Saint Louis University Law Journal

Volume 47
Number 4 *Millstone Lecture (Summer 2003)*

Article 14

11-7-2003

Hope VI and Title VIII: How a Justifying Government Purpose Can Overcome the Disparate Impact Problem

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HOPE VI AND TITLE VIII: HOW A JUSTIFYING GOVERNMENT PURPOSE CAN OVERCOME THE DISPARATE IMPACT PROBLEM[1]

> *Gone are the infamous old housing blocks of East Lake Meadows, a place that was so violent people called it "Little Vietnam." . . .*
>
> *[T]he transformation at East Lake is truly astounding. . . .*
>
> *The people enjoying this community, by and large, are not the same people who lived here before. This is a "mixed income" development now. . . .*
>
> *By every measure these new communities are better places to live.*
>
> *But there's a nagging issue that's often overlooked in the enthusiasm for renewal. If most of the previous tenants don't live here, where did they all go?*[2]

I. INTRODUCTION

Over the past decade the Department of Housing and Urban Development's ("HUD") HOPE VI program has been used to revitalize distressed public housing developments all over the country. While proponents argue that HOPE VI has been a great success in improving the lives of public housing residents and addressing the problems associated with distressed public housing developments, critics point out that many residents have been displaced by the revitalization activity and that HOPE VI demolition has contributed to the nation's dwindling supply of affordable housing units.[3] In overwhelming numbers, those who have been directly affected by HOPE VI revitalization activities are members of protected classes under Title VIII of the

1. Two key experiences in the past year have afforded me a glimpse of both the rewards and frustrations associated with the now decade-old HOPE VI program. First, in the summer of 2002, I spent three months as an intern with McCormack Baron and Associates, a St. Louis, Missouri-based firm nationally recognized as a leader in the development of low and moderate income housing. Specifically, the firm has experience working with several cities to implement HOPE VI revitalization projects. Second, in the fall of 2002, I spent three months working in the Saint Louis University Legal Clinic, which represented a tenant association that filed a lawsuit in opposition to a HOPE VI plan.

2. Christopher Swope, *Rehab Refugees*, GOVERNING MAG., May 2001, at 40-41, *available at* http://www.governing.com/archive/2001/may/housing.txt (last visited Jan. 18, 2003).

3. *See* discussion *infra* Part IV.

Civil Rights Act of 1968 ("Fair Housing Act" or "FHA").[4] Under the FHA, specified class members are granted certain protections to further the goal of "provid[ing], within constitutional limitations, for fair housing throughout the United States."[5] Recent attempts to halt HOPE VI revitalization activities under the theory that the implementation violates the FHA highlights a potential conflict between the HOPE VI policy of revitalization and the FHA mandate to further fair housing throughout the United States.[6] Importantly, attempts to reconcile the HOPE VI program with the FHA presents problems that reveal the broader tension with which policy makers must grapple. Under the FHA, HUD must affirmatively further fair housing, which prohibits it from taking actions that result in a discriminatory effect. At the same time, HUD is directed to carry out the "sound development of the Nation's communities,"[7] and "spur[] economic growth in distressed neighborhoods."[8] As highlighted throughout this Note, these goals often conflict. Although this Note focuses on the particular FHA issues likely to occur within the HOPE VI context, it is essential to recognize that the tension explored here is one that also arises outside of the HOPE VI context.[9]

This Note explores the potential conflict between HOPE VI revitalization policies and the FHA by examining the major components of the HOPE VI program within the context of FHA claims likely to be made in response to a revitalization plan. Following a brief overview of past U.S. housing policy in Part II, Part III of this Note highlights the potential FHA problems that arise in the HOPE VI context. Next, Part IV provides a brief overview of current HOPE VI policies, which are then analyzed under the FHA in Part V. The FHA analysis ultimately concludes that some level of disproportionate impact is probably unavoidable due to the racial and gender characteristics of current public housing tenants; therefore, the determinative question centers on whether there is sufficient justification for the harm the revitalization activity will likely impose. This Note argues that, although each plan must be examined on a case-by-case basis, defenders of a given HOPE VI plan can provide one of several possible justifications sufficient to overcome a prima

4. *See* discussion *infra* Parts III, V.

5. 42 U.S.C. § 3601 (2000).

6. *See* discussion *infra* Parts II, IV.

7. 42 U.S.C. § 3531 (2000).

8. *See* Department of Housing and Urban Development, *Mission & History*, *at* http://www.hud.gov/library/bookshelf18/mission.cfm (last visited February 5, 2003).

9. This reality means that even if the HOPE VI program is eliminated as proposed by President George W. Bush's Fiscal Year 2004 Budget, the tension highlighted here will undoubtedly arise in the context of successor housing policies and programs. For a summary of Bush's proposal, see *Department of Housing and Urban Development*, *at* http://www.whitehouse.gov/news/usbudget/budget-fiscalyear2004/hud.html (last visited February 5, 2003).

facie showing of disparate impact. The sources of such justification include the goals of integrated living patterns, urban revitalization, self-sufficiency, and efficiency. In Part VI, this Note ultimately concludes that the HOPE VI program and the FHA can legitimately coexist, but that important modifications to the program are needed in order to diminish the probability that future FHA litigation will occur.

II. Brief History of U.S. Housing Policy

The 1937 Wagner-Steagall Act ("United States Housing Act of 1937" or "the 1937 Housing Act")[10] is generally recognized as marking the federal government's first large-scale entry into the housing market.[11] The goals of this Depression-era legislation were to encourage the creation of jobs, to act as a slum clearance plan, and to provide for affordable housing.[12] These goals were to be accomplished by providing financial assistance to the states to "remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low-income."[13] The conventional public housing program sought to provide temporary shelter within a larger public welfare system intended to prepare entry-level workers for industrial and service employment.[14] Local public housing authorities ("PHAs") worked to construct public housing developments all across the country, much of which remains a viable housing resource for low-income families.[15] In later years, new public housing developments came in the form

10. Wagner-Steagall Housing Act, ch. 896, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. § 1437 (2000)).

11. There are other examples of lesser levels of government support of housing before the 1937 Housing Act. For example, the First World War brought legislation that authorized the federal government to "build[] housing for factory workers involved in the war effort . . . . remov[ing] the barrier between the federal government and the private housing market." Further, the 1920s brought some state efforts to create new housing for the urban poor, such as the "Lowell Homes" in Massachusetts. *See* Michael S. FitzPatrick, *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).

12. Wagner-Steagall Housing Act, 50 Stat. 888 (announcing the goals of the program to be employment, slum clearance, and housing).

13. *Id.* One commentator noted: "The 1937 Housing Act . . . acknowledged federal responsibility for providing housing for the poor but linked this social purpose to . . . a mandate to create jobs through public works and stimulate the economy. . . . [P]ublic housing also served the purposes of national mobilization [in that it could provide] inexpensive housing within easy walking distance of the factories" producing war-related items. Harry J. Wexler, *HOPE VI: Market Means/Public Ends—The Goals, Strategies, and Midterm Lesson's of HUD's Urban Revitalization Demonstration Program*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 195, 199 (2001).

14. Wexler, *supra* note 13, at 199.

15. *See* THE FINAL REPORT OF THE NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING 38 (1992) [hereinafter FINAL REPORT] (noting that "[m]ost PHAs do not

of high-rise structures intended to house a great number of occupants in a relatively small amount of space.[16] This high-density public housing stock rapidly deteriorated because of a host of factors including poor site location decisions, an inability to meet operating costs, and poor management, among other problems.[17] These problems were compounded by the fact that such developments were often left increasingly isolated as the jobs and infrastructure necessary to help residents move out of poverty continued to leave the cities.[18] Discrimination in the administration of the public housing program plagued public housing, a problem that HUD finally attempted to rectify during the 1970s when it "imposed site selection standards . . . that prevented PHAs from building new family developments in neighborhoods with high concentrations of low-income minority residents."[19]

In the 1970s, a new form of federal housing subsidy, known as Section 8, was introduced in an "attempt[] to move away from the perceived failures of the public housing program."[20] This new subsidy shifted construction and management responsibilities to the private market.[21] The program created both project-based and tenant-based subsidies. The project-based subsidy provided incentives for "developers to create private housing" reserved for low-income families, while the tenant-based subsidy provided tenants with a voucher to be used to pay for housing in the private market.[22] The 1980s brought drastic decreases in funding for housing programs, as well as a shattered public image for HUD because of HUD officials' improper use of funds.[23] By the end of the decade the country was generally left with a deteriorated physical stock of public housing, housing developments suffering from deteriorated management practices, and a deteriorated relationship between PHAs and the residents they were established to serve.[24] Though the federal government

contain severely distressed public housing developments" and that "approximately 94% of the public housing stock does not appear to be severely distressed").

16. FitzPatrick, *supra* note 11, at 431.

17. *See* Wexler, *supra* note 13, at 198 (discussing various factors contributing to the increased distress of public housing including urban poverty, drug-related crime, shortsighted federal regulations, poor and discriminatory location decisions, rules that destroyed the financial viability of large projects, excessively high density, and poor property management).

18. FitzPatrick, *supra* note 11, at 430.

19. Wexler, *supra* note 13, at 200. Wexler notes that, because "HUD . . . lacked the authority . . . to override local opposition to the placement of public housing in working and middle class neighborhoods . . . . the unintended consequence of the HUD's site selection standards was effectively to stop the development of new family public housing in most cities," despite the increasing need for affordable housing. *Id*.

20. FitzPatrick, *supra* note 11, at 431-32.

21. *Id.*

22. *Id.* at 432.

23. *Id.*

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

generally withdrew support for most subsidized housing programs during this decade, it did initiate the Low Income Housing Tax Credit ("LIHTC") program that created incentives for the private development and rehabilitation of housing reserved for low-income households.[25]

The current HOPE VI program is perhaps best viewed as a response to the need for reform and redefinition of the government's role in responding to the affordable housing crisis.[26] In fact, outside of the subsidies provided through the Section 8 and LIHTC programs, HOPE VI currently represents the only significant direct federal funding for the construction of new affordable housing units.[27] The program was created as part of the response to a report by the National Commission on Severely Distressed Public Housing ("the Commission"),[28] which had been charged with proposing a National Action Plan to eradicate severely distressed public housing.[29] The 1992 Final Report recommended revitalization in three general areas: physical improvements, management improvements, and social and community services designed to address residents' needs.[30] The thrust of the recommendation was that the six percent of the nation's 1.4 million existing public housing dwellings that were "severely distressed"[31] should be eradicated by the year 2000.[32] In response to these findings, HUD created the Urban Revitalization Demonstration project,

25. Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 (1998). Roisman noted further that "[t]he LIHTC program allows owners of residential rental property to claim tax credits . . . for 30% to 70% of the present value of new and substantially rehabilitated housing developments. [A] project qualifies for the credit only if . . . the owner rents at least 20% of the units" to low-income households. *Id.* at 1014.

26. Wexler contended that policy makers considered two approaches to reform: (1) traditional reform, which advocates major funding to physically revitalize "severely distressed public housing and to overhaul troubled PHA's, leaving unchanged the basic public housing model as conceived in 1937", and (2) structural reform, which emphasizes the introduction of practices from the private sector, shifting responsibility for correcting problems to private developers and property managers who are given more discretion and flexibility than what has been traditionally given to PHAs. Wexler, *supra* note 13, at 201. Wexler argues that reformers attempted to combine these approaches through the HOPE VI program. *Id.*

27. FitzPatrick, *supra* note 11, at 423.

28. Congress created this Commission by enacting the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (1989). *See* FINAL REPORT, *supra* note 15, at xiii.

29. FINAL REPORT, *supra* note 15, at xiii.

30. *See id.* at 9-33.

31. The Commission's work resulted in four measures of "severe distress:" (1) physical deterioration and unacceptable living conditions; (2) families living in distress facing problems associated with poverty; (3) high incidence of serious crime, and (4) management difficulties evidenced by high vacancy rates, move-out rates, transfer requests, and low levels of rent collection. FINAL REPORT, *supra* note 15, at B-3.

32. *Id.* at 2.

which later became known as HOPE VI.[33] This program essentially makes federal grants available to local PHAs to revitalize their "severely distressed" public housing. The program operated pursuant to annual appropriations from fiscal year 1993 through fiscal year 1998,[34] finally receiving multi-year authorization beginning in fiscal year 1999 under the Quality Housing and Work Responsibility Act of 1998 ("Housing Reform Act of 1998").[35] Congress has appropriated funds each fiscal year since the inception of the program,[36] with the most recent appropriation ensuring that funding remains

33. FitzPatrick, *supra* note 11, at 435-36. HOPE VI was created by the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571, which was approved on October 6, 1992.

34. *See* Department of Housing and Urban Development, *Hope VI Program Authority and Funding History*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/about/history.cfm (last visited Jan. 18, 2003). From fiscal year 1993 to fiscal year 1998, Congress provided annual appropriations ranging from $300,000,000 to $778,240,000 per year. *See infra* note 36.

