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Notes and Comments: Remedying Segregated Public Housing in Metropolitan Baltimore

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REMEDYING SEGREGATED PUBLIC HOUSING IN METROPOLITAN BALTIMORE

As a result of the actions and inactions of local government in the Baltimore metropolitan area, low-income public housing occupied by black families has been effectively confined to low-income black neighborhoods in Baltimore City, fostering a pattern of racial and economic segregation in the metropolitan area. The author examines the establishment of this cycle and considers the judicial and local and federal legislative means available to break it.

I. INTRODUCTION

The Baltimore Standard Metropolitan Statistical Area[1] underwent significant demographic change during the last two decades. Typical of large metropolitan areas, there was a substantial exodus of white families from the city to the suburban areas[2] which

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The statistical data used in this article reflects conditions for the year 1970 unless specified otherwise.

1. Standard Metropolitan Statistical Area (SMSA) is a term defined by the Office of Management and Budget and used extensively by the Bureau of Census. Generally, a SMSA consists of a central city having a population exceeding 50,000 persons and the contiguous counties if socially and economically integrated with the central city. The Baltimore SMSA consists of Baltimore City and Carroll, Harford, Howard, Anne Arundel and Baltimore Counties. *See* BUREAU OF THE BUDGET, STANDARD METROPOLITAN STATISTICAL AREAS (1967).
2. During the decade between 1960 and 1970, the city experienced an absolute population loss of over 30,000 persons with a net outmigration of nearly 120,000 persons. This net outmigration was comprised of an absolute outmigration by whites of 150,000 persons and an absolute inmigration by nonwhites of 30,000 persons. The suburban counties, however, experienced a population growth of 300,000 persons, 60 percent of which was the result of net inmigration. The white migration from the city to the suburbs accounted for a white-nonwhite proportional change during the ten year period. U.S. BUREAU OF CENSUS, 1970 CENSUS OF POPULATION AND HOUSING, General Demographic Trends for Metropolitan Areas, 1960 to 1970, Maryland, PHC(2)-22, 5 (1971). More recent population estimates and projections indicate that the suburban counties will continue to grow during the next decade at the expense of the city. *See* DEPARTMENT OF HEALTH AND MENTAL HYGIENE, MARYLAND POPULATION ESTIMATES 1974 AND PROJECTIONS TO 1980, at 11 (1975). *See generally* K. TAEUBER & A. TAEUBER, NEGROES IN CITIES (1965); DAVIS & DONALDSON, BLACKS IN THE UNITED STATES: A GEOGRAPHIC PROSPECTIVE (1975).

   As to the United States, the black population of the nation's central cities has increased by 3.2 million while the white population has declined by 600,000 between 1960 and 1970. Blacks increased only in metropolitan areas while black populations in nonmetropolitan areas declined by more than one quarter of a million persons. U.S. BUREAU OF CENSUS, 1970 CENSUS OF POPULATION AND HOUSING, General Demographic Trends for Metropolitan Areas, 1960 to 1970, United States Summary, PHC(2)-1, 4 (1971).

resulted in the city's population becoming disproportionately black[3] and disproportionately poor.[4] In contrast, the suburban counties attracted white, economically advantaged families.[5] If this trend were to continue unabated, the city's population would be overwhelmingly black by the year 2000.[6] As whites continue to flee the city, the concentration of low-income families will intensify.[7] A heavier burden is then placed on the city to provide costly services despite an erosion of its tax base as a result of the exodus of higher-income families.[8]

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3. The entire Baltimore SMSA has a 23.7 percent black population. It is not evenly distributed. The city's population is over 46 percent black, while the remainder of the SMSA is less than 6 percent black. The percentage black population for each locality in the SMSA is set forth below:

Anne Arundel County	11.1%	Harford County	8.2%
Baltimore County	3.2%	Howard County	8.1%
Carroll County	4.0%	Baltimore City	46.4%

U.S. BUREAU OF CENSUS, 1970 CENSUS OF POPULATION AND HOUSING, Census Tracts, Baltimore, Md., Standard Metropolitan Statistical Area, PHC(1)-19, Table P-1 (1972).

4. There is a disparity of median incomes between the families living in the city and those living in the suburban counties. See the table below for the median income levels for Baltimore City and each county in the SMSA.

Anne Arundel County	11,474	Harford County	10,750
Baltimore County	12,072	Howard County	13,461
Carroll County	10,180	Baltimore City	8,814

U.S. BUREAU OF CENSUS, 1970 CENSUS OF POPULATION, Per Capita, Median Family Money Income, and Low Income Status in 1969 for States, Standard Metropolitan Statistical Areas, and Counties 1970, PC(S1)-63, Table 3 (1974). Baltimore City also houses a greater percentage of below poverty level families:

Anne Arundel County	5.7%	Harford County	6.2%
Baltimore County	3.5%	Howard County	4.2%
Carroll County	6.6%	Baltimore City	14.0%

Id.

5. *See* notes 2-4 *supra*. *But see* League of Women Voters of Baltimore County, Everybody's Got to be Someplace, I-1 (Sept. 1975) [hereinafter cited as League].

> In America, poor people have the same right as the rich to live in a slum. When it comes to living in the greener pastures of suburbia, however, it's a different story. The rich can afford to pay the price of admission there; the poor cannot. So the affluent move to suburbia .... The poor stay where they "belong", in the inner city.

L. RUBINOWITZ, LOW-INCOME HOUSING: SUBURBAN STRATEGIES 1 (1974).

6. U.S. COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 4 (1974) [hereinafter cited as the FLEMMING COMM'N REPORT]. *See also* NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 5 (1968) [hereinafter cited as the DOUGLASS COMM'N REPORT].
7. DOUGLASS COMM'N REPORT, *supra* note 6, at 5.
8. FLEMMING COMM'N REPORT, *supra* note 6, at 9-11.

> Baltimore City Council fiscal advisor Janet Hoffman believes a most serious problem is the parasitic financial relationship which exists between the city and the suburbs. Testifying at an August 1970 Commission hearing in Baltimore, Ms. Hoffman described the drain which commuters cause on city resources. Baltimore is not able to tax suburbanites who work in the city, yet it supports many services used by suburban dwellers. Ms. Hoffman cited the hospitals, stadium, zoo, art museums, and many tax-exempt organizations — health, cultural, charitable, and religious — as

The low-income city dweller's outlook appears bleak. As industry and blue collar employment opportunities continue to move to the suburbs,[9] he is left behind, facing significantly higher odds of being unemployed.[10]

An investigation of the causes of residential segregation discloses a variety of contributing factors,[11] dominated by racial dis-

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examples of activities which the city alone subsidizes, but which people from the regional area use extensively. There is no parallel benefit from the suburbs to the urban dweller.

Id. at 11. *See also* Milliken v. Bradley, 418 U.S. 717, 760 n.12 (1974); Gautreaux v. Romney, 457 F.2d 124, 138 (7th Cir. 1972).

9. FLEMMING COMM'N REPORT, *supra* note 6, at 11. "[B]etween 1955 and 1965, 82 industries relocated from Baltimore City to the surrounding suburbs, most of them in Baltimore County." *Id. See also* Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974), *aff'd on other grounds sub nom.* Hills v. Gautreaux, 96 S.Ct. 1538 (1976). Between 1948 and 1968 jobs increased in Baltimore City by 11 percent, but increased in the surrounding counties by 245 percent. *Hearings Before the U.S. Commission on Civil Rights,* Baltimore, Maryland, 14 (1970) [hereinafter cited as *Baltimore Hearings*].

10. The unemployment figures set forth in the table below reveal that blacks faced higher unemployment in most areas of the SMSA. Additionally, the table illustrates the unemployment problems faced by city residents.

MALES

	Percent Unemployed	*(Negroes) Percent Unemployed*
Anne Arundel County	2.2%	2.8%
Baltimore County	2.1%	2.9%
Carroll County	1.8%	5.7%
Harford County	2.1%	3.4%
Howard County	1.7%	2.0%
Baltimore City	4.3%	5.8%

FEMALES

	Percent Unemployed	*(Negroes) Percent Unemployed*
Anne Arundel County	3.5%	5.2%
Baltimore County	3.4%	3.0%
Carroll County	3.2%	1.3%
Harford County	5.5%	9.5%
Howard County	2.3%	4.4%
Baltimore City	5.1%	6.7%

U.S. BUREAU OF CENSUS, 1970 CENSUS OF POPULATION AND HOUSING, Census Tracts, Baltimore, Md., Standard Metropolitan Statistical Area, PHC(1)-19, Tables P-3, P-6 (1972). *Cf. Baltimore Hearings, supra* note 9, at 506, Exhibit No. 5 (Staff Report, Demographic Economics, Social and Political Characteristics of Baltimore City and Baltimore County).

