPE VI became part of a larger plan to replace housing projects with “attractively designed mixed income housing communities.” *Id.* at 204.

127. 2004 NOFA, *supra* note 72, at 64,155-64,163 pt. V(A).

128. *Id.* at 64,161 pt. V(A)(8).

129. *Id.* at 64,136 pt. I(A)(3).

130. Unit mix accounts for a maximum of only 3 out of a possible 125 points. *Id.* at 64,161 pt. V(A)(8)(a)(2), 64,164 pt. V(B)(2)(a)(4). Further, HUD does not require a minimum unit mix—only a “sufficient” amount of public housing rental units, as determined by the applicant. *Id.* at 63, 161 pt. V(A)(8)(a)(2)(a). Applicants are “encouraged” to create additional public housing units, though there doesn’t seem to be any significant scoring incentive to do so. *Id.*

### I. Scoring Process

With these baseline criteria identified, HUD scores each application on a point system.<sup>131</sup> HUD contends that the selection process is "designed to ensure that grants are awarded to eligible PHAs with the most meritorious applications."<sup>132</sup> The first step is an initial review to ensure that a number of threshold requirements are satisfied.<sup>133</sup> If the application clears the threshold requirement review, it is preliminarily rated according to the criteria identified in the NOFA and then ranked by highest score.<sup>134</sup> Lastly, a final panel comprised of upper-level HUD staff reviews the preliminary ranking information, assigns the applications a final score, and selects the most highly rated applications, subject to the amount of funding available.<sup>135</sup>

## V. HOPE VI ANALYSIS: THE *DARST-WEBBE* CASE

### A. History

The Darst-Webbe housing development existed on the near south side of downtown St. Louis for more than four decades. Erected in 1956, the Darst-Webbe family development was originally "comprised of six clusters of high-rise developments, containing a total of 758 units."<sup>136</sup> Located just a mile from

131. *Id.* at 64,155-64,164 pt. V(A)-(B).

132. 2004 NOFA, *supra* note 72, at 64,164 pt. V(B). However, many commentators have criticized HUD's HOPE VI selection criteria and scoring process, arguing that it is not tailored to actually build housing capacity or truly identify the housing most in need of revitalization. See Robert Solomon, *Notes From the Inside: Thoughts About The Future of Public Housing*, 10 J. AFFORDABLE HOUS. & CMTY. DEV. L. 34, 38 (2002). Solomon argues that in seeking to score applications objectively, HUD "has created a system that places "form over function and rewards grantsmanship more than need." *Id.* He notes that this has spawned a small industry of consultants to prepare HOPE VI applications - charging fees that range from \$100,000 to \$250,000. *Id.*

133. 2004 NOFA, *supra* note 72, at 64,164 pt. V(B)(1). The 2004 NOFA lists a variety of threshold requirements, including the appropriateness of the proposed project, the contiguity of the project, whether the applicant is an existing HOPE VI grantee that has performed poorly, site control, zoning approval, and appropriate certification and documentation requirements. *Id.* at 64,138-64,141, pt. III(C).

134. *Id.* at 64,164 pt. V(B)(2). According to the 2004 NOFA, the maximum number of points is 125. *Id.* at 64,164 pt. V(B)(2)(a)(4). The most heavily weighted criteria include the capacity and experience of the applicant's "team" (25 points), the overall soundness of the applicant's approach (25 points), the amount of need for revitalization (24 points), and leveraging of resources (16 points). *Id.* at 64,155 pt. V(A)(1), 64,157 pt. V(A)(2), 64,158 pt. V(A)(3), 64,162 pt. V(A)(9).

135. *Id.* at 64,164 pt. V(B)(3). The Final Review Panel may reduce funding for any items in an applicant's budget that it determines are "ineligible." *Id.* at 64,164 pt. V(B)(4).

136. Near Southside Redevelopment Area: Redevelopment Area, <http://stlouis.missouri.org/development/hopevi/redeveloparea.html> (last visited Jan. 13, 2005) [hereinafter Southside Redevelopment Area].

downtown St. Louis in a largely industrial area, these nine-story reinforced concrete behemoths were fairly typical for their time. In 1961, several more high-rise structures were added, bringing the total number of units to 1,000.<sup>137</sup> The Darst-Webbe site was bordered by additional public housing to the east and west.<sup>138</sup> The entire complex contained two “super blocks”- occupying roughly twelve square blocks spanning sixty-five acres.<sup>139</sup> At its peak, Darst-Webbe was home to an estimated 3,500 people and the site’s density averaged thirty units per acre.<sup>140</sup>

Darst-Webbe was burdened by the same design deficiencies, budgetary constraints, crime, vandalism, and drug use that plagued many of the nation’s public housing projects throughout the 1970s and 1980s. By the early 1990s, the development was in severe disrepair. Substantial physical deterioration and site deficiencies made for hazardous and oppressive living conditions.<sup>141</sup> The site needed extensive improvements in almost every major system, including plumbing, electrical, building envelope, elevator, lighting, heating and cooling, fire alarms, sprinklers, and life-safety.<sup>142</sup> An environmental inspection revealed asbestos and lead contamination.<sup>143</sup> The development was also a haven for drug dealers and gang violence - a veritable breeding ground for criminal activity.<sup>144</sup> HUD assessed the physical needs of the site in 1995

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137. *Id.* At its peak, the Darst-Webbe high-rise clusters consisted of six nine-story buildings, a twelve story building, and an eight story building. *Id.*

138. Clinton Peabody - located just west of Darst-Webbe - was built in 1942 and consisted of 52 two and three-story brick buildings with a total of 647 units and a non-dwelling building. *Id.* LaSalle Park Village, constructed in 1976 and containing 148 apartments in 16 two-story buildings, sat immediately to the east. *Id.* Neither housing development was technically considered a part of Darst-Webbe, though the name “Darst-Webbe” was often used loosely to refer to the entire 65 acre property. Near Southside Redevelopment Area: Revitalization Plan, <http://stlouis.missouri.org/development/hopevi/revitalizationplan.html> (last visited Oct. 22, 2005) [hereinafter Southside Revitalization Plan].