35. Veterans Affairs and HUD Appropriations Act, Pub. L. No. 105-276, 112 Stat. 2461 (1998) (codified in scattered sections of 42 U.S.C.). The Quality Housing and Work Responsibility Reform Act of 1998, Pub. L. No. 105-276, § 535, 112 Stat. 2518, 2518 (1998) (codified as amended at 42 U.S.C. § 1437 v (a)(3)) [hereinafter Housing Reform Act of 1998] was the first major piece of public housing legislation enacted since 1992 and makes substantial changes to the United States Housing Act of 1937. *See* Eileen M. Greenbaum, *Quality Housing and Work Responsibility Act of 1998: Its Major Impact on Development of Public Housing*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 310 (1999). Some argue that the Act only accelerates a disturbing trend toward the demolition of thousands of affordable units, leading to tenant relocation and a reduced supply of an already insufficient number of affordable housing units. *See, e.g.*, Center for Community Change, *Public Housing Overhaul*, *at* http://www.communitychange.org/pahcrisis2.htm (last visited Jan. 18, 2003) [hereinafter *Public Housing Overhaul*] (arguing that tenants have been forced to relocate and that the Act reduces the supply of affordable housing). For a brief explanation of how the Housing Reform Act of 1998 impacted the HOPE VI program, see Department of Housing and Urban Development, *Hope VI Program Authority and Funding History*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/about/history.cfm (last visited Jan. 18, 2003).

36. The first appropriation for HOPE VI came in fiscal year 1993, in which funding was made available to up to fifteen cities that were to be selected from either the forty most populous cities or the troubled housing authority list. Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies, Pub. L. No. 102-389, 106 Stat. 1571 (1992). Under HUD's annual appropriations acts, HOPE VI continued to be funded and the program continued to be modified, with later bills allowing for an increased number of applicants and an increased level of funding. *See* 106 Stat. 1571 ($300,000,000 appropriated); Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 103-124, 107 Stat. 1275 (1993) ($778,240,000 appropriated); Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 103-327, 108 Stat. 2298 (1994) ($500,000,000 appropriated); Omnibus Consolidated Rescissions and Appropriations Act, Pub. L. No. 104-134, 110 Stat. 1321 (1995) ($480,000,000 appropriated); Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 104-204, 110 Stat. 2874 (1996) ($550,000,000 appropriated); Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 105-65, 111

available through September 30, 2003.[37] At the time of this writing, President George W. Bush has proposed that the HOPE VI program not be reauthorized, making the future of the current program an uncertain one as policy makers debate whether the program will continue.[38] Due to its unique legislative history, HOPE VI is governed by a series of statutes and regulations, including appropriations bills, guidelines contained in each year's Notice of Funding Availability ("NOFA"), and the provision found in the Housing Reform Act of 1998.[39] Viewed together, these sources that govern HOPE VI reveal a program that, in many ways, fundamentally differs from past housing policy. The competitive HOPE VI application process is guided by the ranking structure outlined in each periodic NOFA. Applicant proposals are scrutinized under this structure to determine which will be awarded the limited number of available grants. Through this process, each applicant must design a revitalization plan that will meet the program's basic threshold requirements and garner the most additional points in order to earn the highest possible ranking. The HOPE VI program highlights the tension HUD faces in complying with its dual goals of furthering fair housing and revitalizing distressed communities.

III. HOPE VI AND THE FAIR HOUSING ACT

Federal law imposes various obligations on HUD as the federal administrator of the HOPE VI program. Perhaps the most fundamental obligation is that found in the civil rights era legislation commonly known as the Fair Housing Act.[40] The FHA mandates that HUD "administer the

Stat. 1344 (1997) ($550,000,000 appropriated); Veterans Affairs and HUD Appropriations Act, Pub. L. No. 105-276, 112 Stat. 2461 (1998) ($600,000,000 appropriated); Appropriations, 2000—Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies, Pub. L. No. 106-74, 113 Stat. 1047 (1999) ($575,000,000 appropriated); Departments of Veterans Affairs and Housing and Urban Development—Appropriations, Pub. L. No. 106-377, 114 Stat. 1441 (2000) ($575,000,000 appropriated); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 107-73, 115 Stat. 651 (2001) ($573,735,000 appropriated).

37. Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 107-73, 115 Stat 651 (2001).

38. On November 15, 2002, the House passed a bill that would reauthorize the HOPE VI program through fiscal year 2004. However, the bill did not come for a vote in the Senate. *See* HOPE VI Program Reauthorization Act of 2002, H.R. 5499, 107th Cong. (2002); *Congress Adjourns*, 7 NAT'L LOW INCOME HOUSING COALITION MEMO TO MEMBERS 46 (Nov. 22, 2002), *at* http://www.nlihc.org/mtm/mtm7-46.htm (last visited Jan. 18, 2003). For a more complete discussion of this bill's provisions, see *infra* Part VI. *See also supra* note 9.

39. FitzPatrick, *supra* note 11, at 437.

40. 42 U.S.C. § 3601 (2000). Note that the Fair Housing Amendments Act of 1988 added significant provisions to the original statutory language, expanding the protections against discrimination to persons with disabilities and families with children.

programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of the FHA.[41] The dual goals of the FHA are to promote integration and to prohibit discrimination (including both intentional discrimination and actions that have a discriminatory effect)[42] in the nation's housing.[43] Pursuant to the mandate to affirmatively further fair housing, HUD must use its grant programs to assist in ending segregation and discrimination.[44] In light of these obligations, HOPE VI projects must be carefully evaluated to determine whether they pass FHA scrutiny. While HOPE VI projects bring significant possibilities for the transformation of severely distressed public housing neighborhoods into healthy, mixed-income communities, these benefits do not come without significant costs. For instance, HOPE VI demolition has contributed to the nation's dwindling stock of affordable housing units,[45] and some argue that its policies have abandoned the poorest residents in favor of the less desperate.[46] The fact that most public housing residents whose suffering justified the revitalization activities do not return after the revitalization has been completed has been widely

41. 42 U.S.C. § 3608(e)(5) (2000).

42. *See* discussion *infra* Part IV.

43. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).

44. *See, e.g.*, NAACP, Boston Chapter v. Sec'y of Hous. and Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987).

45. "During the past three decades, the focus of federal low-income housing policy has shifted away from constructing new public housing projects toward housing vouchers, subsidies for privately-owned buildings, and tax credits for private production of new low-income housing." Center on Budget and Policy Priorities, *Is the Proposed Cut to the Public Housing Capital Fund Justified?* (Sept. 26, 2002), *at* http://www.cbpp.org/9-18-02hous.htm. Pursuant to the Housing Reform Act of 1998, PHAs can apply to HUD to demolish public housing units if the agency can show that the housing is obsolete, too costly to rehabilitate, or that demolition would be in the best interest of the tenants. *See Public Housing Overhaul*, *supra* note 35. There is evidence that policy makers are concerned about this net loss of affordable housing stock. For example, the Senate Appropriations Committee has rejected HUD's proposal for a voluntary conversion of public housing to project-based voucher assistance because of its concern that such action will likely result in the net loss of public housing units. Joseph P. Poduska, *Senate Banking Committee Approves 2003 HUD Appropriations Bill; Supplemental Sent to President*, 30 NO. CD-7 HDR CURRENT DEVELOPMENTS 1 (Aug. 5, 2002). This same committee, in reauthorizing the HOPE VI program for another year, expressed its concern about the future of the program, noting that HUD has approved the demolition of 140,000 housing units since the HOPE VI program was implemented. *Id.* Though some of these units have been or are scheduled to be replaced, a significant number will remain forever lost. *See* Swope, *supra* note 2 (explaining that, in the 1990s, approximately 100,000 units were demolished and approximately 60,000 were scheduled to be replaced).

46. *See, e.g.*, Swope, *supra* note 2; *Public Housing Overhaul*, *supra* note 35 (arguing that the new trends in housing policy afford PHAs more opportunity to evict the poorest tenants in favor of renting to higher income residents).

recognized,[47] though its implications are disputed. Proponents maintain that the low return rate is explained by the fact that former residents have exercised their right to choose to live elsewhere, while critics argue that the low return rate is because fewer units are being built and that more stringent screening imposes a limit on the number of people who can return to a redeveloped site.[48] This debate raises legitimate questions regarding the impact of the program on the public housing residents and neighborhoods HOPE VI is intended to benefit.[49]

Embedded within this policy debate exists a more narrow legal problem that must be addressed. The widespread displacement of FHA-protected class members raises concerns about whether the implementation of HOPE VI projects violates the FHA mandate that the federal government affirmatively further fair housing. This legal issue is reflected in the fact that some public housing tenants themselves have organized in opposition to HOPE VI revitalization projects[50] and that members of the legal community have spoken out about possible FHA violations.[51] Various legal claims have been brought in response to HOPE VI plans—some of these allege a violation of the Fair Housing Act,[52] and others allege violations of different federal laws.[53] Though

47. *See, e.g.*, Swope, *supra* note 2; Wexler, *supra* note 13, at 197 (asking "How does a HOPE VI team build a sustainable mixed income community without discouraging or excluding substantial numbers of low income residents from remaining or returning to the site? If some level of exclusion is unavoidable, how can HUD ensure that displaced residents will be able to use section 8 vouchers and certificates to find decent housing in accepting and acceptable communities elsewhere?").

48. *See, e.g.*, Swope, *supra* note 2.

49. HUD is asking cities to assess the local impact on people and neighborhoods. *See* Swope, *supra* note 2 (noting that HUD has directed cities to assess the impact of HOPE VI projects). Furthermore, a recent HOPE VI appropriation act directs the Urban Institute to conduct an independent study on the long-term effects of HOPE VI on former residents of distressed public housing developments. Appropriations, 2000—Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies, Pub. L. No. 106-74, 113 Stat. 1047 (1999).

50. *See, e.g.*, Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., 1997 WL 31002 (N.D. Ill.); Darst-Webbe Tenant Ass'n Bd. v. Saint Louis Hous. Auth., 202 F. Supp. 2d 938 (E.D. Mo. 2001); Reese v. Miami-Dade County, 210 F. Supp. 2d 1324 (S.D. Fla. 2002).

51. For example, the executive director for the Lawyers' Committee for Civil Rights Under Law has expressed the view that HOPE VI has resulted in the loss of a considerable number of public housing units and the displacement of their mostly African-American and Hispanic occupants, thereby evidencing HUD's failure to affirmatively further fair housing, and the ACLU has called for a formalized fair housing review of HOPE VI projects before they are approved. *See Finance, Management and Development of Fair Housing*, 30 NO. CD-5 HDR CURRENT DEVELOPMENTS 24 (July 8, 2002) (quoting Barbara Arnwine, Executive Director of the Lawyers' Committee for Civil Rights Under Law, and Philip Tegeler, Connecticut Civil Liberties Union Legal Director, representing the ACLU).

52. *See, e.g.*, *Cabrini-Green*, 1997 WL 31002; *Darst-Webbe*, 202 F. Supp. 2d 938.

53. *See, e.g.*, *Reese*, 210 F. Supp. 2d 1324.

there are various theories of FHA liability that might be used to oppose a HOPE VI plan,[54] the theory most likely to be relied upon is that of disparate impact. [55] A disparate impact claim may be brought under the theory that the facially—neutral policy has a disproportionate adverse impact on those who are members of FHA-protected classes.[56] Before considering the complexities of this type of challenge, it is necessary to understand the major components of the current HOPE VI program.

IV. MAJOR ELEMENTS OF THE CURRENT HOPE VI PROGRAM[57]

A central purpose of the HOPE VI grant program is to help PHAs "improve the living environment for public housing residents of severely distressed public housing projects through the demolition, rehabilitation, reconfiguration, or replacement" of at least some portion of the public housing project.[58] Therefore, a foremost requirement of the HOPE VI grant process is that the public housing in question be "severely distressed." The criteria used to identify severely distressed public housing developments were originally recommended by the Commission[59] and have since been refined and codified. Under the Housing Reform Act of 1998, a severely distressed project is one that: (1) requires major redesign or other activity to correct serious design or other physical deficiencies; (2) is a significant contributing factor to physical

54. For example, a possible theory of liability that is outside the scope of this Note is that implementation of the revitalization plan reinforces patterns of segregation by leaving a great many minority families without replacement housing in the newly revitalized neighborhood, largely resulting in their move to non-racially integrated areas. *See, e.g.*, *Cabrini-Green*, 1997 WL 31002 at *12 (reading the complaint to allege that "because the Cabrini residents will be denied housing in their newly revitalized neighborhood and because those residents have very low incomes, they will be forced to live in a non-racially integrated area" and noting this to be an adequately alleged violation of the FHA); *Darst-Webbe*, 202 F. Supp. 2d at 939 n.1 (noting plaintiffs' allegation that HUD's failure to affirmatively further fair housing consigns the displaced households to live in racially segregated public housing developments).

55. *See, e.g.*, *Darst-Webbe*, 202 F. Supp. 2d at 939 n.1 (explaining the allegations against the Saint Louis Housing Authority, which included denial of housing and discrimination because of race, sex, and familial status); *Cabrini-Green*, 1997 WL 31002 at *12-13 (holding that the plaintiffs had adequately alleged violations of the FHA in regard to their discrimination claims).