11. *See, e.g.,* Taeuber, *Demographic Perspectives on Housing and School Segregation,* 21 WAYNE L. REV. 833, 836-41 (1975). In this article Professor Taeuber briefly analyzes the three major types of causes of residential segregation recognized by scholars: (1) economics, or the poverty of blacks; (2) choice, or the self-separation of blacks; and (3) racial discrimination. *Id.* at 836. The argument supporting economics as a factor is based on the paucity of low and moderate income housing in the suburbs concomitant with the propensity of blacks to be poor. Professor Taeuber points out, however, that the validity of this argument has not been substantiated by complex statistical analysis. *Id.* at 837. He also relegates the "choice" factor to a position of diminutive influence. *Id.* at 838-39. He concludes that the prime cause of residential segregation is racial

crimination.[12] Racial discrimination taints both the public and private housing markets.[13] When the local Public Housing Agency (PHA) selects and the Department of Housing and Urban Development (HUD) approves a public housing site located in the inner city, the pattern of residential segregation is reinforced. Conversely, selection of sites in racially mixed areas reverses this pattern.[14]

This article focuses on the role of public housing[15] in creating the existing pattern of segregated housing in the Baltimore metropolitan area, and explores the affirmative methods available to reverse this pattern.

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discrimination. *Id.* at 840. *See also* O. DAVIS & G. DONALDSON, BLACKS IN THE UNITED STATES: A GEOGRAPHIC PERSPECTIVE ch. 6 (1975); K. TAEUBER & A. TAEUBER, NEGROES IN CITIES (1965); Campbell & Schuman, *Racial Attitudes in 15 American Cities,* in SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (F. Praeger pub. 1968).

12. Taeuber, *Demographic Perspectives on Housing and School Segregation,* 21 WAYNE L. REV. 833, 840 (1975). *See generally* J. KAIN & I. QUIGLEY, HOUSING MARKETS AND RACIAL DISCRIMINATION (1975), in which the authors conclude that "only a small portion of residential segregation can be attributed to socio-economic differences between black and white households." *Id.* at 90. Not only do they reject economics as a primary cause of residential segregation, but they intimate that racial discrimination in the housing market, which has inhibited black home ownership, is a contributing factor to black economic deprivation. *Id.* at 90–91. As does Professor Taeuber, they conclude that the major cause of residential segregation is racial discrimination. *Id.*

13. Taeuber, *Demographic Perspectives on Housing and School Segregation,* 21 WAYNE L. REV. 833, 840 (1975). *See also* Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor,* 82 YALE L.J. 483 (1973). This article reports the findings of a quantitative analysis measuring the correlation of various factors with what the authors term "income group clustering." It reveals a significant correlation in Baltimore between race and income group clustering. *Id.* at 507–08 (Table II, variable X5). The 1970 Census appears to support the proposition that race rather than economics is the primary factor in the creation of concentrations of low-income persons in Baltimore City. The analysis was stated as follows:

> Although a high proportion of the poor reside in the low-income areas, blacks who were above the poverty level were more likely to live in the area than whites who were below this level.

U.S. BUREAU OF CENSUS, 1970 CENSUS OF POPULATION, Low-Income Neighborhoods in Large Cities: 1970, Baltimore, Md., PC(S1)-66, ii (1974). For a discussion of racial discrimination in the private housing market, see Comment, *Racial Discrimination in the Private Housing Sector: Five Years After,* 33 MD. L. REV. 289 (1973).

14. Shannon v. HUD, 436 F.2d 809, 820 (3d Cir. 1970). *See also* Maxwell, *HUD's Project Selection Criteria — A Cure for "Impermissible Color Blindness"?,* 48 NOTRE DAME LAW. 92 (1972).

15. Public housing as used herein refers to federal housing programs which are derived from the United States Housing Act of 1937, ch. 896, 50 Stat. 888 (1937), *as amended.* The programs are generally labeled by their corresponding section of the 1937 Act. For example, the housing assistance program corresponds with Section 8 of the 1937 Act. *See* DOUGLASS COMM'N REPORT, *supra* note 6, ch. 3. *See also* Friedman, *Public Housing and the Poor: An Overview,* 54 CALIF. L. REV. 642 (1966). The public housing programs for the elderly and handicapped are not discussed in this article.

II. PUBLIC HOUSING AND RACIAL DISCRIMINATION

The lower-income black tenants of public housing in Baltimore City are victimized by a form of two-tiered racial discrimination. First, the suburban areas surrounding the city, especially Baltimore County, effectively exclude lower-income blacks.[16] Second, the only housing affordable by the poor — public housing in the city — subjects blacks to discrimination in site selection and tenant assignment.[17]

A. Exclusion from the Suburbs

A variety of factors has resulted in the exclusion of blacks and the poor from metropolitan suburban areas.[18] These factors include zoning and subdivision regulations, housing and building codes, private restrictive covenants and the personal prejudice of suburban residents.[19]

By policies of action and inaction, Baltimore County has effectuated the exclusion of low-income blacks from its housing market.[20] Baltimore County has employed all of the traditional land use controls such as zoning, building codes, building permit regulations and subdivision regulations that result in housing that is beyond the means of low-income individuals.[21] For example, county zoning laws have not only been employed as a shield to exclude lower-income blacks, but also as a sword to uproot and eliminate black suburban enclaves.[22]

16. *See, e.g., Baltimore Hearings, supra* note 9, at 701, (Exhibit No. 15, Rabin. *The Effect of Development Control on Housing Opportunities for Black Households in Baltimore County, Maryland*). *See generally* FLEMMING COMM'N REPORT, *supra* note 6, at 29–32. *See also* note 25 *infra.*
17. *See* text accompanying notes 37–50 *infra.*
18. *See* Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Control and the Residential Patterns of the Poor,* 82 YALE L.J. 483, 484–85 (1973). *See also* O. DAVIS & G. DONALDSON, BLACKS IN THE UNITED STATES: A GEOGRAPHIC PERSPECTIVE 140, 145 (1975).
19. *See* Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Control and the Residential Patterns of the Poor,* 82 YALE L.J. 483, 484–85 (1973).
20. *Cf. Baltimore Hearings, supra* note 9, at 486 (closing statement of Chairman Hesburgh).
21. *Baltimore Hearings, supra* note 9, at 681 (Staff Report, Land Use Control in Relation to Racial and Economic Integration). These land use controls, resulting from county council action, "have created a major obstacle to racial and economic integration in Baltimore County." *Id.* at 275 (testimony of David Hunter, Staff Attorney, U.S. Commission on Civil Rights).
22. FLEMMING COMM'N REPORT, *supra* note 6, at 30–31. An urban planning consultant testified to two specific examples of the use of zoning controls to displace blacks. First, in an area of Dundalk known as Turner Station, a black neighborhood of approximately 600 homes was rezoned industrial and the homes destroyed. A pocket of white residences in the middle of this area retained its residential zoning. Second, a black residential area of Towson known as Sandy Bottom no longer exists because a threat of commercial zoning caused the landlords to sell

Unlike the other suburban counties, Baltimore County has not created a Public Housing Agency. Until recently, the county was devoid of public housing programs[23] despite the assertion by public interest groups of a prodigious need for such programs.[24] Baltimore County has rejected the city's offers to assist in the organization of a housing program in the county.[25] County officials have repeatedly asserted their confidence in the private market's ability to supply lower-income housing as justification for their failure to instigate public housing programs.[26] Although the private housing market in the county flourished,[27] many lower-income residents were forced to migrate to the city to secure affordable housing.[28]

Other actions by Baltimore County have contributed to the continuing unavailability of lower-income housing in the county. For example, in 1968, Baltimore County applied to HUD for a grant to finance the writing of a water and sewer master plan pursuant to federal legislation which funds such activity.[29] Upon learning that the applicable section of the law had been amended to require a program pertaining to lower-income and minority housing needs, the county promptly withdrew its application.[30] After hearing testimony relating to the above policies and events, Chairman Hesburgh of the U.S. Commission on Civil Rights remarked:

> In a variety of contexts we heard testimony during these three days that white residents of Baltimore County want

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homes occupied by black tenants. *Accord, Baltimore Hearings, supra* note 9, at 279–80 (testimony of Yale Rabin, Planning Consultant, U.S. Commission on Civil Rights, Philadelphia, Pennsylvania).