139. Southside Redevelopment Area, *supra* note 136; Southside Revitalization Plan, *supra* note 138.

140. Southside Redevelopment Area, *supra* note 136.

141. Darst-Webbe HOPE VI Revitalization Plan, Exhibit B, Existing Site Conditions, (1998) (prepared by the St. Louis Housing Authority), *available at* <http://stlouis.missouri.org/development/hopevi/rplist.html> (last visited Jan. 15, 2005) [hereinafter Darst-Webbe Revitalization Plan, Exhibit B]. The St. Louis Housing Authority provided the following description of deterioration at Darst-Webbe: “The site is plagued with deteriorated sewers and laterals, deteriorated parking lots and walks, with lawn areas that are bare and sunken. Architecturally, the walls, roof, and windows are thermally inefficient and leak. Kitchen cabinets, countertops, plaster, doors, closet doors, and windows are deteriorated, damaged, or missing altogether. The mechanical systems are obsolete, beyond their life expectancy, and do not meet code requirements.” *Id.*

142. *Id.*

143. *Id.*

144. A site evaluation of the neighboring Clinton Peabody development blamed the prevalence of crime on severe density and design failures, namely the existence of large tracts of

and determined that total renovation would have cost more than \$55 million, roughly \$72,000 per unit.<sup>145</sup> Simply bringing the buildings in line with existing federally mandated Housing Quality Standards was estimated at more than \$6 million.<sup>146</sup>

Darst-Webbe's physical deterioration was exacerbated by the fact that the buildings were largely unoccupied and left open to the elements. As of 1998, the family buildings at Darst-Webbe were eighty-five percent vacant.<sup>147</sup> The proximity of the abandoned City Hospital Complex, occupying thirteen acres immediately to the southwest, only added to the general atmosphere of desolation and blight. While surrounding neighborhoods like Souldard, Lafayette Square, and LaSalle Park were thriving in the midst of an urban redevelopment in many of St. Louis' historic districts, Darst-Webbe stuck out like a sore-thumb with an abandoned expanse of broken windows, boarded doorways, and crumbling mortar.

#### B. HUD Awards HOPE VI Grant to Revitalize Darst-Webbe

In 1994, HUD awarded the St. Louis Housing Authority ("SLHA") a \$500,000 HOPE VI planning grant to explore options for redeveloping Darst-Webbe.<sup>148</sup> In January 1995, HUD approved a \$46.7 million grant to revitalize the complex and entered into a HOPE VI implementation grant agreement with SLHA.<sup>149</sup> As part of the agreement, SLHA filed a revitalization plan statement "with HUD in April 1995, detailing its approach for the Darst-Webbe site."<sup>150</sup> The plan called for the destruction of 758 units of family public housing, replacing them with a 550-unit mixed-income development that would include 200 newly constructed family public housing units.<sup>151</sup> The remainder would

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"no-man's land" that were magnets for drug dealing and undesirable public congregations. In his memorandum assessing the property, Ray Gindroz, Principal Architect for Urban Design Associates, described the site as "one of the most effective design[s] for the promotion of criminal activity" that he has ever encountered. *Id.*

145. *Id.*

146. The estimate was conducted in conjunction with the HUD mandated Physical Needs Assessment of all property administered by the St. Louis Housing Authority. Darst-Webbe Revitalization Plan, Exhibit B, *supra* note 141.

147. *Id.*

148. The Housing Research Foundation, Darst-Webbe HOPE VI Site Profile, [http://www.housingresearch.org/hrf/hrf\\_SiteProfile.nsf/0/b93af8c87bc8101852569d5004d168d?OpenDocument](http://www.housingresearch.org/hrf/hrf_SiteProfile.nsf/0/b93af8c87bc8101852569d5004d168d?OpenDocument) (last visited Jan. 15, 2005) [hereinafter Darst-Webbe Site Profile].

149. *Id.*

150. Darst-Webbe HOPE VI Revitalization Plan, Exhibit A, Executive Summary 3 (1998) (prepared by the St. Louis Housing Authority), *available at* <http://stlouis.missouri.org/development/hopevi/rplist.html> (last visited Jan. 15, 2005) [hereinafter Darst-Webbe Revitalization Plan, Exhibit A]. Kuhlman Design Group of St. Louis prepared the plan for the SLHA. *Id.*

151. Darst-Webbe Site Profile, *supra* note 148.

be a mix of tax-credit rental units and “for sale” units.<sup>152</sup> The plan also included demolishing the adjacent City Hospital complex.<sup>153</sup> HUD approved the plan on July 13, 1995.<sup>154</sup>

Due to a lack of construction progress on the City Hospital site, HUD placed the Darst-Webbe HOPE VI grant in default in August 1997 and threatened to recapture the \$46.7 million.<sup>155</sup> After representatives from the City of St. Louis and SLHA met with HUD officials in Washington, D.C., HUD agreed to provide SLHA with a technical assistance consulting team in an effort to cure the default.<sup>156</sup> The team convened a market study and helped SLHA establish a Steering Committee to address the deficiencies of their initial HOPE VI plan.<sup>157</sup> Among the recommendations HUD made was for the City of St. Louis to apply for \$50 million in Section 108 loan assistance - \$20 million of which would be applied to demolishing the hospital complex and building infrastructure on the Darst-Webbe redevelopment site.<sup>158</sup> HUD issued a conditional cure of the grant and released the funds.<sup>159</sup>