56. Under the FHA, it is illegal to discriminate based on a person's race, national origin, color, religion, sex, disability, or familial status. 42 U.S.C. § 3604 (2000).

57. The brief overview of the major HOPE VI components that follows is not intended to provide a complete explanation of every facet of the program. For a more complete discussion of the HOPE VI program, see FitzPatrick, *supra* note 11, and Wexler, *supra* note 13.

58. Department of Housing and Urban Development Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants; Fiscal Year 2002; Notice, 67 Fed. Reg. 49,766, (Part I (A)(1)) (July 31, 2002) [hereinafter "July 2002 NOFA"].

59. For a list of the Commission's original criteria, see FINAL REPORT, *supra* note 15, at B-3.

decline and disinvestment in the surrounding neighborhood; (3) is occupied predominantly by very poor families with children whose parents are unemployed and dependent on public assistance or has high rates of vandalism and criminal activity in comparison to other housing in the area; (4) cannot be revitalized through other programs because of costs and funding constraints, and (5) to the extent the project contemplates work on an individual building, that building is sufficiently separable.[60] A project that has been legally vacated or demolished, but for which there has been no replacement housing assistance other than Section 8 assistance, can also qualify as severely distressed.[61] If the project is determined to be severely distressed and is granted HOPE VI funds, the grant recipient may use the funds to carry out a variety of revitalization activities.[62]

A. Creating Mixed-Income Communities

The Commission noted that families living in public housing "often face adverse conditions such as a lack of social and support services . . . and a lack of employment opportunities" within a physical environment that "often has a high concentration of very low income families living on a relatively small site."[63] It further noted that these families share the common socioeconomic characteristics of low education levels, low employment rates, and low household incomes.[64] This concern is reflected in the HOPE VI goal of providing for a "mixed-income, well functioning community on the revitalized site."[65] It is expected that the HOPE VI revitalization will help to improve the surrounding neighborhood and build a sustainable community.[66] Ultimately, this is done through a plan that "[p]rovide[s] housing that will avoid or decrease the concentration of very low-income families."[67] A reduction in concentration does not necessarily entail a reduction in the number of housing units; the redeveloped community may actually have a higher density, depending on the site's market conditions.[68] Because market rate and public housing units exist side-by-side, HOPE VI developments are characteristically

60. Housing Reform Act of 1998, *supra* note 35, at sec. 535, § 24(j)(2)(A).

61. *Id.* at § 24(j)(2)(B).

62. These activities include resident relocation, demolition, sale or lease of the site, rehabilitation of community facilities, development activity, homeownership activity, acquisition, management improvements, administrative costs, community and supportive services, and leveraging other resources. July 2002 NOFA, *supra* note 58, at 49,768-69 (Part V).

63. FINAL REPORT, *supra* note 15, at B-3.

64. *Id.*

65. July 2002 NOFA, *supra* note 58, at 49,783 (Part XIV(A)).

66. *Id.* at 49,766 (Part I(A)(2)&(4)).

67. *Id.* at 49,766 (Part I(A)(3)). *See also* FitzPatrick, *supra* note 11, at 438; Pub. L. No. 104-134, 110 Stat. 1321 (1995).

68. July 2002 NOFA, *supra* note 58, at 49,783 (Part XIV(A)).

designed in a way that enables them to blend into their larger community so as to avoid the historical stigma associated with public housing.[69] Some argue that reducing the concentration of very low income, minority families on public housing sites will lessen the "concentration effects" that have led to an increase in social isolation for public housing residents.[70] While these proponents view mixed-income housing as an antidote to the negative conditions created by social and economic isolation,[71] critics view a policy that fosters mixed-income developments as a waste of resources.[72] Mixed-income developments are further encouraged by the relatively recent shift in public housing income targets, which require that only 40% of all new admissions to public housing must have an income that does not exceed 30% of the area median income.[73]

B. Replacement Housing

Traditional public housing policy required that for every unit of public housing demolished by a PHA, another unit had to be built in its place.[74] This

69. Wexler, *supra* note 13, at 206. This new design philosophy is known as New Urbanism, which promotes the idea that development occur within compact neighborhoods that encourage pedestrian activity with a wide spectrum of housing types that allow for diverse income levels and a mix of activities. *Id.* at 207. Public housing units within a mixed-finance development "must be comparable in size, location, external appearance, and distribution to the non-public housing units within the development." 24 C.F.R. § 941.600(b) (2002).

70. Wexler, *supra* note 13, at 203 (explaining the work of William Julius Wilson).

71. Cited benefits of mixed-income developments include: (1) higher-income residents provide new social norms that emphasize work and abiding by the law; (2) low income households will have the benefit of better schools, jobs, and safety, and (3) institutions are more likely to invest in a mixed-income neighborhood. *Id.* at 204-205.

72. *Id.* at 205. The chief criticism of a policy that encourages mixed-income communities is that scarce public resources should be allocated to those most in need. These critics argue that HOPE VI permits PHAs to use scarce resources to attract working and middle class residents to mixed-income developments at the expense of those in need of assisted housing. *Id.*

73. Housing Reform Act of 1998, *supra* note 35, at sec. 513 § 16(a). Previously, the minimum percentage of residents who had to have incomes at or below 30% of the area median had been 75%. *See* Susan Bennett, *The Possibility of a Beloved Place: Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 279 (2000). In the past, public housing admission preferences were for the lowest income households as defined in the Housing and Community Development Act of 1987, such as those in substandard housing, homeless, living in shelters, involuntarily displaced, or paying more than 50% of their income for shelter. *See* Wexler, *supra* note 13, at 200 n.6. Under the Act, the PHA's admission policy must be designed to deconcentrate poverty and promote income-mixing. *See* Greenbaum, *supra* note 35, at 330.

74. This rule is found in numerous HUD regulations. *See, e.g.*, 24 C.F.R. § 42.375 ("All occupied and vacant occupiable lower-income dwelling units that are demolished or converted to a use other than as lower-income dwelling units in connection with an assisted activity must be replaced with comparable lower-income dwelling units."). *See also* Wexler, *supra* note 13, at 202.

policy is often referred to as the one-for-one replacement requirement. 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.[75] The initial HOPE VI appropriation bills suspended this requirement for HOPE VI projects, and this suspension was made permanent with the passage of the Housing Reform Act of 1998.[76] In general, replacement units may now consist of some combination of public housing units, Section 8 certificates, and eligible homeownership units.[77] As a part of the application process, a PHA may request Section 8 vouchers to relocate residents affected by the revitalization[78] and to serve as replacement units for all units that will be "demolished, sold, or otherwise disposed of" and that will not be replaced under the plan.[79] As might be expected, the discontinuance of the one-for-one replacement requirement has been quite controversial, with critics arguing that it has led to the aggregate loss of public housing units across the country.[80]

C. Mixed-Financing

Another significant hallmark of the HOPE VI structure is its provisions for encouraging mixed-finance developments. HOPE VI grant money is intended to be used to leverage significant levels of other public and private investment. Financing techniques typically involve partnerships with resident and community groups, local government, and foundations.[81] The mixed-finance

75. FINAL REPORT, *supra* note 15, at 79.

76. Greenbaum, *supra* note 35, at 314. Severely distressed housing projects can now be demolished without obtaining funding to replace each lost unit. *Id.*

77. The first appropriation bill for HOPE VI provided that units demolished pursuant to the program could be replaced by one-third Section 8 certificates, with the balance to be replaced by a combination of conventional public housing and units acquired through a host of other programs. Pub. L. No. 102-389, 106 Stat. 1571 (1992). Under the July 2002 NOFA, a replacement unit is deemed to be any combination of public housing rental units, eligible homeownership units, and Section 8 vouchers. July 2002 NOFA, *supra* note 58, at 49,771 (Part VI(8)).

78. *See* July 2002 NOFA, *supra* note 58, at 49,768 (Part III(B)(22)) ("An application must include a certification that the applicant has completed a HOPE VI Revitalization Relocation Plan and that the Relocation Plan is in compliance with the Uniform Relocation Act"); *id.* at 49,780 (Part XII) (explaining that residents relocated under a revitalization plan are covered by the acquisition policies and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970).

79. *Id.* at 49,767 (Part II(E)(6)&(7)).

80. *See* Greenbaum, *supra* note 35, at 314.

81. Financing sources may include federal programs, tax-exempt financing, conventional loans, pension funds, foundation loans and grants, and equity from the private sector. *See, e.g.*, McCormack Baron & Associates, *Statement of Qualifications and Experience* (2002) (on file with author).

concept allows PHAs to combine their funding with other private and public sources and to form partnerships with other entities for development, ownership, and management purposes.[82] This development concept is intended to enhance the ability of PHAs to engage in meaningful collaboration with other local organizations in working toward the revitalization of neighborhoods suffering from disinvestment.[83] The resulting financial structure is quite complex,[84] but many argue that it is this very complexity that creates successful projects able to respond to the various interests of neighborhood residents, real estate developers, and investors.[85] Many view the leveraging of HOPE VI funds with other public and private financing as the best available response to the overwhelming need to revitalize the nation's public housing projects.[86]

D. Public Housing Residents

In keeping with its goal to "improve the living environment for public housing residents of severely distressed public housing projects,"[87] the HOPE VI regulations mandate various provisions related to public housing residents themselves. First, the regulations allow for up to 15% of a HOPE VI grant to be used to fund economic and social support activities known as community and supportive services ("CSS activities").[88] These services must be designed to meet the needs of all residents of the severely distressed project, including those remaining on-site, those permanently relocating, those temporarily relocating, and new residents of the revitalized units.[89] Appropriate CSS activities include services such as educational activities, job readiness and

82. 24 C.F.R. § 941.600(a)(1) (2002).

83. 61 Fed. Reg. 19,708, 19,713 (May 2, 1996). HUD's philosophy seems to be that such opportunities will increase the likelihood of economic and racial integration. *Id.*

84. For example, Phase I of Murphy Park, a mixed income community funded under the Urban Revitalization Demonstration Program, the predecessor to HOPE VI, was financed through both public and private resources, including a traditional first mortgage loan, public housing development funds received under the Housing and Community Development Act of 1992, LIHTC equity investments from corporate investors, a loan secured by a first mortgage on a ninety-nine year ground lease from the St. Louis Housing Authority to the developer, and loans secured by second and third mortgages on the ground lease. The project also received support from the City of St. Louis in the form of tax abatement, public improvements, and assistance in securing corporate donations. Peter W. Salsich, Jr., *Thinking Regionally About Affordable Housing and Neighborhood Development*, 28 STETSON L. REV. 577, 589-90 (1999).

85. *Id.* at 593.

86. Greenbaum, *supra* note 35, at 311.

87. July 2002 NOFA, *supra* note 58, at 49,766 (Part I(A)(1)).

88. The HOPE VI program initially allowed for the use of up to 20% of the total grant to be used to pay the cost of CSS activities. Pub. L. No. 102-389, 106 stat. 1571 (1992). The percentage allowance was eventually cut down to 15%. *See* July 2002 NOFA, *supra* note 58, at 49,778 (Part XI(2)).

89. *Id.* at 49,778-89 (Part XI(A)(8)).

employment training, life skills training, credit unions, homeownership counseling, substance abuse treatment, domestic violence education, and child care services.[90] Second, the regulations mandate at least some level of resident involvement in creating the HOPE VI plan, though the precise extent of this involvement is unclear.[91] The following FHA analysis offers a more in-depth view of the program's ultimate impact on public housing residents.

V. ANALYSIS UNDER THE FAIR HOUSING ACT

Among its many mandates, Title VIII prohibits discrimination in housing by making it unlawful to "otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[92] The FHA further mandates that HUD "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing]."[93] In FHA cases, courts have generally declined to take a narrow view of the phrase "because of race," recognizing that "a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy."[94] Specifically, "a strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry."[95] Both Titles VII (employment discrimination) and VIII (housing discrimination) of the Civil Rights Act of 1968 have 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.[96] Perhaps because of the similarities between the two statutes and the fact that both statutes seek to address invidious discrimination, Title VIII doctrine has

90. *Id.* at 49,779-80 (Part XI(B)).

91. *See* Housing Reform Act of 1998, *supra* note 35, at sec. 535, § 24(e)(2)(D). For a full discussion of this issue, see *infra* Part VI(A).

92. 42 U.S.C. § 3604(a) (2000).

93. 42 U.S.C. § 3608(e)(5) (2000). The duty requires that HUD do more than simply refrain from discriminating itself. NAACP, Boston Chapter v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 154 (1st Cir. 1987). This requires that HUD have a method whereby it collects the racial and socioeconomic information necessary for compliance with its duties under the FHA. Shannon v. U.S. Dept. of Hous. & Urban Dev., 436 F.2d 809, 821 (3d Cir. 1970).

94. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

95. *Id.* at 1290.