23. A real estate firm has been subcontracted by the State of Maryland to administer a Section 8 housing assistance program in Baltimore County. It has been allocated funds to finance between 410 and 710 units. League, note 5 *supra*, at III–7. For an explanation of Section 8 housing, see text accompanying notes 140–44 *infra*.
24. *Baltimore Hearings, supra* note 9, at 742. The League of Women Voters of Baltimore County, Baltimore County Community Action Agency, and Baltimore Neighborhoods, Inc., among other groups, have stressed the need for lower-income housing in Baltimore County. *See generally* League, *supra* note 5.
25. *See Baltimore Hearings, supra* note 9, at 76–78 (testimony of Robert C. Embry, Commissioner, Department of Housing and Community Development).
26. *Id.* at 393 (testimony of Dale Anderson, Baltimore County Executive).
27. Between 1960 and 1968, the number of housing units in Baltimore City increased by only 2,345 units. During the same period of time, there was an increase in Baltimore County of 40,551 housing units. *Id.* at 513.
28. *Id.* at 517 *citing* League of Women Voters of Baltimore County, Report of the Housing Workshop 12 (1968). Many of the lower-income county residents who were forced to migrate to the city eventually were housed in the city's public housing projects. *Id.* Due to insufficient public housing to satisfy the needs of city residents, HCD offered assistance to the county to organize a public housing program in an attempt to deter the influx of lower-income persons into the city. The county was unresponsive. *See* note 25 *supra* and accompanying text.
29. Housing Act of 1954 § 701, 40 U.S.C. § 461 (1970).
30. *Baltimore Hearings, supra* note 9, at 736 (Staff Report, HUD Programs and Activity in Baltimore City and County).

> to keep their county the way it is. It is as though they have built an island fortress where strangers, and in this context it's impossible not to read the word "strangers" to mean poor and blacks, where they are not welcome.[31]

Judicial challenge to exclusion of low-income residents from suburban areas is difficult at best, primarily because the exclusion occurs through laws and policies which are ostensibly neutral.[32] The laws seem neutral due to their stated goals of protection of health, reduction of pressure on local services, enhancement of the physical environment and preservation of property values.[33] Regardless, the result is the exclusion of low-income residents.[34] This is not to say that the issue has not been litigated, but the cases do not provide definitive guidelines for judicial challenge to suburban segregated housing.[35] On the other hand, judicial challenge to the

31. *Id.* at 486.
32. *See generally* Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Control and the Residential Patterns of the Poor,* 82 YALE L.J. 483 (1973).
33. *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767 (1969).
34. *Id.*
35. *Compare* Warth v. Seldin, 422 U.S. 490 (1975) (city of Rochester taxpayers lacked standing to assert claim that zoning laws of the suburban town of Penfield excluded persons of low income); James v. Valtierra, 402 U.S. 137 (1971) (upholding constitutionality of state requirement of local referendum for lower-income housing projects); Citizens' Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), *cert. denied,* 421 U.S. 948 (1975) (city's failure to fund a lower-income project upheld in the absence of a racially discriminatory intent); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (constitutionality of large-lot zoning ordinance upheld); Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (1975) (constitutionality of the consent and cooperation agreement upheld); Cornelius v. City of Parma, 374 F. Supp. 730, *rev'd mem.,* 506 F.2d 1400 (6th Cir. 1974), *vacated and remanded,* 422 U.S. 1052 (1975) (black and white plaintiffs were unable to challenge city's ordinance excluding low-rent housing projects unless approved by referendum because context was not a justiciable controversy); *with* Metropolitan H.D. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *cert. granted,* 95 S. Ct. 560 (1976) (city's failure to rezone piece of property to permit low and moderate-income housing development held unconstitutional); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975) (city's ordinance prohibiting multi-family dwelling discriminates against blacks in violation of Title VII of Civil Rights Act of 1968); United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (city's failure to extend water and sewage services had racially discriminatory effect); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972) (two non-profit corporations developing federally assisted housing had standing to challenge exclusionary effects of city's ordinance); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971) (withholding building permits for a low and moderate-income housing subdivision held to violate the equal protection clause); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (city's zoning decision blocking the development of a low and moderate-income subdivision held to violate the fourteenth amendment). *See also* Board of Supervisors of Fairfax

type of racial discrimination fostered by the city in site selection of public housing and tenant assignment has succeeded in recent years.[36]

B. Discrimination by the City

The first public housing law was passed by Congress in 1937,[37] and shortly thereafter the Baltimore Housing Authority was created.[38] During the early years of development, public housing projects were operated on a racially segregative basis in Baltimore.[39] With the passage of time and the concomitant demographic transformation of the inner city from white to nonwhite, some projects originally located in predominantly white neighborhoods now appertain to black neighborhoods.[40] Both the originally segregative basis and the transformation of neighborhoods contributed to the current concentration of public housing in black neighborhoods.

Urban renewal programs also contributed to the concentration of public housing in black neighborhoods due to the requirement[41] that new units be constructed in the same neighborhood where deteriorating units were destroyed.[42] Since the urban renewal areas[43] were predominantly black, reconstruction in black-populated areas resulted. Also, as in other cities, black residents displaced by urban renewal programs were relocated within the same

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County v. De Graff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973) (ordinance *requiring* subdivision builders to allocate specific percentage of units to low and moderate-income housing held unconstitutional).

Fifty years ago the Supreme Court declared that zoning laws were immune from constitutional attack unless they failed to relate to the public welfare, morals, safety, or general welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

36. *See, e.g.*, Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969). *But see* Thompson v. Housing Authority of City of Miami, 251 F. Supp. 121 (S.D. Fla. 1966).
37. United States Housing Act of 1937, ch. 896, 50 Stat. 888 (1937).
38. BALTIMORE, MD., CODE art. 13, § 1 (1966).
39. Housing Authority of Baltimore City, Fourth Report 10 (1945). In this report by a city agency, housing projects are identified by race. *See also* E. Ash, The Baltimore Story 2 (Dec. 9, 1955), where the Director of Management of the Housing Authority of Baltimore outlines the procedures to be taken to convert from segregative to integrated housing practices in Baltimore City.
40. Interview with Robert C. Embry, Commissioner, Department of Housing and Community Development, in Baltimore, Sept. 23, 1976 [hereinafter cited as Embry Interview].
41. Housing Act of 1949, ch. 338, § 105(c), 63 Stat. 416 (1949), *as amended*, 42 U.S.C. § 1455(c) (1970).
42. *Id.*
43. See BALTIMORE, MD., CODE art. 13, §§ 34–51 (1966), for a description of where the urban renewal areas were located.

neighborhood.[44] Prior to 1968, the Baltimore City Department of Housing and Community Development (HCD) made little or no effort to offer relocation housing in racially mixed or predominantly white areas to displaced blacks.[45]

The public housing program in Baltimore City has been and is racially segregated.[46] The sites selected for public housing and the tenant assignment to individual projects demonstrate the degree of segregation. Of the twenty-two public housing projects existing in 1970, only four were located in neighborhoods where the nonwhite population did not exceed sixty percent.[47] Three of the four projects located in white neighborhoods were populated overwhelmingly by white tenants.[48] These three projects were the only ones with significant white populations.[49] Ten of the remaining eighteen projects were located in neighborhoods where the nonwhite population exceeded ninety-five percent.[50] Indeed, a strong correlation existed and continues to exist between the racial composition of the tenant population and the racial composition of the neighborhood in which the project is located.[51] Although 1976 data for the racial composition of neighborhoods is unavailable, the tenant composition statistics continue to reveal a high degree of segregation.[52] It seems unlikely, however, that the neighborhoods have changed in any significant manner in the past six years.

At a minimum, a de facto segregative condition exists in the public housing program in Baltimore.[53] In *Banks v. Perk*,[54] suit was brought against the Cuyahoga Metropolitan Housing Authority (CMHA), located in Ohio, seeking, *inter alia*, a declaration that CMHA's site selection practice was racially discriminatory,

44. *Cf.* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).
45. *Baltimore Hearings, supra* note 9, at 79–80 (testimony of Robert C. Embry, Commissioner, Department of Housing and Community Development).
46. This is not to say that it is being *operated* on a discriminatory basis. The present segregation of public housing is due more to the vestiges of past discriminatory actions.
47. *See* Appendix A (App. A) and Appendix B (App. B) for a listing of the projects and the percentages of white and nonwhite population in each project. App. A lists figures for the year 1970, App. B lists figures for 1976. The census tract data for the percentage of nonwhite population in all of the neighborhoods is not available for 1976.
48. *See* App. A.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See* App. B.
53. *See* Apps. A and B. The overwhelmingly one-race character of the projects evidences segregation, all that is needed for a de facto condition to exist.
> [*D*]*e facto* segregation is a condition created by factors apart from the conscious activity of government and *de jure* segregation [is] caused or maintained by state action.