As part of its process for curing the default, HUD required SLHA to submit a new formal revitalization plan.<sup>160</sup> SLHA expanded the HOPE VI redevelopment to include the neighboring Clinton Peabody development.<sup>161</sup> In addition to demolishing the 758-unit Darst-Webbe family development, the

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152. *Id.*

153. The Revitalization Plan did not originally call for spending any HOPE VI funds on the nearby Clinton Peabody development. *Id.*

154. *Id.*

155. Darst-Webbe HOPE VI Program Implementation Technical Assistance, <http://www.abtassociates.com/Page.cfm?PageID=1824&OWID=2109767283&CSB=1> (last visited Jan. 15, 2005).

156. *Id.*

157. Darst-Webbe HOPE VI Program Implementation Technical Assistance, <http://www.abtassociates.com/Page.cfm?PageID=1824&OWID=2109767283&CSB=1> (last visited Jan. 15, 2005). The Steering Committee consisted of key stakeholders including residents, elected officials and city staff, service providers, corporate leaders, neighborhood representatives, and SLHA staff to help guide the process. *Id.* This Steering Committee significantly reduced the role of Darst-Webbe residents in planning, implementing, and monitoring the HOPE VI program. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth. (Darst-Webbe I)*, 202 F. Supp. 2d 938, 942 (E.D. Mo. 2001). After the committee was formed, SLHA stopped convening meetings of the Joint Advisory Development Committee - a panel formed in an agreement with the tenant associations affected by the redevelopment. *Id.* The JADC was to meet bi-weekly, approve budgets, and “participate in selecting the various professionals involved in planning and implementing the development.” *Id.*

158. *Id.* at 942-43.

159. *Id.* at 942; Darst-Webbe Revitalization Plan, Exhibit A, *supra* note 150, at 3.

160. The HUD team assisted SLHA in preparing the new Revitalization Plan and SLHA submitted it on October 30, 1998; HUD gave the new plan final approval on April 28, 1999. *Darst-Webbe I*, 202 F. Supp. 2d at 942-43, 947.

161. *Id.* The new plan was also expanded to address conditions on several adjacent blocks that were not owned by SLHA. *Id.*

new plan called for eliminating 217 more units of public housing at Clinton Peabody, as well as an additional 242 units of elderly public housing at Darst-Webbe.<sup>162</sup> Like the original plan approved in 1995, the 1998 plan proposed construction of a 550-unit mixed income development.<sup>163</sup> However, whereas the original HOPE VI proposal provided for 200 units of family public housing, the new plan called for only 80 units of public housing to replace the 1000-plus demolished units.<sup>164</sup>

### C. *Darst-Webbe Tenant Association Files Suit*

In response to the changes made in the new revitalization plan, the Darst-Webbe Tenant Association Board "filed an action against SLHA and HUD in the United States District Court for the Eastern District of Missouri on March 3, 1999.<sup>165</sup> The Tenant Board brought twelve counts against SLHA and seven counts against HUD, seeking declaratory and injunctive relief to enjoin SLHA from proceeding with the Darst-Webbe development.<sup>166</sup> Plaintiffs challenged the demolition of public housing units at Darst-Webbe and Clinton Peabody and the displacement of its residents, arguing that HUD failed to sufficiently consider the fair housing effects of the Darst-Webbe HOPE VI plan when reviewing the proposal.<sup>167</sup> Their central theory was that the elimination of the extra units of public housing had a disparate impact on African-Americans in

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162. Brief of Appellants at 9, *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, No. 04-1614 (8th Cir. 2004), available at 2004 WL 2738766.

163. *Id.* Of these 550 units, 250 would be single-family and duplex "for sale" units and 300 would be family rental units. Darst-Webbe HOPE VI Revitalization Plan, Exhibit D, Physical Revitalization Plan 47 (1988) (prepared by the Saint Louis Hosing Authority), available at <http://stlouis.missouri/development/hopevi/rplist.html> (last visited Oct. 2, 2005) [hereinafter Physical Revitalization Plan].

164. Brief of Appellants at 9, *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, No. 04-1614 (8th Cir. 2004), available at 2004 WL 2738766. The new revitalization plan also contemplated the construction of 72 "for sale" units in neighborhoods throughout the city, but outside the Darst-Webbe revitalization area. Physical Revitalization Plan, *supra* note 163. The units qualified as public housing replacement according to HUD's standards because they were targeted to families at sixty to eighty percent (\$28,260–\$37,680) of area median income. Brief of Appellants at 9-10, *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, No. 04-1614 (8th Cir. 2004), available at 2004 WL 2738766. The plan set aside \$7 million in HOPE VI funds to finance their construction. SLHA also budgeted \$3 million of the award for the construction of a Community Recreation Center at the Darst-Webbe site. *Id.*

165. Brief of Appellants/Cross Appellees at 11, *Darst-Webbe Tenant Ass'n v. St. Louis Hous. Auth.*, No. 02-1777/1778 (8th Cir. 2002), available at 2002 WL 32375102.

166. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth. (Darst-Webbe I)*, 202 F. Supp. 2d 938, 939, 945 (E.D. Mo. 2001), *aff'd in part and remanded in part by* 339 F.3d 702 (8th Cir. 2003), *remanded to* 299 F. Supp. 2d 952 (E.D. Mo. 2004), *aff'd by* 417 F.3d 898 (8th Cir. 2005).