96. 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). The Court has used this disparate impact theory of liability in its articulation that a facially neutral employment practice may violate Title VII without evidence of a subjective intent to discriminate. *See* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 645-46 (1989).

developed largely through analogy to existing Title VII doctrine.[97] For example, employment discrimination and housing discrimination disparate impact claims are both analyzed using the same basic prima facie case structure governing proof and persuasion: Upon plaintiff's showing of a prima facie case of disparate impact, the defendant is responsible for demonstrating a sufficient justification for the policy.[98] If the defendant is successful in justifying the policy, the policy may nonetheless be held to be discriminatory if the plaintiff is able to show that the defendant's justification is merely pretextual and that another, less discriminatory policy would serve the defendant's interests just as well.[99] Because the Supreme Court has declined to articulate the standards required to make out a prima facie case of disparate impact under the FHA,[100] the lower courts have been left to decide their own standards and measures of what constitutes disparate impact.[101] Though each of the various lower courts follow the same basic burden-shifting model first articulated in the Title VII cases, they have adopted different standards for the prima facie showing required of plaintiffs and the extent of the justification burden imposed on defendants.[102] The standard imposed on a plaintiff ranges from the relatively less stringent burden of demonstrating that the action "actually or predictably results in discrimination"[103] to the relatively more stringent burden of prevailing under a factor test that takes more than mere discriminatory effect into consideration. For example, the Seventh Circuit uses the following factors to determine under what circumstances conduct that

97. *See, e.g.*, 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 & ETHNIC ANC. L. DIG. 64, 73 (1996); McCormack, *supra* note 96, at 564.

98. McCormack, *supra* note 96, at 564.

99. *E.g.*, Hispanics United of DuPage Co. v. Vill. of Addison, 988 F. Supp. 1130, 1162 (N.D. Ill. 1997).

100. In *Town of Huntington v. Huntington Branch NAACP*, the Court expressed its satisfaction that disparate impact had been shown and that the justification offered to rebut the prima facie case was inadequate, but declined to reach the question of the proper disparate impact test to be used in FHA analysis. 488 U.S. 15, 18 (1988). It reserved the decision on the appropriateness of the Title VIII test applied by the Second Circuit for a future case. *Id. See also* Richard C. Cahn, *Determining a Standard for Housing Discrimination under Title VIII*, 7 TOURO L. REV. 193, 193 (1990). The case that the Supreme Court has been waiting for may be City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 263 F.3d 627 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 2618 (2002). *See* discussion *infra* note 107.

101. The First, Second, Fifth, and Eighth Circuits have all adopted an "effect-only" standard, or a substantially similar standard. The Fourth and Seventh Circuits have adopted a "four-factors" standard. The Sixth and Tenth Circuits have adopted a "three-factors" standard. Ahrend, *supra* note 97, at 71.

102. *See generally* Ahrend, *supra* note 97. Though many consider the differences between these standards to be minimal, others argue that the differences are really quite significant. *Id.* at 65.

103. United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974).

produces a disparate impact will violate the FHA: (1) the strength of the plaintiff's demonstration of discriminatory effect; (2) whether there is some evidence of discriminatory intent; (3) the defendant's interest in taking the action complained of, and (4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for minorities or whether the plaintiff simply wants to restrain the defendant from interfering with the property owners who seek to provide such housing.[104] The less stringent model is known as the "effects test," while the more stringent model is used in "factors test" jurisdictions.[105]

Because guidance for the proper evidentiary showing of disparate impact from the Supreme Court has yet to emerge, it is useful to consider the Court's Title VII cases. The Supreme Court's analysis in *Wards Cove Packing Co. v. Atonio*,[106] a Title VII employment discrimination case in which the court specifically addressed the proper application of Title VII's disparate impact theory of liability, provides some guidance for proper FHA disparate impact analysis.[107] In *Wards Cove*, former salmon cannery workers alleged employment discrimination on the basis of race.[108] To prove their prima facie case, the workers produced statistical evidence showing a high percentage of nonwhite workers in the cannery jobs (unskilled positions on the cannery line) and a low percentage of nonwhite workers in the noncannery positions (skilled

104. Metro. Hous. Dev. Corp. v. Vill. Of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

105. At least one commentator uses these terms to differentiate between the two major ways courts evaluate FHA claims. *See* Ahrend, *supra* note 97, at 66-72 (introducing these terms and analyzing cases that exemplify these approaches).

106. 490 U.S. 642 (1989).

107. Importantly, it is far from clear that the Wards Cove analysis should be used to analyze disparate impact claims under the FHA or whether the Title VII disparate impact theory of liability should even be a recognized cause of action under the FHA. *E.g.*, Brief for Petitioner at *21-26, 2002 WL 31039413, City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 263 F.3d 627 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 2618 (2002) (No. 01-1269) (arguing that the legislative and judicial history of the FHA do not support a disparate impact cause of action). Many anticipated that the Supreme Court would take the opportunity to address the disparate impact question when it decided *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 123 S. Ct. 1389 (2003), this Term. In *Cuyahoga*, a developer of low-income housing brought equal protection, due process, and FHA claims. 123 S. Ct. at 1392. The FHA claim was brought on the theory that repeal of an ordinance that had approved the development of low income housing (and that led to the city's decision to refuse to grant building permits) had a disparate impact based on race. *Cuyahoga*, 263 F.3d at 640. The developer also argued that its rights under the FHA were violated when the city gave effect to the anti-family biases of its citizens by repealing the ordinance. *Id.* The Supreme Court's decision in this case could have had important implications for disparate impact claims under the FHA. However, the developer apparently abandoned the FHA claim and so the Court did not address the issue. *Cuyahoga*, 123 S. Ct. at 1397. A definitive answer on this question will have to wait until another appropriate case comes before the Court.

108. *Wards Cove*, 490 U.S. at 647-48.

positions falling into a variety of classifications).[109] The Supreme Court rejected this type of analysis in favor of a comparison between the racial composition of the at-issue jobs with the racial composition of the qualified population in the relevant labor market.[110] The Court explained that "if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities."[111] In addition to setting forth the evidentiary standard required for making out a prima facie disparate impact case, the Court further stated that a plaintiff must demonstrate that it is the particular employment practice that has created the disparate impact.[112] Further, despite the shifting persuasion burden that controls disparate impact cases, the burden of proving that discrimination has been caused by a specific employment practice remains with the plaintiff throughout the litigation.[113] To effectively evaluate the FHA claim that could be brought in response to a HOPE VI plan, it is necessary to first consider the prima facie case.

A. The Prima Facie Case of Disparate Impact in a HOPE VI Case

A FHA claim made in response to the implementation of a HOPE VI revitalization plan would likely be brought under the theory that the demolition and replacement policy of the HOPE VI project denies and limits housing opportunities because of race, sex, and/or familial status in violation of the FHA.[114] That is, the plaintiff would argue that the facially-neutral HOPE VI revitalization plan results in a denial of housing opportunities to members of a protected class, and that such denial has an adverse effect that is disproportionate to the effect on those outside of the protected classes. Under the FHA, when a decision "has a greater adverse impact on one racial group than on another," it is said to have a disparate impact.[115] The court would need to determine whether the redevelopment plan ultimately imposes a comparatively greater harm on protected class members than it imposes on those outside the protected classes. This determination would need to be made on a case-by-case basis and would heavily depend on the specifics of the proposed redevelopment plan. The court would likely consider the impact on at least three groups as it determines whether implementation of a HOPE VI revitalization plan creates a disparate impact: (1) the current residents; (2)

109. *Id.* at 650.
110. *Id.*
111. *Id.* at 653.
112. *Id.* at 657.
113. *Wards Cove*, 490 U.S. at 659.
114. 42 U.S.C. § 3604(a), (b) (2000).
115. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

those on the public housing waiting list, and (3) those eligible for public housing. If the plaintiff can prove that a policy or decision has deprived protected class members of housing opportunities to a greater degree than it has deprived unprotected individuals, a prima facie case will be made.

The difficulty that results from the Supreme Court's refusal to endorse a particular means of measuring disparate impact in FHA cases[116] is that it is unclear precisely how disparate impact should be measured. Though courts tend to analogize to employment discrimination cases such as the *Wards Cove* case set forth above, the analogy has been less than perfect, resulting in complex methodologies and disputes among the various parties to the lawsuit as to the correct measurement.[117] Ultimately, courts have used a variety of measurements of disparate impact, all of which generally focus on whether the policy "'bears more heavily on one race than another.'"[118] No matter the

116. *See* Town of Huntington v. Huntington Branch NAACP, 488 U.S. 15, 18 (1988) (finding that disparate impact was shown, but refusing to endorse the Second Circuit's measurement of disparate impact).

117. *See, e.g.*, *In re* Employment Discrimination Litig. Against the State of Ala., 198 F.3d 1305, 1311-12 (11th Cir. 1999) ("Demonstrating disparate impact in the first instance can be tricky business; it often involves ominous-sounding methods of statistical inquiry . . ."); Summerchase Ltd. P'ship I v. City of Gonzales, 970 F. Supp. 522, 528-529 (M.D. La. 1997) (determining whether the court should use "absolute numbers" or "proportional numbers" to determine whether there was a disparate impact); Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 154 (S.D.N.Y. 1989) (noting that the parties could not agree on the methodology that should be used to determine whether there was a disparate impact);.

118. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (quoting Wash. v. Davis, 426 U.S. 229, 242 (1976)). *See also* Edwards v. Johnston County Health Dep't, 885 F.2d 1215, 1223 (4th Cir. 1989) (determining that plaintiffs' disparate impact claim failed because they did not prove that the policy affected minorities to any greater degree than it affected whites); Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988) (finding a significant disparate impact because two-thirds of those who would have benefited from the low-income housing a developer wanted to build were minorities and the failure to build impacted protected class members at twice the rate of unprotected individuals); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 (4th Cir. 1984) (stating that the standard to be applied is "whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied"); *Metro. Hous. Dev. Corp.*, 558 F.2d at 1288 (explaining that because a greater number of minorities than whites satisfied the income requirements for subsidized housing, the city's refusal to permit the project had a greater impact on minorities than on whites pursuant to a "statistical, effect-oriented view of causality"); *Summerchase*, 970 F. Supp. at 530 (examining the composition of those households eligible to reside in the proposed low-income development and determining that because approximately two-thirds of the eligible households were Caucasian and one-third were African-American, there was no disparate impact because the decision not to issue the permit affected Caucasians in a much greater proportion than African-Americans); Green v. Sunpointe Assocs., No. C96-1542C, 1997 WL 1526484, at *6 (W.D. Wash. May 12, 1997) (emphasizing that the proper measurement was to compare the presence of protected class members in the group impacted by the facially-neutral policy with the presence of those class members in the group of those eligible to participate in the given program or the general local population, noting that comparison to those eligible for the program is the favored method, stating

measure of disparate impact that is ultimately settled upon by the courts, it is likely that a plaintiff bringing a disparate impact claim in reaction to a HOPE VI revitalization plan will be able to establish at least some level of disparate impact. In general, minorities occupy a large percentage of the family public housing stock. For example, in 1998, minorities occupied 69% of all public housing.[119] In particular, African-American households occupied nearly half of all public housing units in 1998.[120] Further, African-American households tend to reside in public housing projects that are overwhelmingly populated by other African-Americans.[121] Also important to any FHA analysis is that single women head 85% of public housing families with dependent children.[122] Because protected class members overwhelmingly occupy public housing, it is very likely that virtually any decision or policy related to the demolition and revitalization of such housing will have a disparate impact on those protected class members. Of course, because each case must be examined on its own merits, this fact alone does not guarantee the plaintiff will be successful in making out a prima facie case,[123] but it does demonstrate that the more determinative question in a HOPE VI FHA claim is whether there is sufficient justification for the disparate impact created.

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that the percentage of protected classes in the Section 8 program was considerably higher than the percentage of protected classes in the surrounding population, and finding that, among current residents, the policy impacted the protected class members at greater rates than it affected unprotected classes).

119. HUD, *A Picture of Subsidized Households*, *at* http://www.huduser.org/datasets/assthsg/statedata98/HUD4US3.TXT (last visited Jan. 18, 2003) [hereinafter *Subsidized Households*]. *See also* Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POV. L. & POL'Y 35, 53 (2002) (citing a similar statistic for 1995).

120. *Subsidized Households*, *supra* note 119 (noting that 47% of public housing units are occupied by African-Americans).

121. Hendrickson, *supra* note 119, at 53 (noting that, on average, African-American public housing residents reside in public housing projects that are 85% African-American and only 8% Caucasian).

122. FINAL REPORT, *supra* note 15, at 47.

123. Whether a plaintiff can establish a showing of disparate impact to the degree necessary to establish a prima facie case may not be an easy task. It remains unclear just how severe the discriminatory effect must be in order to constitute a violation of the FHA. Even if the plaintiff is able to state a viable claim, he or she still has a substantial burden to prove the alleged violations of the FHA. *See* J. Mark Powell, *Fair Housing in the United States: A Legal Response to Municipal Intransigence*, 1997 U. ILL. L. REV. 279, 288 (1997). For example, in *Darst-Webbe*, the court apparently did not think plaintiffs had proven any allegations of discrimination based on race, sex, or familial status. The court relegated its opinion on the matter to a single footnote at the end of the opinion, stating that it "found absolutely no evidence of discrimination." Darst-Webbe Tenant Ass'n Bd. v. Saint Louis Hous. Auth., 202 F. Supp. 2d 938, 950 n.17 (E.D. Mo. 2001). It seems clear that both the prima facie case of whether a significant discriminatory impact can be shown and the rebuttal opportunity for a defendant to prove a legitimate government purpose are highly dependent on the particular facts of any given case.