Hart v. Community School Bd. of Educ., 512 F.2d 39, 49 (2d Cir. 1975).
54. 341 F. Supp. 1175 (N.D. Ohio 1972), *modified*, 473 F.2d 910 (6th Cir. 1973).

and violative of the fourteenth amendment's equal protection clause. In assessing whether the continued maintenance of a segregated public housing system violated the fourteenth amendment, the court found that such de facto segregation warranted relief.[55] The court held that CMHA was charged with an affirmative duty to integrate the public housing in the city.[56] The factual pattern presented to the court in *Banks* is very similar to the pattern found in Baltimore.[57]

The Supreme Court, however, still refuses to discard the de facto — de jure distinction.[58] The question arising in any segregation suit is what proof meets the burden of showing de jure segregation. The Second Circuit Court of Appeals stated in *Hart v. Community School Board of Education*:[59]

> A finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. To say that the foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions.[60]

Notwithstanding the indication in *Banks* that de facto segregation in public housing may be constitutional in magnitude, evidence of de jure segregation exists in the Baltimore City public housing program. As previously mentioned, at its inception the public housing program was operated on a racially segregative basis.[61] Also, the administration of the urban renewal programs aggravated the condition.[62] However, the governmental actions evidencing most clearly de jure segregation occurred in 1966, when the Baltimore City Council passed a resolution confining Section

55. *Id.* at 1184–85.
56. *Id.*
57. In both cities, the housing authorities did not impose tenant quotas, site location was not cleared in advance with the councilman for the district, projects were erected in white areas and neighborhood shifts caused projects originally built in white neighborhoods to now be located in black areas. The situation in *Banks* and in Baltimore differ from the factual pattern presented the court in the case of *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969). *See* Section III(A) *infra.*
58. Keyes v. School Dist. No. 1, 413 U.S. 129 (1973). Despite a vigorous argument by Justice Powell, the Court refused to abandon the de facto — de jure distinction. The Court did adopt a principle by which school authorities found to be guilty of de jure segregation in one segment of the district had the burden of showing that de facto segregation existing in another segment was not caused by their actions.
59. 512 F.2d 37 (2d Cir. 1975).
60. *Id.* at 50.
61. *See* note 39 *supra.*
62. *See* text accompanying notes 41–45 *supra.*

23 leased housing programs[63] to urban renewal areas.[64] Since urban renewal areas were mostly black, the resolution served to restrict this program to black areas, which effectively terminated the program in Baltimore City altogether.[65]

The site selection of public housing also provides evidence of de jure segregation. Between 1960 and 1970, the Baltimore Housing Authority (HCD's predecessor) proposed twenty-one project sites to the city council, eighteen of which were in black neighborhoods.[66]

Using the *Hart* tests,[67] actions such as the above by governmental authority constitute de jure segregation, having the natural and foreseeable consequence of causing segregation in public housing in Baltimore.[68] It is this type of governmental discrimination, constitutional in magnitude, which invokes metropolitan relief.[69]

63. The Section 23 program was added to the United States Housing Act of 1937 by the Housing and Urban Development Act of 1965, § 103(a), 79 Stat. 451 (1965). Pursuant to this program the PHA leases vacant dwelling units from private owners and subleases them to low-income families.
64. *See* BALTIMORE, MD., CODE art. 13, §§ 34–51 (1966).
65. Embry Interview, *supra* note 40.
66. Comment, *Public Housing and Integration: A Neglected Opportunity,* 6 COLUM. J.L. & SOC. PROB. 253, 261 (1970).
67. *Hart v. Community School Bd. of Educ.,* 512 F.2d 37 (2d Cir. 1975) involved school segregation rather than housing discrimination. The standards employed to determine whether segregation, either de jure or de facto, exists should be the same, however, since both problems intertwine and fall within the purview of the fourteenth amendment. Also, in *Hills v. Gautreaux,* 96 S. Ct. 1538 (1976), the Court cited school desegregation cases in its analysis of a housing desegregation problem. Moreover, the Federal District Court for the Northern District of Georgia has noted:

> For better or worse, both by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing. Among other things, this reflects the recognition that in the area of public housing local authorities can no more confine low-income blacks to a compacted and concentrated area than they can confine their children to segregated schools.

Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972) (citations omitted).
68. *Cf.* Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970), where the court concluded:

> Possibly before 1964 the administrator of the federal housing programs could . . . remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible.

Id. at 820. In *Gautreaux v. Chicago Housing Authority,* 296 F. Supp. 907 (N.D. Ill. 1969), Judge Austin remarked:

> [T]his court ruled that "plaintiffs as present and future users of the system have the right under the Fourteenth Amendment to have sites selected without regard to the racial composition of either the surrounding neighborhoods or of the projects themselves." The statistics on the family housing site . . . show a very high probability, a near certainty, that many sites were vetoed on the basis of racial composition of the site neighborhood.

Id. at 913 (citation omitted).
69. *See* Hills v. Gautreaux, 96 S. Ct. 1538 (1976), discussed *infra* Section IIIA.

III. METROPOLITAN RELIEF

The Supreme Court has declared that "the command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws."[70] A corollary to this principle is that states cannot escape their obligations under this amendment by delegating state functions to local governments.[71] Once it is found that a state or local subdivision thereof has violated the Constitution, then "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future."[72] In formulating such a decree, the district courts are to be guided by traditional principles of equity.[73] While the scope of the district court's equitable powers are broad, prior cases counsel that "judicial powers may be exercised only on the basis of a constitutional violation."[74] When state policies foster segregation, equal protection is denied.[75]

Until the Supreme Court announced its decision in *Milliken v. Bradley*,[76] the law was clear that municipal boundaries could be crossed when necessary to remedy a constitutional violation.[77] In *Milliken*, the district court, after finding that the Detroit Board of Education had created and perpetuated racial segregation in the city's schools, appointed a panel to submit a desegregation plan which would encompass Detroit plus fifty-three suburban school districts.[78] The suburban school districts were to be incorporated into the proposed plan despite the absence of proof that they had committed acts of de jure segregation.[79] The Supreme Court held their inclusion impermissible:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate

70. Cooper v. Aaron, 358 U.S. 1, 16 (1958).
71. Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, 658 (E.D. La. 1961), *aff'd per curiam*, 388 U.S. 515 (1962).
72. Louisiana v. United States, 368 U.S. 145, 154 (1965).
> The objective today remains to eliminate . . . all vestiges of state-imposed segregation. . . . That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971), *quoting* Green v. County School Bd., 391 U.S. 430, 437-38 (1968).
73. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 12 (1971).
74. *Id.* at 15-16. *See also* Milliken v. Bradley, 418 U.S. 717, 738 (1974).
75. Brown v. Bd. of Educ., 347 U.S. 495 (1954).
76. 418 U.S. 717 (1974).
77. *See* Reynolds v. Sims, 377 U.S. 533, 575 (1964).
78. 418 U.S. at 733.
79. *Id.*

> units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.[80]

The Court elaborated further that "without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy."[81] It was against the backdrop of this scenario that *Hills v. Gautreaux*[82] was decided by the Supreme Court.

A. Hills v. Gautreaux

The *Gautreaux* case originated in 1966, when black tenants of and applicants for public housing in the city of Chicago instituted separate class actions in federal district court against the Chicago Housing Authority (CHA)[83] and HUD,[84] charging them with intentionally maintaining an existing pattern of residential segregation through tenant assignment and site selection procedures, in violation of the fifth and fourteenth amendments. The district court stayed the action against HUD pending the outcome of the action against CHA.[85] After finding that CHA had unconstitutionally discriminated on the basis of race in site selection and tenant assignment, the court granted summary judgment for the plaintiffs.[86] CHA was ordered to "affirmatively administer its public housing system . . . to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional . . . procedures . . . and use its best efforts to increase the supply of Dwelling Units as rapidly as possible. . . ."[87]

The case against CHA then receded into the background as the district court focused its attention on the action against HUD.