167. *Darst-Webbe I*, 202 F. Supp. 2d at 939-40 n.1; see Brief of Appellants at 16-17, *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, No. 04-1614 (8th Cir. 2004), available at 2004 WL 2738766.

St. Louis and that HUD, in approving SLHA's new HOPE VI plan, thus failed to meet its duty to affirmatively further fair housing in violation of the Fair Housing Act, 42 U.S.C. § 3608(e).<sup>168</sup>

After the district court entered summary judgment on Count XIV in favor of HUD,<sup>169</sup> the remaining eighteen claims proceeded to a bench trial over six days in July 2001.<sup>170</sup> The district court, the Honorable Stephen Limbaugh, ruled in favor of the plaintiffs on two counts and in favor of HUD on the remaining counts.<sup>171</sup> In an admittedly unconventional approach,<sup>172</sup> the court began its analysis of the case by first examining the relief sought by the plaintiffs and then determining whether plaintiffs were entitled to that relief. The court did not address each count individually.<sup>173</sup>

The district court reached its decision on the majority of the counts without engaging in any substantial analysis of the HOPE VI plan. In dismissing the plaintiffs' contention that HUD failed to affirmatively further fair housing, Judge Limbaugh stated: "[o]bviously, HUD believes that it has taken all necessary steps to further fair housing. If plaintiffs are requesting that the court set out detailed steps, it will not do so."<sup>174</sup> The court noted that it had power to review agency decisions, but strongly rejected the suggestion that it should examine HUD's review process in the instant case: "[t]he Court is not going to give specific instructions to the defendants, telling them how they should involve plaintiffs in the planning, implementing, and monitoring of the

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168. *Darst-Webbe I*, 202 F. Supp. 2d at 939-40, n.1.

169. *See id.* at 939. This Count challenged HUD's approval of the Section 108 loan to the City of St. Louis as part of the HOPE VI financing. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.* (*Darst-Webbe II*), 339 F.3d 702, 707-08 (8th Cir. 2003). On appeal, the Eighth Circuit affirmed the grant of summary judgment. *Id.* at 708

170. The *Darst-Webbe* case was the first HOPE VI discrimination case to go to trial. *See* Press Release, The Housing Research Foundation, HUD and St. Louis Housing Authority Prevail in First HOPE VI Discrimination Case, <http://www.housingresearch.org/hrf/hrfhome.nsf/e9c24279c3bd4d1085256a0300779c07/4d6e2bb63b96f38c85256b2500752337?OpenDocument> (last visited Jan. 24, 2005).

171. The Court found that HUD had impermissibly expanded the scope of the HOPE VI project to include Clinton Peabody. *Darst-Webbe I*, 202 F. Supp. 2d at 939, 950. Shortly after the trial, HUD issued an official determination that Clinton Peabody was severely distressed and formally approved the inclusion of that development within the *Darst-Webbe* HOPE VI project. *Darst-Webbe II*, 339 F.3d at 706 n.4.

172. As Judge Limbaugh explained: "[t]he Court has determined that it would be impossible to go through and address each count. Most of the counts overlap in either the facts that might support them, or the relief being sought for them, or both. It is obvious from the disjointed complaint, summary judgment motions and the arguments made at trial, that nobody knows exactly how to address this cause of action. The issues addressed by the parties often times never meet, and it is impossible for the Court to evaluate the arguments." *Darst-Webbe I*, 202 F. Supp. 2d at 944.

173. *Id.*

174. *Id.* at 949.

HOPE VI plan. Defendants should involve plaintiffs in the planning, and the Court believes defendants know that.”<sup>175</sup>

With that, the court stated that “it has addressed the remainder of plaintiffs’ claims and finds . . . in favor of the defendants.”<sup>176</sup> The court did not examine the specific provisions of the HOPE VI plan—including the unit mix and the decision to provide only 80 units of public housing as opposed to 200 units—and failed to make any specific factual findings in concluding that HUD satisfied its obligation to affirmatively further fair housing.<sup>177</sup> In its concluding remarks, the court expressed frustration that the case was ever brought and urged the parties to work together to forge an understanding without judicial intervention.<sup>178</sup>

#### D. Eighth Circuit Remands

The Tenant Board appealed the decision, narrowing its challenge to eight of the original eighteen counts.<sup>179</sup> Among their arguments was that the trial court erred in determining that HUD fulfilled its obligation to affirmatively further fair housing without making sufficient factual findings.<sup>180</sup> The Eighth Circuit agreed and remanded the case in part, instructing the district court to provide a more detailed explanation for its conclusions on six of the eight counts.<sup>181</sup>

The Eighth Circuit found that the Tenant Board did present evidence that HUD failed to consider the ramifications of the proposed HOPE VI program on its obligation to affirmatively further fair housing.<sup>182</sup> In explaining its

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175. *Id.*

176. *Id.* at 950.

177. In a footnote to the opinion, the court noted: “Counts I-IV, XIII, XVII, and XVIII contain allegations of discrimination based on race, sex, and familial status. Although the Court *did not analyze these counts*, it would like to note that it found absolutely no evidence of discrimination.” *Darst-Webbe I*, 202 F. Supp. 2d at 950 n.17 (emphasis added).

178. As the court explained: “[t]his is a case that never should have been before the Courts. Plaintiffs are public housing tenants and defendants are the agencies responsible for providing public housing. They both depend on each other, and it is logical that they should work together, even without a legal mandate to do so. The Court seriously hopes all parties involved can resolve their problems, and work together to achieve the best results in completing this worthwhile project.” *Id.* at 949.