B. The Justifying Government Purpose in a HOPE VI Case

Perhaps the more determinative question in a FHA analysis is whether, given a finding of disparate impact, the defendant can sufficiently justify its actions in order to avoid FHA liability. Analogizing again to the *Wards Cove* analysis, once the plaintiff has demonstrated a prima facie case of disparate impact the burden shifts to the defendant to demonstrate a justification for the practice.[124] The *Wards Cove* Court explained that this phase of the analysis consists of two components. First, the fact finder must consider any justifications that an employer offers for the use of the practice in question. Second, the fact finder should consider the availability of alternative practices that would bring about the same business goals with less racial impact.[125] Burdens of the proposed alternatives, such as cost, are relevant in determining whether alternative practices would be equally as effective as the challenged practice.[126] In transferring this doctrine to FHA cases, courts' precise rebuttal burdens have varied to some degree, largely depending on the particular court's requirements for a prima facie case. In an "effects test" circuit, the standard that attaches to the justification burden ranges from a "legitimate and bona fide"[127] to a "compelling"[128] government interest. In a "factors test" jurisdiction, the justification concept is embedded within the factor analysis.[129]

124. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 658 (1989). The *Wards Cove* disparate impact standards for employment discrimination cases were codified in part and overruled in part by 42 U.S.C. § 2000e-2(k)(1) (2000). The codification retains a form of the justification defense originally provided in *Wards Cove*. Langlois v. Abington Hous. Auth., 207 F.3d 43, 50 n.4 (1st Cir. 1999).

125. *Wards Cove*, 490 U.S. at 658.

126. *Id.* at 661.

127. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977).

128. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974). At least one commentator suggests that the *Black Jack* "compelling interest" standard really is not very different from the "legitimate and bona fide" standard articulated by other courts. McCormack, *supra* note 96, at 603. McCormack noted that the "necessary to a compelling interest" standard is tempered by other factors, including whether the choice made in fact does further the governmental interest asserted, whether the interest served by the choice is constitutionally permissible and substantial enough to outweigh the private detriment, and whether less drastic means are available. *Id.* at 603 n.289.

129. Although the burden-shifting concept underlies a proper discriminatory effect analysis in both "effects test" and "factors test" circuits, its use is less detectable in "factors test" jurisdictions. It has been somewhat unclear whether the factors test merely sets the requirements for a prima facie case with a separate justification phase to follow, or whether the factors constitute a final determination on the merits. Hispanics United of DuPage v. Vill. of Addison, 988 F. Supp. 1130, 1151 (N.D. Ill. 1997). It generally has been determined that the factors constitute a guide for a court's ultimate determination and should be used to "navigate to a conclusion on the merits." *Id.* at 1153. It would be redundant to engage in a justification phase after a consideration of the factors because one of the factors already considers the defendant's interest in taking the action. *Id.* at 1153 n.14. In both types of jurisdictions, the defendant must

Ultimately, the various tests all seek to balance the defendant's interests in enacting the plan with the disparate impact it creates.[130] Most disparate impact cases also encompass the concept that a justification made in response to a disparate impact claim will be sufficient to avoid FHA liability only if no less discriminatory alternatives exist. The plaintiff would most likely proffer suggestions of less discriminatory alternatives,[131] with the defendant having the opportunity to demonstrate that the proffered alternatives would not effectuate its purpose.[132] This concept embraces the idea that the parties should determine whether alternative approaches might reduce the racially-discriminatory effect.[133] If a less discriminatory alternative would also serve the legitimate interests of the entity implementing the policy, the defendant's choice would be viewed "merely as a 'pretext' for discrimination."[134]

As the First Circuit pointed out in *Langlois v. Abington Housing Authority*,[135] "practically all" of the cases examined by the courts dealing with employment and housing discrimination treat a showing of discriminatory impact as "doing no more than creating a *prima facie* case, forcing the defendant to proffer a valid justification."[136] Further, both private and government actions produce disparate racial effects quite frequently; such impact is "merely the basis for requiring justification."[137] For example, in *Langlois v. Abington Housing Authority*, the court concluded that the defendant PHAs' choice to maintain local residency preferences in ranking applicants for Section 8 rent subsidy vouchers did not violate the FHA, despite

offer justification for its actions; in the "effects test" jurisdictions, this justification phase occurs after a disparate impact has been shown, and, in the "factors test" jurisdictions, the justification is considered as part of the court's factor analysis.

130. McCormack, *supra* note 96, at 602. McCormack argues that the concept of Title VII business necessity helps to effect Title VIII's purpose because it suggests that a defendant should be required to explain its actions and should face liability if its explanation is inadequate. *Id.* at 604.

131. *See, e.g.*, Mountain Side Mobile Estates P'ship v. Sec'y of Hous. and Urban Dev., 56 F.3d 1243, 1254 (10th Cir. 1995); *Hispanics United*, 988 F. Supp. at 1162 (noting that the plaintiff may satisfy its burden of persuasion by demonstrating that less discriminatory alternatives are available).

132. *See, e.g.*, Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988) (stating that a disparate impact claim could be overcome by demonstrating that the actions furthered, "in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect"), *aff'd by* 488 U.S. 15 (1988); *Hispanics United*, 988 F. Supp. at 1163 (determining that there was little likelihood that less discriminatory alternatives could have furthered the city's interests).

133. McCormack, *supra* note 96, at 605.

134. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 660 (1989) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

135. *Id.* at 43.

136. Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-50 (1st Cir. 1999).

137. *Id.* at 50.

the fact that such a choice did create a disparate impact.[138] In this "effects test" jurisdiction, the court found that the PHAs demonstrated a legitimate reason for the discriminatory effect, thereby justifying the policy's negative impact. This justification focused on the fact that PHAs are local agencies seeking to assist local residents and that Congress itself endorsed the use of local preferences in the distribution of Section 8 vouchers.[139] A similar rationale was relied upon in *Hispanics United of DuPage County v. Village of Addison,*[140] a case concerning final approval of a proposed consent decree to dispose of FHA claims made by a group of Hispanic residents.[141] When the city began purchasing and demolishing multifamily residences in largely Hispanic neighborhoods, which it claimed were blighted, those affected by the decision sued the city under the theory that the prior and planned acquisition and demolition had a disparate impact on Hispanic residents.[142] In considering the fairness of the consent decree, the court found that it would have been possible for the city to sustain its burden of proving legitimate justifications for engaging in the acquisition and demolition of the multifamily residences.[143] The city's justifications focused on the fact that the residences had recurring housing code violations, poor property maintenance, and that high-density development had overshadowed necessary greenspace.[144] In this "factors test" jurisdiction, the factor inquiring into the defendant's intent probably would favor defendants who likely would be able to produce legitimate justifications.[145]

In considering the implication of these cases within the HOPE VI context, the determinative issue would be the defendant's ability to proffer a sufficient justification for the discriminatory effect created by the implementation of a revitalization plan. Careful examination of the HOPE VI program reveals the following possible justifications that could prove sufficient to pass FHA scrutiny: (1) the program's goal of bringing about more integrated living patterns by lessening the concentration of very low income households; (2) using federal resources as tools for reinvesting in urban neighborhoods; (3) the program's focus on improving living environments and increasing the self-sufficiency of public housing residents by addressing their physical, social, and economic needs, and (4) granting local PHAs with the flexibility necessary to more efficiently provide for local housing needs. Though there are an indefinite number of possible justifications for the disparate impact created by

138. *Id.* at 51.
139. *Id.*
140. 988 F. Supp. 1130 (N.D. Ill. 1997).
141. *Id.* at 1130.
142. *Id.* at 1135.
143. *Id.* at 1163.
144. *Id.* at 1162.
145. *Hispanics United*, 988 F. Supp. at 1163.

the implementation of a HOPE VI plan, the following four justifications provide a representative sample of the types of justifications defendants might offer. When HOPE VI projects are used to further legitimate goals, the projects are much more likely to pass FHA scrutiny because the discriminatory impact will be justified. These justifications are discussed in greater detail below.

1. Integrated Living Patterns

As previously explained, U.S. housing policy has generally resulted in concentrations of very low income families in often segregated areas.[146] One recommendation the Commission made was to allow for a greater mix of incomes in severely distressed public housing developments.[147] The Commission believed that including working families in public housing developments could provide a stabilizing force in distressed developments and would help to eliminate the possibility that such developments would be further isolated.[148] The Commission emphasized that this was necessary to improve management and livability within public housing developments.[149] The Commission also noted that such a policy would allow PHAs to "take steps to promote stable communities in severely distressed public housing and to promote the idea that this housing is a valuable community resource."[150] This recommendation forms the basis of the HOPE VI emphasis on decreasing the concentration of very low income families in specific neighborhoods.[151] Importantly, this policy comports with the FHA goal to establish "a policy of dispersal through open housing . . . look[ing] to the eventual dissolution of the ghetto and the construction of low and moderate income housing in the suburbs . . . ."[152] Further, the Supreme Court has identified the goal of Title VIII as "replace[ment of] ghettos 'by truly integrated and balanced living patterns.'"[153] Housing opportunities created through the HOPE VI program can decrease the current concentrations of very low income citizens in the urban core, thereby effectuating this policy goal and providing positive benefits for families.[154]

146. Hendrickson, *supra* note 119, at 53.

147. FINAL REPORT, *supra* note 15, at 69.

148. *Id.* at 104.

149. *Id.* at 70.

150. *Id.*

151. Housing Reform Act of 1998, *supra* note 35, at § 535 (a), 112 Stat. 2518, 2581.

152. 114 CONG. REC. 2,985 (1968) (statement of Sen. Proxmire).

153. 114 CONG. REC. 3,422 (1968) (statement of Sen. Mondale). *See also* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 95 (1977) (emphasizing that Title VIII represents "a strong national commitment to promote integrated housing.").

154. Many argue that the de-concentration strategy employed by HOPE VI is not aimed to assist the residents who are being displaced, but "a more ambiguously defined community of

2. Urban Revitalization

In addition to the integrated living pattern justification, proponents of a HOPE VI plan can point to the need for neighborhood reinvestment. Efforts to bring about more integrated living patterns cannot be relegated merely to public housing developments. Instead the policy focus must incorporate entire neighborhoods. The government's fair housing policy is ultimately concerned with making "full and free housing choice a reality."[155] Truly effectuating this policy requires reinvestment in minority neighborhoods so that these neighborhoods "are no longer deprived of essential public and private resources."[156] When this occurs, the opportunity for stable, racially-mixed neighborhoods emerges as a meaningful choice.[157] Public housing developments do not exist in isolation; rather, their successes and failures are closely connected to the surrounding neighborhood. The need for reinvestment in urban neighborhoods is addressed within the HOPE VI context as funds are leveraged by PHAs collaborating with other local institutions to effect revitalization of the neighborhoods where the severely distressed public housing is located.[158]

3. Self-Sufficiency

In addition to advancing policies that bring about more integrated living patterns and provide for reinvestment in urban neighborhoods, the government also has a legitimate interest in providing incentives for economic self-sufficiency. Public housing historically has been criticized because it tends to foster disincentives for economic self-sufficiency.[159] The physical location of the inner-city can limit opportunities to escape poverty because many jobs are

stakeholders, those whose revulsion at the deterioration they see or imagine may have prompted them to 'disinvest' in the neighborhood." Bennett, *supra* note 73, at 280.

155. July 2002 NOFA, *supra* note 58, at 49,782.

156. *Id*.

157. *Id.* HUD intends that two goals be advanced through the use of HOPE VI revitalization grants: (1) the expansion of assisted housing opportunities in non-minority neighborhoods, and (2) reinvestment in minority neighborhoods to improve the quality of affordable housing there. *Id.* It must be recognized that the latter goal is much more politically difficult than the former. *See, e.g.*, Note, *Making Mixed-Income Communities Possible: Tax Base Sharing and Class Desegregation*, 114 HARV. L. REV. 1575, 1575 (2001) (noting that a wealthy locality rationally will seek to prevent construction of low-income housing). However, merely because the implementation of a policy is politically difficult does not mean that it is not a valid policy goal. The reality that it will be relatively easy for local PHAs to reinvest in minority neighborhoods without complementary efforts to expand assisted housing opportunities in non-minority neighborhoods is a reality that should be carefully scrutinized. A local PHA that wants to present this concept as evidence of justification for disparate impact must be held accountable for its efforts to effectuate both policies, not just the politically less difficult one.

158. *See* 24 C.F.R. § 941.600(a)(1) (2002); 61 Fed. Reg. 19,708 (May 2, 1996).