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80. *Id.* at 744–45. In *Milliken,* the Court noted that an inter-district violation also warrants an inter-district remedy. *Id.* at 745, 755.
81. *Id.* at 745.
> Boundary lines may be bridged where there has been a constitutional violation calling for inter-district relief, but, the notion that school district lines may be casually ignored or treated as mere administrative convenience is contrary to the history of public education in our country.

Id. at 741.
82. 96 S. Ct. 1538 (1976).
83. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 909 (N.D. Ill. 1969).
84. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971).
85. *Id.* at 753.
86. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 914 (N.D. Ill. 1969).
87. Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736, 741 (N.D. Ill. 1969). Over a year expired without the submission by CHA of proposed new housing sites. In an unreported decision the district court modified the 1969 order to require submission by CHA of sites for 1500 new units. The modified order was appealed and affirmed. Gautreaux v. Chicago Housing Authority, 436 F.2d 306, 308–11 (7th Cir. 1970), *cert. denied,* 402 U.S. 922 (1971).

The court dismissed all four counts of the suit against HUD.[88] On appeal, the United States Court of Appeals for the Seventh Circuit reversed and remanded with directions to enter summary judgment for the plaintiffs.[89] On remand, the district court granted summary judgment against HUD, consolidated the cases, and entered an order requiring the parties to propose remedial plans.[90]

HUD proposed, and the district court accepted, a remedial plan confined to the municipal boundaries of the city of Chicago.[91] The plaintiffs, whose request for a metropolitan plan order was rejected,[92] appealed the court's finding that metropolitan relief was unwarranted because "the wrongs were committed solely within the limits of Chicago and solely against residents of the City."[93] The Seventh Circuit reversed and remanded the case for adoption of a comprehensive metropolitan area plan.[94] The Seventh Circuit interpreted *Milliken* to hold that the equitable factors in that case disfavored a metropolitan plan because of the administrative complexities of school district consolidation and because of the deeply rooted tradition of local government control of public schools.[95] The court noted that "the equitable factors which prevented metropolitan relief in *Milliken v. Bradley* are simply not present here."[96]

Contending that the *Milliken* decision barred the implementation of any metropolitan area plan, HUD obtained review by the

88. Gautreaux v. Romney, 448 F.2d 731, 733 (7th Cir. 1971).

89. *Id.* at 740. While this case was pending, plaintiffs sought an injunction against HUD's grant of Model Cities funds to Chicago until CHA had submitted housing sites to the city council for approval. The injunction was granted by the district court, but overturned on appeal. Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972).

90. Gautreaux v. Chicago Housing Authority, 363 F. Supp. 690, 691 (N.D. Ill. 1973), *rev'd,* 503 F.2d 930 (7th Cir. 1975), *aff'd,* 96 S. Ct. 1558 (1976).

91. *Id.*

92. The plaintiff's motion asked the court to consider a metropolitan plan similar to the one which had been affirmed by the Sixth Circuit in *Bradley v. Milliken,* 484 F.2d 215 (6th Cir. 1973), a case dealing with racial segregation in the Detroit city schools. Ironically, the *Bradley* plan was reversed by the Supreme Court, while the *Gautreaux* plan was affirmed. *See* Milliken v. Bradley, 418 U.S. 717 (1974), *rev'g* 484 F.2d 215 (6th Cir. 1973).

93. 363 F. Supp. at 690–91.

94. 503 F.2d at 939. For the Seventh Circuit's reasoning in distinguishing *Milliken, see* note 96 *infra* and accompanying text. An excellent outline of the *Gautreaux* cases can be found in Kushner & Werner, *Metropolitan Desegregation after Milliken v. Bradley; The Case for Land Use Litigation Strategies,* 24 CATH. U.L. REV. 633 (1975); *see also* Note, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief,* 122 U. PA. L. REV. 1330 (1974); Comment, *Of Courts and Coercion: Enjoining Federal Funding to Eliminate Segregation of Public Housing,* 58 IOWA L. REV. 1283 (1973); Comment, 44 N.Y.U.L. REV. 1172 (1969); 83 HARV. L. REV. 1441 (1970); 17 ST. LOUIS U.L.J. 395 (1973).

95. 503 F.2d at 935–36.

96. *Id.* at 936. The court further observed that there was "no deeply rooted tradition of local control of public housing; rather, public housing is a fairly supervised program with early roots in the federal statute." *Id.*

Supreme Court. It asserted two reasons why a remedy extending beyond the boundaries of Chicago should not be granted. First, the grant of a metropolitan area-wide order would be incommensurate with the constitutional violation to be remedied.[97] Second, the decree would have the effect of restructuring governmental units not implicated in HUD's or CHA's violations.[98] The Supreme Court considered and rejected both of these contentions *seriatim.* Unlike the Seventh Circuit, the Court interpreted *Milliken* to hold the metropolitan area-wide order in that case impermissible,

> not because it envisioned relief against a wrongdoer extending beyond the city in which the violation had occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.[99]

The Court noted a critical distinction between HUD in *Gautreaux* and the suburban school districts restructured by the *Milliken* order. HUD had violated the Constitution whereas the suburban school districts had not been implicated in any acts of de jure segregation.[100] *Milliken,* it stated, was not a per se rule proscribing remedial orders which extend beyond the geographic boundaries of the city where the violation occurred.[101]

The Court believed that the more substantial issue before it was whether a metropolitan remedial order would, as a matter of law, require interference with the operations of local governments not implicated in HUD's unconstitutional conduct.[102] In deciding that such interference was not the inevitable result of a metropolitan order, the Court reasoned that a federal court possesses the ability to formulate a remedial plan providing the constitutional relief warranted while simultaneously adhering to the limitations on judicial power established in *Milliken.*[103] The Court observed that recent public housing legislation vested HUD with the authority to contract directly with private owners and developers without an intermediary public housing agency.[104] There-

97. 96 S. Ct. at 1546.
98. *Id.*
99. *Id.* at 1545.
100. *Id.* at 1546.
101. *Id.* at 1547. The Court stated that it was "entirely appropriate and consistent with *Milliken* to order CHA and HUD to attempt to create housing alternatives for those [plaintiffs] in the Chicago suburbs." *Id.* The Court observed that the entire metropolitan area was relevant for purposes of plaintiffs' housing options. *Id.*
102. *Id.*
103. *Id.* at 1548.
104. The Court is alluding to the new Section 8 program enacted by the Housing and Community Development Act of 1974, § 201, 42 U.S.C. § 1437f (Supp. 1976). *See* note 138 *infra* and accompanying text.

fore, within the framework of existing legislation, HUD, by the exercise of discretion in the selection of housing proposals and through direct contractual arrangements with private owners, was capable of providing relief to the members of the plaintiffs' class without diminishing the role of the local governments in the federal housing programs.[105]

The Supreme Court noted the emphasis which Congress had placed on locating housing so as to avoid undue concentrations of lower-income persons and to promote diverse housing opportunities.[106] "An order directed solely to HUD," the Court reasoned, "would not force unwilling localities to apply for assistance under these programs but would merely reenforce the regulations guiding HUD's determination of which of the locally authorized projects to assist with federal funds."[107] Projects would not be built without the localities' consent except as provided by statute, and land use controls would remain in force.[108] Satisfied that the limitations implied in its opinion would protect the suburban localities from undue interference by the federal government, the Court affirmed the decision of the Seventh Circuit, remanding the case for the consideration of a metropolitan area-wide remedial plan.[109]

105. From the phraseology used in this opinion it is apparent that the Supreme Court envisioned something akin to a "best efforts" order rather than an order which would impose upon HUD a specific unit production quota.

106. *See* 42 U.S.C. § 5301(b) (Supp. 1976):

> The Congress further finds and declares that the future welfare of the Nation and the well-being of its citizens depend on the establishment and maintenance of viable urban communities as social, economic and political entities . . . .

and *id.* § 5301(c)(6):

> The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives— . . .
>
> The reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher incomes. . . .

107. 96 S. Ct. at 1549.

108. Stripped to its essentials, this opinion merely instructs HUD to use its pre-existing statutory authority in a manner which will afford the plaintiffs the greatest degree of relief. The opinion's vitality is derived, nonetheless, from its recognition that the entire metropolitan area for the purposes of housing programs and options is a single integrated unit.

109. 96 S. Ct. at 1550.