179. *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth. (Darst-Webbe II)*, 339 F.3d 702, 708 (8th Cir. 2003).

180. *Id.*

181. *Id.* at 713. The remand was more a procedural correction than a stinging rebuke. As the Court noted, “[w]e sympathize with the difficult situation the district court faced in resolving this complicated case. While we do not necessarily disagree with the ultimate conclusion reached by the district court, we are unable to affirm the district court on six of the . . . counts, because the memorandum opinion fails to provide the detail required by Federal Rule of Civil Procedure 52(a).” *Id.* at 715.

182. *Id.* at 713.

decision to remand, the court discussed the scope of 42 U.S.C. 3608(e) and HUD's duty to affirmatively further fair housing. As the court noted, the FHA imposes upon HUD an affirmative obligation. It requires more than simply refraining from discriminatory action or from purposely aiding discrimination by others.<sup>183</sup> HUD must make its program decisions by considering the effect of its grants on the racial and socioeconomic composition of the surrounding area.<sup>184</sup> At a minimum, HUD has an obligation to "assess negatively "those aspects of a proposed course of action that would further limit the supply of genuinely open housing" and to weigh possible alternatives.<sup>185</sup> Stated broadly, the duty to affirmatively further fair housing mandates that HUD must take action "to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation."<sup>186</sup> The FHA certainly does not mandate specific actions or remedial plans, but it does hold HUD's actions to a high standard.<sup>187</sup>

The Eighth Circuit also discussed the legal standard for reviewing an agency's actions and the district court's authority to set aside a decision.<sup>188</sup> Section 3608 of the FHA is enforceable through the Administrative Protection Act ("APA"), which regulates the administration and operation of federal agencies.<sup>189</sup> Under the APA, a reviewing court shall declare unlawful and set aside agency actions that it finds to be arbitrary, capricious, or an abuse of discretion.<sup>190</sup> The court explained:

"Clearly, HUD possesses broad discretionary powers to develop, award, and administer its grants and to decide the degree to which they can be shaped to help achieve Title VIII's goals. This fact, however, does not in itself mean that HUD is immune from review for "abuse of discretion" in exercising these powers."<sup>191</sup>

The court concluded by noting that the district court had the power to enjoin the use of HOPE VI funds or Section 108 loan guarantees until it was satisfied that HUD had taken appropriate steps to affirmatively further fair housing.<sup>192</sup>

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183. *Id.* (citing *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 156 (1st Cir. 1987)).

184. *Darst-Webbe II*, 339 F.3d at 713 (citing *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 156 (1st Cir. 1987)).

185. *Id.*

186. *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (quoting *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973)).

187. *See McGrath v. Dep't of Hous. & Urban Dev.*, 722 F. Supp. 902, 908 (D. Mass. 1989).

188. *Darst-Webbe II*, 339 F.3d at 713-14.

189. *See id.* at 709 (citing 5 U.S.C. § 706(2)).

190. 5 U.S.C. § 706(2)(A) (2000).

191. *Darst-Webbe II*, 339 F.3d at 713 (quoting *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 157 (1st Cir. 1987)).

192. *Id.* at 713-14.

*E. District Court Dismisses Suit Again*

On remand, the district court did not hear new evidence or hear new argument as neither party requested leave to file any submissions.<sup>193</sup> The court again found for HUD on all six remaining counts, but endeavored to provide a more thorough explanation of its decision as directed by the Eighth Circuit. At the outset, the court acknowledged difficulty in reviewing HUD's decision.<sup>194</sup> It noted the many competing policy goals facing HUD in undertaking a community revitalization project and determined that HUD did consider the fair housing needs of the St. Louis community in approving the Darst-Webbe HOPE VI plan.<sup>195</sup>

While the district court again held that HUD had fulfilled its duty to further fair housing affirmatively, it provided little in the way of substantive analysis and specific factual findings. The court's analysis focused only on whether HUD considered the fair housing needs of the St. Louis community.<sup>196</sup> The court did not address the unit mix, the elimination of the extra 120 units of affordable housing, or other specific details of the HOPE VI Revitalization Plan.<sup>197</sup> Instead, the court noted that while it may have chosen different

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193. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth. (Darst-Webbe III)*, 299 F. Supp. 2d 952, 955 (E.D. Mo. 2004).

194. *Id.* at 954-55, 967. "The Court notes that the administrative process followed in this case was not so readily susceptible to review. . . . [I]nstead, the case at bar presents the Court with thousands of pages of reports, proposals, planning documents, and letters, each of which implicate multiple policy goals and address different statutory and regulatory requirements." *Id.* at 963.

195. The Court referred to the "Analysis of Impediments to Fair Housing - City of St. Louis Report", a report submitted by HUD and prepared by the University of Missouri-St. Louis Public Policy Research Center in conjunction with the HOPE VI plan. *Id.* at 964. The Court noted that HUD "carefully considered" the AI Report when it conducted a community assessment. *Id.* In deciding whether HUD took appropriate action to respond to the impediments to fair housing in the St. Louis area, the Court declined to apply a test "mechanistically." *Id.* at 965. As the Court noted,

HUD had many other issues before it besides the fair housing impact of the Plan such as the HOPE VI goals of deconcentrating low-income public housing populations, reducing the density of existing low-income housing, and providing a community centered approach to revitalizing the Near Southside. Even so, one fact that stands out is HUD's recognition that a lack of affordable home-ownership opportunities and the lack of necessary knowledge and resources on the part of potential minority homebuyers, are two of the most serious impediments to fair housing in the St. Louis market.