159. Housing Reform Act of 1998, *supra* note 35, § 502(a)(3).

located outside the neighborhoods where inner-city residents live.[160] The Commission summarized this problem by noting that disincentives for economic self-sufficiency included the fact that rent calculation regulations gave little incentive for a public housing resident to maintain employment because of substantial rent increases for every dollar earned.[161] HOPE VI provides a means of responding to this need to increase opportunities for economic self-sufficiency by implementing policies that reward employment and economic self-sufficiency among public housing residents.[162] The program's explicit purpose is to create incentives and economic opportunities for public housing residents to "work, become self-sufficient, and transition out of public housing and federally assisted dwelling units."[163] Poverty generates social and economic problems that impose enormous costs on the residents themselves and also on the entire nation.[164]

4. PHA Efficiency

Finally, the federal government's choice to grant local PHAs more flexibility can provide another source of justification for the disparate impact imposed by a HOPE VI revitalization plan. Importantly, Congress has decided that the past federal policy of overseeing every aspect of public housing has worsened the problems associated with public housing and has placed great administrative burdens on local PHAs.[165] Large administrative costs and bureaucratic delays tend to consume scarce resources that can be better used elsewhere (e.g. building more affordable housing, funding support services, or paying higher salaries to attract higher quality program administrators). Further, such large bureaucracies tend to be less responsive to local problems and often fail to consider the unique strengths and weaknesses of each

160. *See, e.g.*, Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 799-800 (1991). Schill suggested that concentration effects "may feed upon themselves" because as communities become increasingly populated by residents who turn to deviant or illegal behaviors due to their inability to find a job, businesses will likely choose to relocate to a location with access to a more appropriate labor pool. *Id.* at 805 (discussing the theories of William J. Wilson). In his article, Schill summarized the two major strategies to alleviate the problem of concentrated ghetto poverty: (1) bring jobs closer to people by promoting economic development within the inner-city, and (2) bring people closer to jobs by dispersing inner-city populations or facilitating access through improved transportation networks. *Id.* at 808.

161. FINAL REPORT, *supra* note 15, at 103.

162. Housing Reform Act of 1998, *supra* note 35, § 502(a)(5)(D).

163. *Id.* at § 502(b)(5), 112 Stat. 2521 (1998).

164. Schill, *supra* note 160, at 815-16. Schill noted that this can lead to "[a] generation of urban poor becom[ing] recipients of public assistance rather than productive members of the workforce." *Id.* at 816.

165. Housing Reform Act of 1998, *supra* note 35, § 502(a)(4).

individual PHA.[166] Arguably, a federal policy that emphasizes the consolidation and streamlining of various public housing programs will better serve the public interest than a policy that emphasizes strict federal control.[167] Ultimately, allowing for more local control and flexible use of federal funds can contribute to increasing the amount of viable affordable housing, perhaps to an extent that justifies the disparate impact created by a HOPE VI revitalization plan.[168]

These justifications all essentially embody the concept that the government has a legitimate interest in promoting the production of affordable housing.[169] The government has a legitimate interest in ensuring that housing policies are carried out in a manner that will create positive benefits and make the most efficient use of scarce resources. The decision to take housing policy in a new direction is arguably a justified and necessary policy choice. Many agree that the public housing policies of past decades have failed and that a new course of action is necessary.[170] In considering the FHA's impact on the HOPE VI program, it is essential to recognize that there exist numerous justifications for the disparate impact the revitalization plans often create. It is equally important to recognize that those harmed by a revitalization plan have the opportunity to demonstrate that these justifications are merely pretextual and that other, less discriminatory means exist for accomplishing the same goals. Unless the proffered justifications prove to be merely pretextual, however, it is likely that a HOPE VI plan would pass FHA scrutiny because the disparate impact it creates could be justified by a legitimate government purpose.

166. The Commission found that "HUD micromanages PHAs to the extent that there is little flexibility in the public housing program." FINAL REPORT, *supra* note 15, at 22. This impedes a PHA's ability to respond to the needs of its housing developments. The Commission argued that PHAs need authority to make decisions and to allocate funds in ways that will best meet the needs of their developments. *Id.*

167. Housing Reform Act of 1998, *supra* note 35, § 502(a)(5)(A) & (B).

168. *See id.* § 502 (b)(1), (2).

169. The need for governmental support for affordable housing is not a need that is likely to decrease in the foreseeable future. Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal be Met?*, 71 N.C. L. REV. 1619, 1639 (1993). Salsich argued that "[t]he failure to recognize the reality of long-term housing needs has been a major contributor to the impatient attitude with which most Americans view governmental housing programs." *Id.* at 1640.

170. Public housing is generally considered to be a failure by most Americans, but remains an important rental housing resource for many low-income families. *See id.* at 1641. Salsich noted that "[a] repeated flaw of federal housing programs has been the insistence that affordable housing units be physically occupied by low-income persons. What is needed instead is a constant inventory of affordable housing units in a setting that encourages diversity in housing and provides role models for others." *Id.*

C. The Showing of Mere Pretext in a HOPE VI Case

As previously explained, the final step in a typical housing or employment discrimination analysis is to give the plaintiff the opportunity to demonstrate that there are less discriminatory ways to carry out the goals of the defendant, thereby demonstrating that the defendant's proffered justifications are merely pretextual. In the HOPE VI context, plaintiffs might bring forth a variety of less discriminatory alternatives. Further, these plaintiffs might also demonstrate that a given justification is hallow and merely serves to hide other, illegitimate PHA goals that are not proper justifications for the disparate impact that the plan creates. Arguments in favor of less discriminatory alternatives will generally focus on analyses that conclude: (1) more hard units of public housing should be included in the plan,[171] and (2) the size and cost of the new units should be tailored to reflect the local affordable housing need (i.e. the disparate impact should be minimized by ensuring that at least the current residents who wish to return to the revitalized site are "eligible" for the new units).[172] Attempts to demonstrate that a given justification is merely a shell to hide other, impermissible goals also might focus on illegitimate motives such as a local PHA's submission to political pressures to free up prime real estate for market rate development.

1. Alternative Plans

Arguments for a less discriminatory alternative that focuses on increasing the number of public housing units in a given plan essentially advocate changing the ratio of public housing to nonpublic housing units. Because HOPE VI projects, unlike other public housing developments, are uniquely sensitive to market forces, there must be a careful balance between the mix of public housing and market rate units. Therefore, without clear evidence that the site could easily support more public housing units, an argument to increase the number of public housing units is likely to fail. However, an argument that advocates tailoring the plan to reflect the size and cost requirements of those in need of affordable housing is likely to have a better chance of succeeding. HOPE VI provides that "persons displaced by the reconstruction activities provided for [in the HOPE VI appropriations statute]

171. This ostensibly would lessen the disparate impact because a greater number of units means that fewer protected class members would be denied the opportunity for affordable housing.

172. This ostensibly would lessen the disparate impact because more affordable units that are large enough to accommodate larger families would reduce the number of protected class members adversely affected by the decision to revitalize. This concept overlaps with other claims plaintiffs might bring in response to a HOPE VI revitalization plan, namely that defendants had not complied with HOPE VI requirements.

shall be eligible for . . . replacement units."[173] The meaning of "eligible" is a source of potential dispute, but the requirement does provide a basis for plaintiffs to argue that the units should be tailored to current residents.[174] Less discriminatory alternatives that are based on one or both of these concepts are likely to lessen the discriminatory impact of a revitalization plan, and in some cases, will be an alternative sufficient to overcome the justifications proffered in support of the HOPE VI project. However, such proposals might prove insufficient if they do not effectuate the defendant's purposes at least as well as the disputed plan. It is essential to recognize that, in order to overcome the defendant's legitimate justification for the policy or decision, the plaintiff must show that a less discriminatory alternative would comparably serve the legitimate interests of the entity implementing the policy.[175] The defendant's interest in successful revitalization will be thwarted if its goals of a mixed-income, revitalized community are ignored by the proffered less discriminatory alternatives.

2. Illegitimate Purpose

In addition to offering viable less discriminatory alternatives, the plaintiff might also discount a proffered justification by demonstrating that it hides an illegitimate purpose. Revitalization activity that is motivated by illegitimate goals is not in keeping with the spirit of the HOPE VI program and therefore

173. Departments of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571, 1580 (1992).

174. Plaintiffs would likely argue that the term encompasses two ideas: (1) units for which they meet any formal qualifications, and (2) units which are of the size (e.g. larger number of bedrooms) and price they require. *See* Brief of Appellants/Cross-Appellees at 51-52, Darst-Webbe Tenant Ass'n Bd. v. Saint Louis Housing Auth. No. 02-1777/1778 EMSL (8th Cir. 2002) (on file with author). Defendants are likely to maintain that the term refers only to formal qualifications and not to size or cost requirements. On the issue of whether HOPE VI requires that people who are displaced because of reconstruction activities shall be eligible for replacement units of their choice to the "maximum extent practicable," the *Cabrini-Green* court found that the statutory language was too vague to be enforceable. Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., No. 96 C 6949, 1997 WL 31002, at *16 (N.D.Ill. Jan. 22, 1997) (discussing 42 U.S.C. § 1437*l* & 42 U.S.C. § 1437p(b)(2)). A related concern is that tenants from the original neighborhood who want to move back in will be unable to do so because they cannot meet the formal screening requirements, let alone find units of the appropriate size and cost. Poor credit history or minor criminal histories might lead to denial. John J. Ammann, *Housing out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 320 (2000). HOPE VI grantees are required to develop Management Agreements that address: (1) incentives that reward work and promote family stability; (2) a system of local preferences adopted in response to local housing needs; (3) lease requirements that encourage self-sufficiency; (4) site-based waiting lists; (5) strict applicant screening requirements; (6) strict enforcement of lease and eviction provisions; and (7) improving the safety and security of residents and eliminating crime and drugs from the neighborhood. July 2002 NOFA, *supra* note 58, at 49,772.

175. Wards Cove Packing Co. Inc. v. Atonio, 490 U.S. 642, 660 (1989).

should not overcome a prima facie showing of disparate impact because no legitimate justification exists for the harm imposed. Perhaps the most prevalent example of such an illegitimate goal is the degree to which a HOPE VI project is undertaken amidst local political pressures to free up prime real estate for market rate development. As the Commission itself stated, 94% of public housing does not meet the HOPE VI severely distressed threshold requirement and is therefore not appropriate for the program.[176] However, many maintain that the program has been broadly applied to fund the demolition of units that are not truly distressed.[177] For example, in areas where gentrification has begun and a public housing site remains as the last "island of affordability," there can be considerable pressure to use HOPE VI grant money to reduce the number of affordable units in the area while freeing up real estate for market-rate units.[178] HOPE VI proposals to demolish obsolete units carry the risk that they will contribute to the affordable-housing crisis when local developers and politicians seek to free the property for more profitable uses.[179] Further, there is a risk that when "[t]aking the long view," HOPE VI has the potential to "echo . . . the urban renewal of years past" when entire communities were destroyed in the name of urban renewal.[180] A project that is primarily motivated by such desire is an illegitimate use of the HOPE VI program.[181]

Beneath the surface of these arguments lies the idea that the resources devoted to a given HOPE VI project would be better used by simply maintaining the public housing stock already in existence. Most agree that the housing resources currently in existence should not be taken for granted.[182] It

176. *See* Wexler, *supra* note 13, at 199.

177. *See, e.g.*, *Public Housing Overhaul*, *supra* note 35 (charging that the HOPE VI program has been broadly applied and that demolished units could be refurbished for the same cost but for local political pressures to free up prime real estate).

178. *See, e.g.*, Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned from the D.C. Housing Authority's HOPE VI Projects*, 10 J. AFFORDABLE HOUS. & CMTY. DEV. L. 353, 357 (2001) (relating that "[f]ar from leading the neighborhood of Capitol Hill toward revitalization, the project barely succeeded in rebuilding a few affordable units in the immediate area" and that "[f]rom the perspective of the approximately 20,000 low-income households on the waiting list for DCHA housing or Section 8 vouchers, it looks like another tool in the hands of the area's gentrifiers to reduce the number of affordable units.").

179. *Id.* at 359.

180. Bennett, *supra* note 73, at 263.

181. Of course, from an evidentiary standpoint, this motive may be hard to decipher. Such motivation would perhaps be evidenced by communications among community decision-makers and the extent to which the plan contains the maximum proportion of public housing units appropriate for the particular housing market.

182. Bennett, *supra* note 73, at 264-65 (noting that "in a housing economy in which many who earn minimum wage would have to work between 103 and 133 hours a week to earn the amount necessary to make rent on a two bedroom apartment, and full time teachers, police

is understandable that residents of public housing would choose to fight to keep imperfect housing rather than take the risk that they will end up worse off than before.[183] However, it is essential to recognize that the housing policies embodied within the HOPE VI program do not necessarily result in fewer opportunities for low-income families. Creative use of the more flexible HOPE VI program can result in a variety of affordable housing options.[184] If HOPE VI is to represent a viable housing policy that comports with the FHA, Congress will need to consider modifications to the current requirements to help ensure that the disparate impact on protected classes is less significant and that the government's purpose in effectuating the plan is a legitimate one.