B. Maryland Public Housing Law

The Maryland enabling statute creates in each city of the State a housing authority, but the authority's powers remain dormant until the governing body of the city passes a resolution declaring a need for the authority to function in the city.[110] Once the resolution is passed and the authority begins operation, it possesses the powers necessary to effectuate its purposes,[111] those purposes being primarily the elimination of slum areas and the construction of sanitary dwelling accommodations for persons of low income.[112] As with the CHA in the *Gautreaux* decisions, a Maryland housing authority may operate in an area extending beyond the city's boundaries.[113] Before passage of the Housing and Community Development Act of 1974,[114] Baltimore City's housing authority had never exercised the extraterritorial jurisdiction.[115] Although state law grants it authority to operate in Baltimore County, federal law requires the city to obtain a consent agreement from the county.[116] Despite solicitations by Baltimore City, the county has withheld its consent.[117]

Maryland law also provides that two or more housing authorities may join together in the construction and operation of a housing project in the area of operation of one of the authorities.[118] Baltimore City has been unable to establish a cooperating arrangement with any of the suburban areas.[119] In terms of the metropolitan expansion of public housing opportunities, such a joint program is impossible in the absence of willing cooperation of the suburban areas.

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110. MD. ANN. CODE art. 44A, § 4 (1957).
111. *Id.* § 8.
112. *Id.* § 2.
113. *Compare* ILL. REV. STAT. ch. 67½, §§ 17(b), 27c (1959) (three mile extra-territorial jurisdiction), *with* MD. ANN. CODE art. 44A, § 3(f) (1957) (ten mile extra-territorial jurisdiction excluding other incorporated cities).
114. Act of Aug. 22, 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 12, 15, 20, 40, 42, 49 U.S.C.).
115. *See* note 146 *infra*. *See also Baltimore Hearings, supra* note 9, at 75, 83-84.
116. 42 U.S.C. § 1415(7) (1970). In *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975), the constitutionality of such a consent agreement was upheld.
117. Embry Interview, *supra* note 40. With respect to public housing, Baltimore County and Baltimore City are adverse parties. The county, having attracted middle and upper class whites from the city, has a tax rate which is approximately half that of the city. It also is able to spend substantially more per pupil to educate its school children. Public housing tenants, of course, are tax consumers as opposed to tax payers and would dilute the county's tax base. In 1970, approximately seventy percent of the public housing tenants in Baltimore City were welfare recipients. *Baltimore Hearings, supra* note 9, at 91.
118. MD. ANN. CODE art. 44A, § 11 (1957).
119. Embry Interview, *supra* note 40.

The State has not contributed in any appreciable degree to the solution of the lower-income housing problem which confronts the Baltimore metropolitan area.[120] In a recent amendment to the statute creating the housing authorities, the legislature proclaimed:

> It is hereby found and declared that there exists within Baltimore City a critical shortage of decent, safe and sanitary dwelling accommodations available either to rent or purchase which persons of eligible low income can afford. . . .[121]

It is this type of myopia which inhibits metropolitan involvement in public housing programs. While persons of low income presently are confined primarily to the city, the shortage of affordable housing for persons of low income extends throughout the metropolitan area.[122] As acknowledged in the *Gautreaux* decision, the housing options for persons of low income should extend to the entire metropolitan area.[123]

IV. THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

The Housing and Community Development Act of 1974[124] substantially altered existing public housing and community development legislation. As noted in *Gautreaux*, the flexibility of the housing assistance programs spawned by the Act expanded the role of HUD in providing lower-income housing opportunities.[125] From the standpoint of metropolitan involvement in the lower-income housing assistance programs, however, the most innovative and far-reaching aspect of the 1974 Act is the connection established between the housing programs and the community development programs, namely, the housing assistance plan.[126]

120. *Id. See also Baltimore Hearings, supra* note 9.

121. MD. ANN. CODE art. 44A, § 8B(a) (Supp. 1976).

122. [T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community. The city and suburbs together make up what I call the "real city." To solve the problems of the "real city", *only metropolitan-wide solutions will do.*

Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 937 (7th Cir. 1975), *aff'd on other grounds sub nom.* Hills v. Gautreaux, 96 S. Ct. 1538 (1976) (statement by Secretary Romney).

123. 96 S. Ct. at 1547.

124. Act of Aug. 22, 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 12, 15, 20, 40, 42, 49 U.S.C.) [hereinafter cited as the 1974 Act].

125. 96 S. Ct. at 1549.

126. *See Hearings on Implementation of Section 8 and Other Housing Programs Before the Subcommittee on Housing and Urban Development of the House Committee on Banking, Currency and Housing,* 94th Cong., 1st Sess., at 5 (1975). *See generally* City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976).

Each local government making an application for a Community Development Block Grant[127] must include in its application a housing assistance plan which (1) accurately surveys the condition of existing housing in the community,[128] (2) assesses the housing assistance needs of lower-income persons residing or expected to reside in the community,[129] (3) specifies a realistic annual goal for the number of families to be assisted,[130] and (4) indicates the general location of proposed housing for lower-income persons.[131] This application requirement cannot be waived by HUD.[132] The potential effect of this requirement from a metropolitan perspective is that a suburban community will no longer receive funding for community development projects while simultaneously abrogating its responsibility for the provision of lower-income housing.[133]

In some metropolitan areas the link established between housing and community development programs may have a coercive effect on suburban areas, requiring them to formulate realistic lower-income housing plans to avoid loss of community development funding.[134] In Baltimore County, the threatened loss of com-

127. Ten existing community development programs administered by HUD were consolidated and replaced by the Community Development Block Grant Program. *See* C.F.R. § 570 1(c) (1976).
128. 42 U.S.C. § 5304(a)(4)(A) (Supp. V, 1975).
129. *Id.*
130. *Id.* § 5304(a)(4)(B).
131. *Id.* § 5304(a)(4)(C).
132. *Id.* § 5304(b)(3).
133. *See* S. REP. No. 93-693, 93d Cong., 2d Sess. 6 (1974).
134. *See, e.g.,* City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976), in which the City of Hartford brought suit against HUD and seven suburban towns challenging the propriety of HUD's decision to approve community development block grant applications submitted by these towns. The gravamen of plaintiff's complaint was that HUD had approved these grants without requiring the suburban communities to submit realistic estimates of the number of lower-income persons expected to reside within its borders. Six of the seven towns had submitted estimates of zero and the seventh submitted an estimate derived from a calculation formula admittedly unacceptable to HUD. Plaintiff argued that the approval of these grants, despite submission of patently unrealistic "expected to reside" estimates, was tantamount to a de facto waiver of this application requirement in contravention of the statute. The District Court found that the "expected to reside" figure was "the keystone of the spatial deconcentration objective of the . . . 1974 Act", and held that the approval of these deficient grant applications was an abuse of discretion by HUD. Accordingly, the funding of these grants was enjoined.

The importance of the holding in this case is deflated when the basis of the "expected to reside" estimate is examined. The "expected to reside" figures are estimates of the number of lower-income persons expected to be employed in the community as a result of expanding commercial development. 24 C.F.R. § 570, 303(C)(2)(i) (1976). But in a large city such as Baltimore, the strain on the treasury and public housing programs is caused by welfare and other non-working families. Therefore, even realistic "expected to reside" estimates overlook the segment of the population most in need of public housing. Embry Interview, *supra* note 40.

munity development funding would not promote low-income housing programs since the county lacks any community development programs.[135]

The housing assistance plan relates to another aspect of the 1974 Act — Section 8 lower-income housing assistance programs.[136] The new Section 8 programs attempt to establish a nexus between the public and private markets by making use of the private housing market and developers in a public housing program through three types of assisted housing: existing, substantially rehabilitated and new. Currently, only the existing program is being used to provide housing for lower-income families. The programs for substantially rehabilitated and new housing are devoted almost exclusively to housing for the elderly and handicapped.[137]

The Section 8 existing housing program operates in accordance with an annual contributions contract between HUD and the PHA.[138] Pursuant to this contract, the PHA makes assistance payments to participating owners of existing units who rent to lower-income tenants.[139] Families wishing to participate in this program must first be determined eligible by the PHA and obtain a Certificate of Family Participation.[140] Thereafter, a certified family is responsible for searching the area of operation of the sponsoring PHA and finding an existing privately-owned dwelling unit which satisfies its needs.[141] Once a suitable dwelling unit is found, if the owner is willing to participate in the program, a housing assistance contract is entered into by the dwelling unit owner and the PHA.[142] The amount of the assistance payment received by the property owner equals the difference between the family's contribution (a fixed percentage of income) and the gross rent.[143] In areas where no PHA operates, or where an existing PHA lacks the capability to implement the program, HUD possesses the authority to contract directly with the owners.[144]

Prior to the 1974 Act, HUD could not make funds available for a housing program without the approval of the local government of the jurisdiction in which it would be located.[145] This remained