*Id.*

196. *Id.*

197. As it did at the trial level, the Court refrained from addressing the specifics of SLHA's Revitalization Plan. *Darst-Webbe III*, 229 F. Supp. 2d at 962-63. As the Court noted: "[t]he Plaintiffs chose to focus on what they saw as the final *product* of the Revitalization Plan (the unit mix in the finished development) during the trial of this case; but a review of HUD's actions under the APA standard . . . requires the Court to look at the regulatory *process* behind HUD's

solutions, HUD's actions were not arbitrary or capricious or an abuse of discretion and thus lied outside the purview of the court's review.<sup>198</sup> Accordingly, it dismissed the action.<sup>199</sup>

*F. Eighth Circuit Affirms*

The Tenant Board again appealed to the Eighth Circuit, arguing that the district court failed on remand to engage in the analysis and fact finding necessary to properly determine whether HUD satisfied its FHA duty.<sup>200</sup> The Eighth Circuit disagreed, finding that the district court reviewed the "large volume of documentary evidence" generated throughout the revitalization efforts.<sup>201</sup> In rejecting the Tenant Board's argument that HUD and SLHA failed to consider the proposal to add 120 rental units, the Eighth Circuit noted that it was not a "secondary legislative body" designed to amend and rework the planning decisions of government agencies.<sup>202</sup>

In discussing the claim that HUD failed to affirmatively further fair housing, the court emphasized the highly deferential standard of review applied to agency decisions under the APA.<sup>203</sup> As the court explained, the standard of review is deferential because "it is not the role of the courts to micro-manage agency actions for compliance with broad, general statutory

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actions before comparing the outcome with the statutory command." *Id.* at 963 (emphasis in original).

198. *Id.* at 966-67.

199. *Id.* at 967.

200. In its Brief, the Tenant Board argued that HUD's decision approving the HOPE VI plan and its program to replace only 80 of the more than 1000 demolished family public housing rental units was "devoid of any consideration of the impact on protected classes" and reflected no negative assessment of how that action would "further limit[] the supply of genuinely open housing." Brief of Appellants at 57, *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, No. 04-1614 (8th Cir. 2004), available at 2004 WL 2738766. According to the Tenant Board, the author of HUD's approval decision admitted that the agency had not analyzed the effects of the plan on African Americans. *Id.* The plaintiffs further maintained that HUD's decision reflected "no positive assessment of alternatives that would increase the supply of open housing," namely the Tenant Board's proposal to add another 120 rental units of affordable housing. *Id.* at 58-59. The district court failed to address these issues on remand and made no factual findings in its opinion. *Darst-Webbe III*, 299 F. Supp. 2d at 965-67.

201. *Darst-Webbe Tenant Ass'n v. St. Louis Hous. Auth. (Darst-Webbe IV)*, 417 F.3d 898, 907-08 (8th Cir. 2005).

202. *Id.* at 904. As the court remarked, "our review is not to determine if one, ten, or one hundred additional, replacement, low-income rental units should have been included in the amended plan. Rather, our review is to ensure that a demonstrated disparate impact in housing be justified by a legitimate and substantial goal of the measure in question." *Id.* (citation omitted)

203. *Id.* at 907. As noted earlier, a court will reverse an agency decision under the APA only where it finds the decision was arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A) (2000).

mandates.”<sup>204</sup> The duty to affirmatively further fair housing is certainly a broad statutory mandate. As such, the court noted that its review of HUD’s action “is not a review to determine whether HUD has, in fact achieved tangible results in the form of furthering opportunities for fair housing.”<sup>205</sup> Rather, its review is limited simply to assessing “whether HUD exercised its broad authority in a manner that demonstrates consideration of, and an effort to achieve, such results.”<sup>206</sup> With that, the court affirmed the district court’s finding that HUD satisfied its statutory requirements.<sup>207</sup>

## VI. THE LESSONS OF *DARST-WEBBE*

The *Darst-Webbe* case illustrates that the range of discretion afforded HUD in the HOPE VI context is simply too broad. The system in place provides no assurances that HUD will satisfy its duty to affirmatively further fair housing. The FHA clearly mandates that HUD must act to end discrimination and segregation in the nation’s public housing stock by affirmatively furthering fair housing,<sup>208</sup> but this is a nebulous concept. HUD and courts have refrained from promulgating specific guidelines or requirements that could be used to glean a more thorough definition of what it means to affirmatively further fair housing and to gauge whether HUD is in fact satisfying that obligation. As a result, HUD can satisfy its legal standard simply by demonstrating it *considered* relevant data, effects, and options in reaching a decision. If HUD’s duty to “affirmatively further” fair housing is to have any substance, then this range of discretion must be narrowed. More must be done to hold HUD accountable to its fair housing obligation and to ensure that HUD utilizes HOPE VI funding as a vehicle to adequately service the needs of the nation’s lowest income families.

### A. *The Judiciary Will Be Ineffective in Narrowing HUD’s Range of Discretion*

An obvious starting point for possible ways to narrow HUD’s discretion and increase accountability is the judicial system. The courts are essentially

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204. *Darst-Webbe VI*, 417 F.3d at 907. The Eighth Circuit relied heavily on the U.S. Supreme Court’s decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). In *Norton*, the Court said the APA “protect[s] agencies from “undue judicial interference with their lawful discretion” and “pervasive oversight by federal courts over the manner and pace of [their] compliance with . . . congressional directives.” *Id.* at 66-67.

205. *Darst-Webbe IV*, 417 F.3d at 907.