VI. MODIFICATIONS NEEDED IN THE CURRENT HOPE VI PROGRAM

Modifications such as those outlined below can improve the effectiveness of the HOPE VI program and will help to ensure its policies comply with FHA goals. These modifications can be useful tools for strengthening the program and ensuring its future success so that it can continue as a viable means of addressing the nation's affordable housing crisis. Of course, virtually any given redevelopment project is likely to displace a certain number of FHA-protected class members. Therefore, it is important to recognize that anything short of a discontinuance of the HOPE VI grant program cannot completely eliminate the risk of violating the FHA. Despite these concerns, HOPE VI represents one of the best options for addressing the immediate problems associated with severely distressed public housing. Modifications to the current program that begin to address problems of resident displacement and the dwindling supply of traditional public housing units are necessary if the HOPE VI program and the FHA are to legitimately coexist. Importantly, HOPE VI must be viewed as one of many tools available to address the affordable housing crisis on local, regional, and national levels. Modifications to the current program will have little effect unless other housing tools, such as the Section 8 program and the LIHTC program, are also strengthened and creatively used in conjunction with HOPE VI.

The House of Representatives' recent attempt to amend the criteria used to evaluate HOPE VI grant applications provides a useful framework for evaluating changes that would likely improve the HOPE VI program. In

officers, and laborers seek emergency overnight shelter, no housing resource can be taken for granted").

183. *Id.* at 301-302 ("Sometimes, residents have rejected the rhetoric of a better tomorrow and fought to keep what they know of an imperfect today. In other instances, residents have litigated and negotiated to preserve as much as possible of an opportunity to return in strength, re-knit as a community.").

184. Patrick E. Clancy & Leo Quigley, *HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL'Y 527, 531-32 (2001).

November 2002, the House passed a bill ("the House bill")[185] that mandated that some additional criteria be used to evaluate HOPE VI applicant plans.[186] Though the House bill was not considered by the Senate this term,[187] the fact that it was passed by the House indicates that this issue will likely be revisited in the future. The additional criteria contained in the House bill include: (1) the applicant's ability to begin and complete the revitalization expeditiously; (2) the applicant's ability to minimize temporary or permanent displacement of current residents; (3) the extent to which the number of units affordable to public housing residents are maintained or created, and (4) whether existing residents are given priority to occupy the units in the revitalized community.[188] Although these additional criteria are a good starting point for addressing HOPE VI's impact on current public housing residents and its impact on the nation's overall supply of affordable housing units, other criteria, such as one that addresses CSS activities, should also be considered in future debates.

A. Public Housing Residents

As the House bill makes clear, HOPE VI plans should be evaluated on their ability to minimize disruption to the lives of public housing residents and the larger community in which they live. Efforts to minimize temporary and permanent displacement, as well as efforts to give current residents priority in returning to the revitalized site should be an essential part of any HOPE VI revitalization effort. These concerns ultimately lead to more fundamental questions about the appropriate level of resident participation.[189] Meaningful resident and community participation can help ensure that displacement is kept

185. HOPE VI Program Reauthorization Act of 2002, H.R. 5499, 107th Cong. (2002).

186. In addition to this bill, Congress previously has expressed its concern regarding the effects of HOPE VI policies on public housing residents. For example, it mandated that the long-term effects of HOPE VI policies be studied. *See* Pub. L. No. 106-74, 113 Stat. 1058 (1999) (mandating that $1,200,000 of the $575,000,000 appropriation be used by the Urban Institute "to conduct an independent study on the long-term effects of the HOPE VI program on former residents of distressed public housing developments").

187. *Congress Adjourns*, NAT'L LOW INCOME HOUS. COALITION, Nov. 22, 2002, *at* http://www.nlihc.org/mtm/mtm7-46.htm.

188. HOPE VI Program Reauthorization Act of 2002, H.R. 5499, 107th Cong. (2002).

189. Resident involvement is a particularly difficult issue because it is unclear what level of involvement residents should have. *See* Wexler, *supra* note 13, at 208-209 (revealing that some of the important questions are: "Does 'meaningful involvement' mean that HUD wants more than resident comments? Should the residents be involved in decision making? If so, to what extent? How much control over the planning and implementation should the residents be given? What happens if the PHA and/or HUD do not agree with what the residents want?"); Bennett, *supra* note 73, at 304 (arguing that HUD's guidance sends mixed messages about the essentialness of resident participation). The Commission envisioned that "[p]ublic housing residents [would] be afforded maximum feasible and meaningful participation in planning, designing, and implementing the programs recommended by the Commission to address the conditions of severe distress." FINAL REPORT, *supra* note 15, at 11.

minimal and that priorities for future occupation at the revitalized site will comport with the needs and goals of public housing residents and the larger community in which they reside. Further, meaningful resident participation is likely to bring about more cooperation because those affected by the decision will have a greater opportunity to make valuable contributions to the revitalization process. Program administrators must recognize that an insincere or token request for input will most likely be followed by resistance and resentment. When a plan is imposed upon residents, they legitimately feel the need to protect their interests by organizing against the implementation of the plan.

Although HUD currently requires that residents be fully and meaningfully involved in revitalization efforts,[190] the significant amount of resistance to some HOPE VI plans indicates that at least some public housing residents do not feel that they are enjoying the benefit of this mandate. Currently, in order to qualify for funding, the grant recipient must comply with minimal standards in regard to resident involvement. These standards include one resident training session on the HOPE VI development process and three public meetings with residents and the broader community.[191] An applicant may secure a higher ranking if it meets certain criteria in addition to these minimal threshold requirements. These additional criteria include regular and significant communication with affected residents and community members, regular efforts to make appropriate HUD communications about HOPE VI available, and reasonable training on the general principles of development so that residents may meaningfully participate.[192] Though this current structure provides a good starting point for encouraging significant resident involvement, it does little to ensure the reality of resident participation. Unless this issue is more fully addressed, the current minimal standards governing resident involvement are likely to fail. From the residents' standpoint, minimal training and meeting requirements seem to indicate HUD's disinterest in hearing the residents' views and perhaps also tends to reflect an inclination to impose a plan upon the residents instead of going through the considerably less-efficient process of listening to those whose lives will be directly impacted by the decision. Often, the local PHA, the developer, the larger community, and the public housing residents themselves may have conflicting interests in

190. The mandate for full and meaningful resident involvement can be found in various documents. *See, e.g.*, July 2002 NOFA, *supra* note 58, at 49,778.

191. HUD does not dictate the content of the training session. The three public meetings are intended to cover the planning and implementation process, the proposed physical plan, the extent of proposed demolition, planned community and support service activities, other proposed revitalization activities, relocation issues, re-occupancy plans and policies, and employment opportunities to be created as a result of the redevelopment. July 2002 NOFA, *supra* note 58, at 49,778.

192. *Id*. at 49,778.

regard to the HOPE VI project. Ignoring this reality only invites future conflicts that are likely to result in litigation.[193] On the other hand, when steps are taken to ensure participation in the process, the revitalization process is likely to be much more smooth.[194]

In order to increase the level of meaningful resident participation and minimize the negative effects of displacement, HOPE VI administrators should evaluate HOPE VI plans on a given PHA's (or its developer's) ability to create strong relationships with neighborhood groups to learn about their goals, needs, and expectations with respect to the revitalization of their community.[195] In addition to creating such relationships, the applicants should be encouraged or required to use a neutral third party to help facilitate discussions among various stakeholders as they articulate their desires for the revitalization process. Toward this end, applicants should further be required to demonstrate how they will involve community members in all stages of the revitalization process. Finally, displacement effects should be minimized by strictly enforcing the provisions of an applicant's required Relocation Plan, which "is intended to ensure that . . . all residents who have been or will be temporarily or permanently relocated from the site are provided with . . . CSS activities such as mobility counseling and direct assistance in locating housing."[196] Although the current scoring structure awards points for a plan to track residents who have been relocated or a plan to provide mobility counseling and direct assistance in locating housing for Section 8 recipients in non-poverty areas,[197] such a provision should be a threshold requirement rather than merely a means to obtain additional application points. Strengthening the focus on current residents is likely to increase the number of stakeholders who

193. *See, e.g.*, Ammann, *supra* note 174, at 320; Kristen D.A. Carpenter, *Promise Enforcement in Public Housing: Lessons from Rousseau and Hundertwasser*, 76 TUL. L. REV. 1073, 1131-32 ("There are tremendous consequences in failing to secure resident support for the new development . . . . Residents must be included in decision-making processes, and they need to be expected to act as stewards.").

194. For example, at the start of the Murphy Park revitalization process in St. Louis, Missouri, a nonprofit organization was created to act as a conduit for neighborhood participation. A residential leadership team was created to identify year resident needs and to create a strategic community plan, thereby developing resources and enlisting stakeholder support for the plan. *See* Deborah L. Myerson, *Sustaining Urban Mixed-Income Communities: The Role of Community Facilities*, ULI LAND USE POLICY FORUM REP., Oct, 2001, at 3.

195. In its *Statement of Qualifications and Experience*, McCormack Baron & Associates stated that its "[d]evelopments frequently involve partnerships with community groups, local government, and foundations. In nearly all instances, conventional development techniques are inappropriate for urban neighborhoods, and a joint venture with a nonprofit organization or community development corporation creates a quality development that contributes to both neighborhood stability and city growth." McCormack Baron & Associates, *supra* note 81.

196. July 2002 NOFA, *supra* note 58, at 49,780.

197. *Id.*

feel that they are a meaningful part of the revitalization process and decrease the number of those who feel the necessity to file a lawsuit in order to assert their rights.

B. Number, Size, and Type of Affordable Units

In addition to evaluating applicants on their ability to meaningfully involve residents and community members, HOPE VI administrators should encourage applicants to create plans that address the need for more affordable units that are of the appropriate size and type to accommodate public housing families. Creative development that incorporates an appropriate number of affordable units that are of the appropriate size and type to accommodate public housing families will help eliminate some degree of disproportionate impact. In addressing the need to create and maintain a high number of affordable units, administrators should focus on creating incentives to: (1) increase the public housing to market rate ratio within the development; (2) rehabilitate and redesign instead of using wholesale demolition techniques, and (3) build off-site replacement units. Further, in addressing the need for units that are of the appropriate size and type, administrators should focus on incentives to create larger units and should explore expanded concepts of what might qualify as a homeownership unit.

Currently, a PHA receives three points if its application describes a unit mix of more than 35% public housing units; it receives two points for a unit mix of 25–34% public housing units; it receives one point for a unit mix of 15–24%; and, the PHA receives no points for a unit mix of less than 14% public housing units.[198] Past experience suggests that many developments can support percentage mixes significantly higher than these. Though market conditions will ultimately dictate the number, size, and type of units at the revitalized site, past HOPE VI experience suggests that the revitalized developments are able to support a relatively high level of affordable units. For example, a HOPE VI development in Atlanta consists of 40% market rate units, 40% public housing units, and 20% tax credit units. A development in New Haven contains an even greater number of affordable units with 10% market rate, 68% public housing, and 22% tax credit units.[199]

In order to ensure the best use of available resources, the program should provide incentives to rehabilitate existing housing, rather than demolishing it, whenever doing so is an appropriate means of maintaining viable affordable housing stock. For example, the Cuyahoga Metro Housing Authority ("CMHA") used its 1994 HOPE VI grant to implement a plan that did not include the demolition of buildings, but instead sought to refurbish the structures with new bathrooms, larger units, new landscaping, and new street

198. *Id.* at 49,783 (Part XIV(A)(1)-(4)).

199. Carpenter, *supra* note 193, at 1099.

locations.[200] After the revitalization was complete, the total number of available units remained virtually the same as had been available before the revitalization.[201] This HOPE VI success reveals that demolition is not always necessary to revitalize severely distressed public housing and that it is possible to maintain, rather than reduce, the number of units in the public housing stock. As part of the application process, a determination should be made regarding whether wholesale demolition and rebuilding is necessary or whether selective, localized redesign can serve revitalization goals just as effectively.[202] Finally, although the current HOPE VI program does reward applicants who plan off-site replacement units,[203] such construction should receive greater emphasis. An example from Pittsburgh, Pennsylvania, illustrates how incentives to replace demolished units with more off-site construction can actually further fair housing goals. The revitalization of McKees Rocks Terrace, a public housing complex on the outskirts of Pittsburgh, Pennsylvania, involved not only on-site redevelopment, but also a new 60-unit rental development in a nearby suburb.[204] The suburban development allowed public housing residents the chance to relocate to a community with better public schools, access to employment, and improved public safety.[205] Although "finding appropriate sites and obtaining local approvals is risky and challenging for any developer attempting to build low-income housing in suburban settings," such effort needs to be an intregal part of any HOPE VI revitalization plan in order to bring about expanded housing opportunities.[206] Applicants who voluntarily choose to undertake a one-for-one replacement that includes both off-site and on-site replacement units should be given a high degree of consideration.[207]

In addition to encouraging a greater number of affordable units to remain in the housing stock, the program should also encourage the construction of units that are appropriate in size and type. For example, in order to ensure that units that will accommodate larger families are included in the HOPE VI plan, the scoring structure should award points for plans that include some specified percentage of larger public housing units. Further, the scoring structure currently rewards developers for including homeownership sites within the

200. FitzPatrick, *supra* note 11, at 440.

201. *Id.*

202. Carpenter, *supra* note 193, at 1126-27.

203. *See* July 2002 NOFA, *supra* note 58, at 49,783-84.