135. League, *supra* note 5, at VII-1. Baltimore County made an application for a Community Development Block Grant in 1975 but was declared ineligible because it lacked urban renewal authority. *Id.*
136. United States Housing Act of 1937, § 8, 42 U.S.C. § 1437(f) (Supp. V, 1975), *formerly* ch. 896, § 8, 50 Stat. 888 (1937).
137. Embry Interview, *supra* note 40.
138. *See* 24 C.F.R. § 882.104 (1976).
139. *Id.* § 882.105.
140. *Id.* § 882.209.
141. *Id.* § 882.103.
142. *Id.* § 882, app. II.
143. *Id.* § 882.114.
144. 42 U.S.C. § 1437f(b)(1) (Supp. V, 1975).
145. 42 U.S.C. § 1415(7)(b) (1970).

true even when state law provided extra-territorial jurisdiction to the PHA sponsoring the program.[146]

Although the 1974 Act retained this requirement for conventional public housing,[147] all Section 8 programs consisting of more than twelve units are now subject to a new procedure embodied in Section 213 of the 1974 Act.[148] In accordance with this procedure, the local government may comment about or object to the program which is to be located within its boundaries, but it lacks any veto power.[149] The local government's basis for comment or objection is limited to an inconsistency with an approved housing assistance plan, if one is in force, and/or a lack of need for public housing.[150] In either case, HUD makes the final decision on whether the inconsistency or need exists.[151]

One infirmity of the Section 8 program is its reliance upon voluntary participation by private owners.[152] The paucity of owners in Baltimore County willing to participate in the Section 8 program inhibits HCD's efforts to utilize its entire area of operation to spatially deconcentrate public housing.[153] Although perhaps also motivated by race or economics, the property owner's desire to avoid formal contract obligations with HCD constitutes a significant factor contributing to owner unwillingness to participate in the program.[154]

In order to circumvent private owner unwillingness, HCD has corresponded with HUD, recommending amendment to the Section 8 program to allow the PHA to make direct payments to the lower-income families who lease from the owner.[155] If this reform were enacted, the lower-income tenant would appear before the landlord as any other member of the renting public. The inhibition against directly contracting with the HCD would be dispelled since

146. *Baltimore Hearings, supra* note 9, at 75, 79–80 (testimony of Robert C. Embry, Commissioner, Department of Housing and Community Development).
147. 42 U.S.C. § 1437c(e) (Supp. V, 1975). "Conventional public housing" means the construction and operation of housing projects by the PHA.
148. *Id.* § 1439. Programs for twelve (12) or fewer units are exempt from the local comment and objection procedures. *Id.*
149. *Id.* § 1439(a).
150. *Id.* § 1439(a)(1)(B), (d)(1)(C).
151. 24 C.F.R. § 882.205 (1976). If an inconsistency with the local housing assistance plan forms the basis of the local government's objection, the importance of HUD's initial scrutiny of these plans is emphasized.
152. *See* Comment, *The Housing and Community Development Act of 1974 — Who Shall Live in Public Housing?*, 25 CATH. U.L. REV. 320, 334 (1976).
153. Embry Interview, *supra* note 40.
154. *Id.* Presently, a Section 8 program is in force in Baltimore County by which a private real estate firm under contract with the State of Maryland performs the functions of a PHA. Still in its infancy, this program has already attracted an applicant waiting list of over 3,000 persons. League, *supra* note 5, at III–6 and III–7.
155. Embry Interview, *supra* note 40.

it would not be involved, and any refusal to rent based on race could be litigated in a civil rights suit.[156]

Another infirmity in the Section 8 program is the limitation on the amount of rent payable per unit imposed by HUD's fair market value determination.[157] This also restricts HCD's efforts to recruit participating owners in the county, since the average rental of a two-bedroom apartment plus utilities well exceeds the figure established by HUD.[158]

Even if the infirmities in the Section 8 program were corrected, the housing needs of large low-income families would still not be met due to the relative scarcity of Baltimore County apartment units with more than three bedrooms.[159]

V. THE FUTURE OF PUBLIC HOUSING IN METROPOLITAN BALTIMORE

While the vestiges of past discrimination in the city remain, segregation, as a policy of the housing authority, has long since been abandoned.[160] A comparison of the 1970 and 1976 tenant composition statistics reveals some progress toward integrating the public housing projects.[161] Additionally, HCD has recently opened a large low-rise public housing project located in a racially mixed neighborhood in the city.[162] With the inception of Section 8 housing assistance programs, HCD's extra-territorial area of operation has become functional for the first time.

The provisions of the Section 8 program, however, impede its implementation in Baltimore County. The fair market rent established by HUD for the metropolitan area ($201 per month for a two-bedroom unit) restricts HCD's operations in the county.[163]

156. *E.g.*, The Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970); The Civil Rights Act of 1968, Title VIII, 42 U.S.C. §§ 3601 *et seq.* *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), wherein the Court stated:

> On its face, therefore, [42 U.S.C.] § 1982, appears to prohibit *all* discrimination against Negroes in the sale or rental of property — discrimination by private owners as well as discrimination by public authorities.

Id. at 421 (emphasis in the original).

157. For the Baltimore metropolitan area, the fair market value has been set by HUD at $201.00. 41 Fed. Reg. 13065 (1976).

158. Interview with Samuel I. Rosenberg, Section 8 Coordinator, Department of Housing and Community Development, in Baltimore, Aug. 10, 1976.

159. League, *supra* note 5, at III–7.

160. *See* E. Ash, The Baltimore Story (Dec. 9, 1955). However, the past acts of discrimination are still sufficient to invoke judicial relief. *See* Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *modified*, 473 F.2d 910 (6th Cir. 1973).

161. *Compare* App. A *with* App. B.

162. The new project, named Hollander Ridge, consists of approximately 1,000 units and is located in northeast Baltimore.

163. *See Hearings on Housing Assistance Payments, Community Development Block Grants and Section 312 Rehabilitation Loans Before the Subcommittee on Hous-*

The additional duties placed on private owners[164] tend to discourage their participation in the program.[165] Until supply exceeds demand in the private market, creating a desire in the private owner to participate, the Section 8 program in its present structure will fail to entice owner participation.[166] While Section 8 program infirmities will continue to handicap the lower-income housing program in the metropolitan area, the primary impediment is the failure of Baltimore County to actively participate in the program.[167]

If the *Gautreaux* case is applicable to metropolitan Baltimore, HUD must use its best efforts and discretion to expand the housing options of the city's poor.[168] Realistically, this means increasing the supply of public housing in Baltimore County for persons of lower income. This can be achieved by a HUD allocation of funds for use by HCD in its extra-territorial area of operation in the county,[169] or by a HUD by-pass of the PHA through exercise of its authority pursuant to Section 8 (b) (1) to deal directly with private owners.[170] Another alternative, not involving HUD, would be for Baltimore County to create a PHA, thereby operating its own public housing program.[171]

An inherent problem in using either of the first two alternatives is that the Section 8 existing program will not be sufficient due to a lack of existing housing.[172] Therefore, new construction is required.[173] New construction, however, is not exempt from land use controls and hence is vulnerable.[174]

In a case pending before the Supreme Court, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[175]

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ing and Urban Development of the House Committee on Banking, Currency and Housing, 94th Cong., 1st Sess. at 29–30 (1975).