206. *Id.*

207. *Id.* at 909. In its closing remarks, the court expressed its hope that “future actions of this type would involve a more explicit discussion from the agency regarding [the] impact on protected classes”; nonetheless, it could not conclude that HUD failed to satisfy its statutory obligations under the FHA and APA. *Id.*

208. 42 U.S.C. § 3608(d)-(e) (2000).

the only outlet for affected residents or public housing advocates to challenge a HOPE VI project. Courts have authority to review agency decisions and to ensure that HUD actions and policies comport with the requirements of the Constitution and federal law. Admittedly, courts must afford considerable deference to an agency's decision if it is supported by a rational basis.<sup>209</sup> A court may not intervene and substitute its own policy choices for that of the agency when reviewing decisions under the "arbitrary and capricious" standard.<sup>210</sup> However, such deference does not require a court to countenance an agency's failure to consider an important aspect of the problem it is addressing.<sup>211</sup> Courts should strive to hold HUD accountable to its obligation to use HOPE VI to affirmatively further fair housing and to fulfill the goals of the FHA.

At a minimum, courts should engage in a more detailed review of HUD's HOPE VI selection process to ensure that HUD thoroughly considers the fair housing effects of its grants. Courts should demand that HUD provide satisfactory explanations for its grant awards and should evaluate these explanations in light of HUD's statutory mission and the goals of the FHA.<sup>212</sup> Specifically, courts should examine more closely and critically HUD's decision to fund a particular HOPE VI project and analyze whether the plan for that project adequately addresses the fair housing concerns of the affected residents. A review of the proper unit mix, the total number of families displaced, the percentage of families able to return to the new development, and the total decline in the number of affordable housing units would require HUD to more thoroughly explain its decision-making process and show that it seriously explored alternatives in passing on a particular HOPE VI proposal.

Indeed, the one promising precedent to emerge from the *Darst-Webbe* case thus far is that trial courts must conduct some form of review before dismissing a HOPE VI challenge. Courts may not reach a decision without first engaging in some level of analysis and examination of HUD's grant award process. The Eighth Circuit appears to now require a more detailed statement of fact finding to this effect at the trial level.<sup>213</sup> This is the only way to develop any type of precedent or to ensure proper appellate review. While it is doubtful this will create any significant objective measure of what it means to affirmatively further fair housing, it is at least an improvement from the total lack of analysis

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209. See *Fort Mill Telephone Co. v. F.C.C.*, 719 F.2d 89, 91 (4th Cir. 1983).

210. *Id.*

211. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

212. See *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 158 (1st Cir. 1987); see also *Bankr. Estate of United States Shipping Co., Inc. v. Gen. Mills, Inc.* 34 F.3d 1383, 1390 (8th Cir. 1994).

213. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth. (Darst-Webbe II)*, 339 F.3d 702, 713-14 (8th Cir. 2003).

conducted by the district court in *Darst-Webbe*. It is a step in the right direction for narrowing HUD's range of discretion and providing substance to the FHA mandate, but it will not be enough.

In practice, the role of the courts seems to be limited. The *Darst-Webbe* case suggests the judiciary will not provide an effective outlet for meaningful change in the way HUD administers HOPE VI.<sup>214</sup> The mechanisms simply do not exist for the courts to question and challenge many of the specific parts of a revitalization plan. Moreover, courts may be unwilling to examine the details of a revitalization plan, preferring instead to defer to HUD as the experts in determining the specifics of its housing programs and grant administration. While the need for latitude in allowing agencies to establish and enact policy decisions unfettered by piecemeal judicial intervention is considerable, the result is a high degree of unaccountability for HUD, at least in the details of the HOPE VI plans that it approves.

As the *Darst-Webbe* case illustrates, trial courts may be reluctant to examine the details of a HOPE VI plan and proscribe adjustments. There, the district court expressly refused to set out specific steps that HUD should follow to satisfy its duty to affirmatively further fair housing. It refrained from engaging in a detailed review of the revitalization plan, noting that it would not challenge on a "line-item basis" the particular details and decisions HUD made.<sup>215</sup> Neither at trial nor on remand did the district court discuss the unit

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214. Admittedly, reaching this conclusion based largely on a single case may be a bit premature. However, the language of the district court and Eighth Circuit and the standards of review they applied suggest the judiciary lacks the authority to effect substantive change in HOPE VI. The ability of courts to review agency decisions is incredibly narrow. Their power is essentially limited to ensuring that HUD *considers* the fair housing affects of its grant awards by examining relevant data and considering alternatives. This is a very minimal showing that HUD can easily satisfy.

While other circuits and district courts have heard challenges to HOPE VI awards, none have wrestled with the specific question raised by the plaintiffs in *Darst-Webbe*: has HUD met its duty to affirmatively further fair housing in implementing a specific HOPE VI redevelopment plan? *See, e.g., COLISEUM SQUARE ASS'N, INC. v. DEP'T OF HOUS. & URBAN DEV.*, 2003 WL 715758 (E.D. La. 2003) (denying injunctive relief to temporarily stop progress on a HOPE VI development pending compliance with environmental and historic property regulations). The court later dismissed the plaintiff's complaint in *COLISEUM SQUARE ASS'N, INC. v. DEP'T OF HOUS. & URBAN DEV.*, 2003 WL 1873094 (E.D. La. 2003); *see also* *Reese v. Miami Dade County*, 2003 WL 22025458 (11th Cir. 2003) (denying residents request for injunctive relief to stop a HOPE VI development because they failed to show irreparable harm); *PARAQUAD, INC. v. ST. LOUIS HOUS. AUTH.*, 259 F.3d 956, 959-60 (8th Cir. 2001) (dismissing plaintiff's challenge of HOPE VI development for failure to conform with the Americans with Disabilities Act as moot because the plan did not pose "certainly impending" harm to tenants); *GAUTREAUX v. CHICAGO HOUS. AUTH.*, 178 F.3d 951 (7th Cir. 1999) (dismissing plaintiffs petition to uphold an injunction restricting the use of HOPE VI funds for lack of jurisdiction).

215. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth. (Darst Webbe III)*, 299 F. Supp. 2d 952, 967 (E.D. Mo. 2004).

mix or address the plaintiffs' specific argument that the HOPE VI Plan called for an insufficient amount of affordable housing and could have supported additional units.

In its current form, the HOPE VI program does not proscribe any requirements or minimum standards for particulars such as the unit mix, the total number of affordable housing units that may be destroyed, the total number of affordable units that must be rebuilt, the total number of families displaced, or the percentage of displaced families that must be allowed to return to the completed development. These are all details that HUD commits to the discretion of the grant applicants. Thus, it is doubtful that courts will mandate adjustments to these details of a HOPE VI plan, preferring instead to yield to HUD because the criteria involve more specialized knowledge of agency experts and industry specialists. If the district court in *Darst-Webbe* is any indication, courts will refrain from setting out detailed steps for HUD to follow in administering HOPE VI. As such, courts will be unable to provide objective measures for determining whether a particular HOPE VI plan affirmatively furthers fair housing.

Even those judges, who may be receptive to arguments that a HOPE VI project provides an inadequate number of affordable units, and thus fails to affirmatively further fair housing, may be hard pressed to find the judicial means to effect change. An excerpt from *Darst-Webbe* illustrates the point:

“[U]nless some nexus is drawn between discrimination and the Plan, the unit mix is up to the agencies entrusted with creating the development. HUD and the SLHA had a series of complicated decisions to make, and while the Court has never taken lightly the impact of those decisions on the lives of the residents of the existing public housing in the Revitalization Plan Area, neither can the Court disregard the considered policy decisions of the agencies entrusted with directing the redevelopment of the Area.”<sup>216</sup>

The court continued by noting that while it may have chosen different solutions such as a more aggressive unit mix or a mortgage program for low-income home buyers, “[t]his is not a case where HUD’s actions are so egregious, so inconsistent with its duty to affirmatively further fair housing, that a dereliction of duty can be presumed.”<sup>217</sup>

Where the standard for intervention is so high, it seems clear that courts will be unable, and not just unwilling, to effect any serious change in the way HUD reviews HOPE VI applications and administers funding for the program. The only way to effect real change is to examine the details of a HOPE VI plan and inquire whether HUD could do more to provide a greater number of affordable housing units. Under the standard of review mandated by the APA, however, so long as HUD demonstrates it at least *considered* the fair housing

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216. *Id.* at 962.

217. *Id.* at 963.

effects of its policies and grants, then HUD has technically satisfied its legal obligation. Little else remains for the courts to do. While courts should nonetheless try to narrow HUD's range of discretion and give effect to the FHA mandate to affirmatively further fair housing, any meaningful change in HOPE VI must come internally through HUD.

*B. HUD Should Evaluate HOPE VI in Light of Its FHA Mandate*

HUD must do more to ensure that it is utilizing HOPE VI to adequately provide for the housing needs of the urban poor. While HUD hails the program as an innovative approach for eliminating the nation's most severely distressed housing projects, the undeniable result is a decrease in the total number of affordable units. Indeed, the reduction in density of public housing sites is one of the program's express goals. Given the shortage of units available to those people with "very low" and "extremely low" incomes, HUD should undertake a comprehensive review of HOPE VI and consider its role as a contributing factor in the decline of available public housing.

HUD should also evaluate its selection criteria and consider its review and scoring processes in light of the FHA mandate to affirmatively further fair housing. As noted above, HUD has refrained from issuing programmatic guidelines to administer HOPE VI. One of the unique features of HOPE VI is that it allows PHAs and private developers the freedom to determine the vast majority of the physical features and details of the site plans they submit for consideration. Details such as the unit mix, the total number of affordable units, the total reduction in the number of affordable units, and the percentage of displaced affordable housing tenants able to return are all committed to the discretion of the private party applicants. HUD should consider establishing minimum thresholds that a plan must meet in these regards.

Additionally, HUD should consider revising its scoring criteria. Under the current structure, HUD gives significant weight to the capacity of the applicant's team and the overall soundness of the approach. Little if any weight is accorded to the number of replacement public housing units proposed. HUD should consider a point scheme that rewards those applicants whose proposal calls for a more aggressive unit mix and retains a higher percentage of displaced families. While these revisions would undeniably alter the character of the program, they could be a means of ensuring that HOPE VI applicants provide for an adequate number of replacement public housing units in their proposals. This would be consistent with the spirit of affirmatively furthering fair housing.

## VII. CONCLUSION

It is unclear what exactly it means to affirmatively further fair housing in the HOPE VI context. What is clear is that HUD enjoys incredibly broad

discretion in shaping and administering the program. This range of discretion must be narrowed to give life to the Fair Housing Act's mandate. More must be done to ensure that the HOPE VI proposals selected for funding are genuinely tailored to address the needs of the public housing residents displaced. While courts should evaluate the specific details of a HOPE VI proposal and demand thorough explanation from HUD for its decisions, their power seems to be limited. As the judiciary is an unlikely option for providing substantive change, HUD must re-evaluate the program and assess whether it is fulfilling its fair housing obligation. HOPE VI may indeed be an innovative, community-based approach for revitalizing dilapidated ghettos. So long as the end result of this revitalization is a reduction in the overall supply of affordable housing units in the face of consistent demand, however, HOPE VI can hardly be said to affirmatively further fair housing.

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