204. Clancy & Quigley, *supra* note 184, at 532.

205. *Id.*

206. *Id.* at 533.

207. Cunningham, *supra* note 178, at 364 (arguing that this may especially be possible in an area that has already begun to move toward revitalization and has begun to attract investor interest).

revitalized development.[208] However, traditional homeownership might not be an effective option for many low-income families who cannot afford the down payment or who do not have sufficient credit to qualify for a reasonable interest rate.[209] Perhaps this problem can be partly remedied by a commitment from grant recipients to provide substantial homeownership education and financial assistance in procuring money for the down payment. Or perhaps other forms of ownership (such as cooperatives or condominiums) could be used instead of the traditional fee simple concept to reduce the cost of ownership.[210] Maintaining a high level of units that are appropriate in size and type for public housing residents who wish to return will help to reduce the disparate impact created by implementation of a given HOPE VI plan.

C. Strengthening the Commitment to CSS Activities

Because facilities such as schools, community centers, and job training centers can help to create and sustain ideal HOPE VI mixed-income communities, an essential final modification to the program is one that addresses this reality. It would be a mistake to ignore the significant impact a commitment to sustained CSS activities can have on the failure or success of a revitalized community.[211] Managers of HOPE VI properties must be committed to community building, recognizing that CSS activities "promote self-sufficiency, provide learning opportunities for children, and play a part in the mission of serving the neighborhood."[212] CSS activities are an integral part of a revitalization process that seeks to not only address a community's

208. July 2002 NOFA, *supra* note 58, at 49,784.

209. Ammann, *supra* note 174, at 314.

210. Salsich, *supra* note 169, at 1643-44. Salsich notes that the cooperative may be a workable concept for very low-income families, particularly if they are adequately subsidized with social services, educational, and employment opportunities. He argues that locating such entities in mixed-income settings can also be an important part of their success. *Id.*

211. The Commission's report repeatedly emphasized the need for both physical and non-physical improvements. *See* FINAL REPORT, *supra* note 15, at 46 ("severely distressed public housing is not simply a matter of deteriorating physical conditions; it is more importantly one of a deteriorating—severely distressed—population in need of a multitude of services and immediate attention" and "[n]o successful strategy for addressing the conditions in severely distressed public housing can ignore the support service needs of public housing residents."). *See also id.* at 3 ("the Commission believes that these programs and activities will not succeed unless components that make education and training opportunities available, assist residents to become job-ready, provide permanent job opportunities, and put money into the pockets of residents are prominent.").

212. Myerson, *supra* note 194, at 4 (recording remarks made by Tina Narr, administrator for HOPE VI Community and Supportive Services with the Seattle Housing Authority, during a presentation on the redevelopment of the NewHolly community located in southeast Seattle on the grounds of the former Holly Park public housing project).

physical needs, but also its long-term economic and social needs.[213] Successful HOPE VI projects, such as the CMHA project described above, provide for a strong collection of social and educational services as part of their CSS activities component. For example, under the CMHA plan, HOPE VI funds were used to create and staff a mall of social service agencies by using VISTA volunteers.[214] The social service mall is available to all neighborhood residents, most of whom live below the poverty line, and provides services such as job training and day care.[215] In St. Louis, urban developer McCormack Baron builds sustainable communities through its nonprofit arm, known as Urban Strategies, which enables it to address the socio-economic aspects of its development activities.[216] Urban Strategies' revitalization activities in the Murphy Park development included the redevelopment of the Jefferson Elementary School to serve students in the neighborhood, provide access to computer networks, and offer job training for parents.[217] In Atlanta, a revitalized development known as the Villages of East Lake includes a new charter elementary school, a preschool, a YMCA, park space, and a public golf course that provides a year-round after-school program for children from East Lake.[218] These examples not only demonstrate how HOPE VI funding can be used to empower an entire community, but also reflect the importance of a solid commitment to CSS activities.

To be effective, CSS activities such as those described above must be sustainable,[219] necessitating that the funds and staff necessary to ensure their long-term success be addressed as a part of any HOPE VI revitalization project.[220] Because one goal of the HOPE VI program is to improve the lives of public housing residents who currently reside in severely distressed public housing, the CSS activities provision should be strengthened by modifying the scoring structure to ensure the long-term survival of CSS programs. First, in

213. Currently, up to 15% of the total grant may be used to pay the costs of CSS activities. July 2002 NOFA, *supra* note 58, at 49,778. Under the July 2002 NOFA, all successful applicants are required to establish Neighborhood Networks Centers (on-site access to computer and training resources), but there do not appear to be any other *required* CSS activities.

214. FitzPatrick, *supra* note 11, at 440.

215. *Id.* at 441.

216. Myerson, *supra* note 194, at 3.

217. *Id.*

218. *Id.* at 5.

219. July 2002 NOFA, *supra* note 58, at 49,779 (noting that "CSS Programs must be carefully planned so that they will be sustainable after the HOPE VI grant period ends.").

220. Myerson identified several ingredients necessary for a sustainable CSS component: a long-term funding strategy, sustainable tenants (for example, YMCA, city parks and recreation programs, family support and health care providers, or education and training programs), involvement of the private sector (for example, mentors, funding sources, or employers), input from the community about its needs and interests, meeting spaces, educational opportunities, and employment assistance. Myerson, *supra* note 194, at 6,

order to ensure that supportive activities continue even after the grant period has ended, the applicant should demonstrate it has secured a long-term commitment from a support provider. Additionally, an applicant must be able to demonstrate that it has a strategy in place to ensure long-term funding of the support activity.[221] Second, applicants should be able to demonstrate that they have a tracking mechanism in place to ensure that all residents in the affected development have the opportunity to learn about available CSS programs. If a local PHA makes little effort to ensure all qualifying residents (including those who resided in the development before revitalization)[222] receive the benefit of CSS activities, the government's FHA justification regarding its legitimate interest in the self-sufficiency of its citizens loses some of its credibility.

VI. CONCLUSION

Though the use of legitimate government purpose might well overcome the FHA disparate impact problem that arises in the HOPE VI context, the broader tension between the goals of furthering fair housing and revitalizing distressed communities is not erased. As policy makers continue to grapple with how best to effectuate these goals, they should recognize that HOPE VI itself can be a very effective housing policy tool if it is able to "embrace a vision much greater than simply removing distressed high-rise towers and dilapidated barrack-style public housing on the site itself."[223] However, decades of government-sanctioned discrimination that have resulted in unfair housing practices and segregated living patterns cannot be overcome by a single program. HOPE VI is not a perfect solution to the housing crisis in this country, but it does provide many viable and workable solutions to remedy past housing mistakes. Interestingly, there have historically been two traditional opposing approaches to tackling the problem of poverty: investing in the poverty-plagued community in an attempt to improve the lives of the

221. Currently, applicants receive one point for demonstrating a strong commitment from experienced organizations and service providers. July 2002 NOFA, *supra* note 58, at 49,780. Sustained funding is not addressed in the ranking structure, though the regulations do permit grant recipients to deposit up to 15% of the HOPE VI grant into an Endowment Trust to provide CSS activities. *Id.* at 49,778.

222. *Id.* at 49,778-79 (stating that "CSS activities . . . must meet the needs of all residents . . . of the severely distressed project, including residents remaining on-site, residents who will relocate permanently to other PHA units or Section 8 housing, residents who will relocate temporarily during the construction phase, and new residents of the revitalized units.").

223. Clancy & Quigley, *supra* note 184, at 540. However, some argue that privitization efforts such as HOPE IV "produce[] an alignment of public- and private-sector interests that renders ineffective the accountability mechanisms proposed by the privitization literature." Note, *When Hope Falls Short: HOPE VI, Accountability, and the Privitization of Public Housing*, 116 HARV. L. REV. 1477, 1479 (2003). The author sees fundamental problems with the program that make the realization of HOPE VI "remote indeed." *Id.* at 1498.

community members,[224] or using a mobility strategy to move people from a community with limited opportunities to a community with sounder economic and social structures already in place.[225] Using HOPE VI alongside other housing tools such as Section 8 and the LIHTC program brings great potential for using these two traditionally opposing approaches in conjunction with one another.[226] Of course, this necessitates that the Section 8 and LIHTC programs be carefully examined and their flaws addressed. Currently, public housing tenants who lose their housing because of demolition are generally given the option of transferring to another public housing site or receiving a Section 8 voucher to obtain housing elsewhere. Though proponents point to greater opportunities for public housing residents, critics point out that those in the Section 8 program often face significant discrimination and difficulty in finding stable housing.[227] As poor and wealthy communities alike continue to

224. Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 STAN. L. & POL'Y REV. 11, 11 (1997). This strategy advocates improving living and economic conditions through targeted community development through the use of community development block grants, revitalization, self-help initiatives, and grass-roots local initiatives. *Id.* at 12.

225. *Id.* at 11. The mobility approach includes concepts such as dispersed public housing, relocation vouchers, reverse commuting improvements, and regional fair share requirements to encourage construction of suburban low-income housing. *Id.* at 12.

226. *Id.* at 12.

227. Though a comprehensive evaluation of the Section 8 program is outside the scope of this Note, it is important to consider that the Section 8 program was created under President Nixon, who favored enabling participants to locate housing in the private market instead of relying on public housing. *See* Hendrickson, *supra* note 119, at 62. Section 8 was seen as a means of safe housing located in neighborhoods with positive role models that allowed increased access to jobs, education, and services. *See* United States Housing Act of 1996, H.R. REP. NO. 104-461, at 98 (1996). Proponents argue that Section 8 provides recipients with greater opportunity to live in more healthy and economically viable neighborhoods. *See, e.g.*, U.S. DEPT. OF HOUS. AND URBAN DEV. OFFICE OF POL'Y DEV. AND RESEARCH, *Voucher Recipients Enjoy Much Greater Choice About Where to Live than Residents of Public Housing and are Less Likely to be Concentrated in Distressed Neighborhoods*, ISSUE BRIEF NO. 1 (December 2000). One criticism of the traditional Section 8 program is that it does not result in true housing choice because of continued discrimination and difficulty in finding available apartments in economically viable neighborhoods. *See, e.g.*, Swope, *supra* note 2, at 42 ("Section 8 is already squeezed in tight rental markets . . . and it can be difficult for public housing tenants to find apartments in decent neighborhoods. In good times, landlords can afford to be choosy . . . [and] most of them prefer nonsubsidized tenants . . . . The result, housing advocates argue, is that residents are moving from one ghetto to another."); United States Housing Act of 1996, H.R. REP. NO. 104-461, at 90 (effective housing choice depends on availability of housing, families' inclination to move, landlord's willingness to accept tenants with housing vouchers, and extent of discrimination in law enforcement). For suggestions on improving the Section 8 program, see Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 111 n.242 (2001) (suggesting that the Section 8 program can be improved by: (1) increasing the fair market rent levels to allow the use of Section 8 vouchers in higher cost areas; (2) providing mobility counseling; (3) regionalizing the authority of central-city PHAs, and (4) increasing the search time allotted to Section 8 voucher holders). The LIHTC program has

rebel against subsidized housing, policy makers will likely need to focus on more regional solutions to the continuing affordable housing crisis.[228] The value of finding better ways to use housing programs in conjunction with one another cannot be overlooked. Regardless of the ultimate fate of the HOPE VI program, policy makers will need to continue to search for the appropriate balance between effecting the goals of fair housing and bringing about revitalization in our nation's distressed communities.

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faced criticism as well. For a comprehensive evaluation of the LIHTC program, see Roisman, *supra* note 25.

228. Peter W. Salsich, Jr., *Solutions to the Affordable Housing Crisis: Perspectives on Privatization*, 28 J. MARSHALL L. REV. 263, 309-310 (1995) (arguing that "[a]ffordable housing cannot be imposed on communities" and that the NIMBY problem will be resolved only by effective leadership that listens, includes all affected parties, and searches for common ground and nonadversarial ways of dealing with the problem). *See also* Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 289, 368 (2002) (arguing that "[u]sing the law to promote diversity in residential communities is probably more difficult than promoting it in any other public policy domain" and that "[g]overnment-sponsored dispersal and integration of poor and minority families into resistant white, middle-class neighborhoods can succeed, if at all, only when done in a small, carefully orchestrated, and low visibility way."); Schill, *supra* note 160, at 839 ("Regardless of whether whites are motivated by racism or are using race as a proxy for lower socioeconomic status, to be effective deconcentration efforts must take their views into account. Otherwise, efforts to achieve deconcentration either will be frustrated by community opposition or lead to the exodus of white households and the reproduction of concentrated poverty."); Note, *supra* note 157, at 1577 (articulating a proposal to regionalize the local property tax in order to promote greater integration of different income groups because "a system that eliminates the fiscal motive may prompt suburbs to relax their zoning laws voluntarily"); *Id.* at 1575 ("A wealthy locality will rationally seek to prevent construction of multifamily units and other low-income housing, because the residents of such housing would consume more in local services than they would contribute in taxes.").

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