164. *Id.* These extra duties may range from extra-territorial services and budget counselling to the provision of day care centers.
165. *Id.*
166. *Id.*
167. *See* Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *modified*, 473 F.2d 910 (6th Cir. 1973). "No matter how a housing authority may try, their aims and goals cannot be met without the support and leadership of the administration within the city it attempts to build public housing." *Id.* at 1179. *See also* note 31 *supra* and accompanying text.
168. 96 S. Ct. at 1547–48.
169. *Id.* at 1548.
170. *See* 42 U.S.C. § 1437(b)(1) (Supp. V, 1975).
171. To date Baltimore County has not created a public housing authority.
172. *Hearings on H.R. 11769 Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Currency and Housing*, 94th Cong., 1st Sess. at 490–91 (1976) (letter from HCD to the Subcommittee).
173. *Id.*
174. Hills v. Gautreaux, 96 S. Ct. 1538, 1550 (1976). *See* MD. ANN. CODE art. 44A, § 14 (1957).
175. 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 96 S. Ct. 560 (1976).

the use of zoning regulations to prohibit construction of multi-family lower-income housing in a suburban community is being reviewed. In this case, the Seventh Circuit Court of Appeals held that the denial of a zoning change violated the equal protection clause of the fourteenth amendment due to its discriminatory effect. The court ruled that the preservation of property values and a zoning plan were not compelling state interests permitting the denial of equal protection. In making its decision, the court took judicial notice of the Chicago metropolitan area's history of segregated housing. The questions presented in the petition for certiorari are:

> (1) Does failure to grant rezoning request for multiple family housing for low and moderate income families in midst of single-family area violate Fourteenth Amendment, even though Village was admittedly maintaining integrity of its zoning plan and protecting neighborhood property values? (2) Does alleged discriminatory housing pattern in Chicago metropolitan area impose upon suburban municipality affirmative duty to ignore its admittedly proper zoning ordinance to permit construction of multi-family low and moderate income housing?[176]

If the Supreme Court affirms the Seventh Circuit's decision, a local government's ability to employ land use controls as a barrier to public housing will be diminished. If the Seventh Circuit is reversed, and land use controls are permitted to be used in this way, Baltimore County could still effectively prevent the construction of public housing. Then the only viable alternative by which public housing could be erected outside the city boundaries would be active county participation.[177]

The Baltimore metropolitan area needs a "fair share" lower-income housing plan which would distribute the responsibility for the provision of lower-income housing throughout the metropolitan area rather than concentrating it in the center city. A proposed amendment to Section 213 (d) (1) of the Housing and Community Development Act of 1974, under consideration by the House Subcommittee on Housing and Community Development, specifically authorizes HUD to make adjustments in the allocation of funds as it deems necessary to assist in the implementation of "fair share" and other cooperative metropolitan area-wide housing

176. 441 U.S.L.W. 3323 (U.S. Nov. 25, 1975).

177. A more drastic alternative would be to completely remove local control from the public housing program and legislatively exempt public housing from local land use controls. The constitutional issues involved with such a program are beyond the scope of this note.

plans.[178] HUD fully supports this amendment.[179] Absent such a plan, the city will continue to bear a grossly disproportionate burden in the production and maintenance of lower-income housing for the area's indigent.

VI. CONCLUSION

Neither the Housing and Community Development Act of 1974 nor the *Gautreaux* decision have had a substantial impact on the housing opportunities of the lower-income blacks residing in Baltimore City. Indeed, it is questionable whether any legislation or court decision is capable of reversing the trend which racially divides the Baltimore metropolitan area. The thrust of *Gautreaux* is toward a racially integrated metropolitan area. Baltimore County almost completely surrounds the city, luring higher-income families away from the city, depleting the city of its economic vitality. Paraphrasing Justice Clark's remarks in the Seventh Circuit's *Gautreaux* decision, the absence of low-income housing opportunities in a suburban area such as Baltimore County evinces "a callousness on the part of [county officials] towards the rights of the black, underprivileged citizens of [Baltimore City] that is beyond comprehension."[180]

The new federal programs represent an attempt to tailor public housing into a form acceptable to middle class communities. Gone are the high-rise monuments to ghetto poverty of the 1940's which contributed so much to the formulation of negative attitudes towards public housing programs. Lingering, however, are the negative attitudes. The public for the most part is unaware of the "new look" in public housing.

Unless the *Gautreaux* decision ignites a new appraisal of metropolitan housing responsibilities, the future looms bleak. Justice Marshall's closing prediction in his *Milliken* dissent sounds a solemn warning:

> Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained . . . are not easily set aside. . . . But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divest this Court from the enforcement of the constitutional principle at issue. . . . In the short run, it may seem to

178. *Hearings on Oversight of Section 8 Housing Assistance Program Before the Subcommittee on Housing and Urban Development of the House Committee on Banking, Currency and Housing*, 94th Cong., 1st Sess., at 55 (1975).

179. *Id.*

180. Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 932 (7th Cir. 1975). Justice Clark of the United States Supreme Court, retired, was sitting by designation.

> be the easier course to allow our great metropolitan areas to be divided up each into two cities — one white, the other black — but it is a course, I predict, our people will ultimately regret.[181]
>
> *John Weld*

ADDENDUM

Since the initial printing of this article, the United States Supreme Court filed its opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977), discussed in Section V *supra*, reversing the decision of the Court of Appeals for the Seventh Circuit. The court of appeals held that in the absence of compelling state interests, the Village's refusal to rezone violated the equal protection clause because of its racially discriminatory *effect*. The Supreme Court, however, reiterated that racially disproportionate impact alone is insufficient to show a denial of equal protection. The Court reaffirmed that the plaintiff must prove that the challenged action was motivated by a discriminatry *purpose*. The reversal in this case was predicated upon a finding that the plaintiffs had not sustained their burden of proof.

The imposition of such a stringent standard of proof will insulate an increased number of exclusionary zoning regulations from the reach of the fourteenth amendment. Suburban communities which have historically and consistently zoned to exclude lower-income families will be able to justify on nonracial grounds zoning decisions which have a racially disproportionate impact. The net result of the Court's decision is the perpetuation of racial isolation of suburban communities.

181. 413 U.S. at 814–15.

APPENDIX A

(1970)

Project	*Census Tract % Nonwhite*	*Population White*	*Population Nonwhite*	*Population Total*	*Population Total*
Latrobe	93.8	72	1979	2051	96.5%
McCulloh	98.7	0	1027	1027	100 %
Poe	98.4	0	700	700	100 %
Douglass	64.9	0	974	974	100 %
Perkins	68.2	239	1732	1971	87.9%
Gilmor	99.6	0	1562	1562	100 %
O'Donnell	6.8	2483	669	3152	21.2%
Somerset	9.5	0	1571	1571	100 %
Cherry Hill	99.6	0	2662	2662	100 %
Cherry Hill Ext. 1	99.6	0	3154	3154	100 %
Cherry Hill Ext. 2	99.6	0	1546	1546	100 %
Claremont	19.5	949	252	1201	21.1%
Lafayette	98.5	0	3442	3442	100 %
Flag House	65.5	52	1900	1952	97.3%
Lexington Terrace	87.1	0	2634	2634	100 %
Murphy Homes	99.3	0	2883	2883	100 %
Westport Ext.	97.9	0	1177	1177	100 %
Fairfield	80.4	0	1112	1112	100 %
Brooklyn	1.6	1529	129	1658	7.8%
Westport I	97.9	0	772	772	100 %
Oswego Mall	94.2	0	241	241	100 %
Lakeview Lowers	83.7	26	170	196	86.7%
		5,350	32,288	37,638	

Source: Planning Division, Research & Analysis Section, Department of Housing and Community Development. (Percent calculations by the author.)

APPENDIX B

(1976)

	Project	*Population White*	*Population Nonwhite*	*Population Total*	*Population Total*
	Latrobe	33	1823	1861	98.2%
	McCulloh	9	930	939	99.0%
	McCulloh Ext.	5	1266	1271	99.6%
	Poe	4	611	615	99.3%
	Douglass	5	902	907	99.4%
	Perkins	98	1774	1872	94.8%
	Gilmor	3	1371	1374	99.9%
	O'Donnell	2204	792	2996	26.4%
	Somerset	8	1349	1357	99.4%
	Cherry Hill	4	2399	2403	99.8%
	Cherry Hill Ext. 1	13	2795	2808	99.5%
	Cherry Hill Ext. 2	6	1363	1369	99.6%
	Claremont	775	330	1105	29.9%
*	Claremont Ext.	146	35	181	19.3%
	Lafayette	20	3036	3056	99.3%
	Flag House	19	1733	1752	98.9%
	Lexington	3	2424	2427	99.9%
	Murphy	14	2617	2631	99.5%
	Westport Ext.	7	1028	1035	99.3%
	Fairfield	6	1025	1031	99.4%
	Brooklyn	1317	275	1592	17.3%
	Westport	0	657	657	100.0%
	Broadway	61	888	949	93.6%
*	West Twenty	95	383	478	80.1%
	Mt. Winans	0	731	731	100.0%
	Oswego	0	211	211	100.0%
*	Lakeview	9	178	187	95.2%
*	Bel Park	35	299	334	89.5%
*	Govans Manor	177	72	249	28.9%
	Somerset Ext.	5	312	317	98.4%
*	Wyman House	113	89	202	44.01%
	Rosedale	0	461	461	100.0%
	Other (Scattered)	156	6072	6228	97.5%
	Total	5,350	40,236	45,586	88.3%

* Indicates public housing projects limited to the elderly and handicapped.

Source: Planning Division, Research & Analysis Section, Department of Housing and Community Development. (Percent calculations by the author.)