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School Desegregation versus Public Housing Desegregation: The Local Housing District and the Metropolitan Housing District

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SCHOOL DESEGREGATION VERSUS PUBLIC HOUSING DESEGREGATION: THE LOCAL SCHOOL DISTRICT AND THE METROPOLITAN HOUSING DISTRICT

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Federal housing programs are planned for and implemented on a metropolitan or regional basis; consequently, to remedy federal discrimination in the administration of such programs, it is not only appropriate but necessary that the adopted remedy be on a similar metropolitan or regional basis. In this way, federal housing programs are distinguishable from the public school context, since educational programs are planned for and carried out on a local school district basis.

In *Milliken v. Bradley*,[1] a school desegregation case, the United States Supreme Court held that a federal court should not impose

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1. 418 U.S. 717 (1974).

metropolitan-wide "inter-district" relief for *de jure* segregation violations occurring within a single school district unless certain conditions are met.[2] Subsequently, in *Gautreaux v. Chicago Housing Authority*,[3] the Seventh Circuit held that equitable considerations mandated metropolitan-wide relief to remedy public housing segregation in Chicago.[4] In early 1975 the Supreme Court granted certiorari at the

2. The district court in *Milliken* held that the state of Michigan and the Detroit Board of Education shared responsibility for creating and perpetuating segregated schools within the city of Detroit. Bradley v. Milliken, 338 F. Supp. 582, 592 (E.D. Mich. 1971). The district court ordered preparation of a metropolitan-wide desegregation plan that would include suburban school districts where no discrimination had been proven. The Sixth Circuit approved this approach, stating that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent nearby school districts for the limited purpose of providing an effective desegregation plan." Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973).

The Supreme Court reversed the Sixth Circuit in a 5-4 decision. Milliken v. Bradley, 418 U.S. 717 (1974). The Court held that an "inter-district" remedy could not be imposed unless (1) school district boundary lines were established with the purpose of fostering racial segregation, or (2) the other included districts failed to operate unitary systems, or (3) segregation in one district affected racial characteristics within other districts ("inter-district segregative effects"). Chief Justice Burger's opinion for the plurality emphasized that a multi-district plan threatened to disrupt the basic structure of public education within Michigan and would place serious financial, administrative and logistical burdens on the state. *Id.* at 742-43. Justice Stewart's crucial concurring opinion stated that *Milliken* did *not* "deal with questions of substantive constitutional law," but rather dealt with equitable principles limiting the scope of remedies under specific circumstances. *Id.* at 753 (Stewart, J., concurring).

3. 503 F.2d 930 (7th Cir. 1975), *cert. granted sub nom.* Hills v. Gautreaux, 421 U.S. 962 (1975).

4. The *Gautreaux* litigation began in 1966 when low-income black plaintiffs filed companion cases against the Chicago Housing Authority (CHA) and the U.S. Department of Housing and Urban Development (HUD). These were class actions, with the class consisting of tenants of CHA housing projects as well as those on the CHA waiting list. The action against HUD was stayed while initial proceedings against CHA were commenced. CHA's motion for summary judgment was denied, Gautreaux v. CHA, 265 F. Supp. 582 (N.D. Ill. 1967), and plaintiffs' motion for summary judgment against CHA was granted, Gautreaux v. CHA, 296 F. Supp. 907 (N.D. Ill. 1969). The district court held that CHA had discriminated in its site selection practices for locating new public housing projects and in its tenant assignment practices, which involved racial quotas. A judgment order was entered requiring that most public housing in the future be placed in predominantly white areas of the city, with a voluntary provision that one-third of the housing could be placed in suburban Cook County if arrangements could be made with the Housing Authority of Cook County to do so. Gautreaux v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

Actual proceedings in the case against HUD began in 1970. Initially the action against HUD was dismissed. Gautreaux v. Romney, 66-C-1460 (N.D. Ill.,

Sept. 1, 1970). This decision was reversed, however, by the Seventh Circuit, which found HUD independently liable for CHA's discriminatory site selection and tenant assignment policies. Gautreaux v. Romney, 488 F.2d 731, 740 (7th Cir. 1971). The court framed the issue before it as whether "HUD's knowing acquiescence in CHA's admitted[ly] discriminatory housing program violated either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964 [42 U.S.C. § 2000d (1970)]." The court held that "the pertinent case law compels the conclusion that both of these provisions were violated." *Id.* at 737. HUD's acquiescence consisted of approving both the proposed housing sites and the tenant assignment plan submitted to the agency by CHA, and in funding the program with over $350 million.

On remand the district court ordered CHA, HUD and the plaintiffs to submit appropriate plans to provide comprehensive relief for the plaintiff class. The court specifically stated that the proposed orders need not be confined to Chicago, if it was necessary and appropriate for comprehensive relief to provide a remedy on a broader geographical basis. Gautreaux v. Romney, 66-C-1456 (N.D. Ill., Dec. 23, 1971). After a hearing in which plaintiffs presented undisputed expert testimony on the necessity and appropriateness of metropolitan relief, the district court adopted HUD's proposal, which was basically a "best efforts" order (to cooperate with CHA) limited to the city of Chicago. Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973). The Court of Appeals reversed, holding that metropolitan relief was "necessary and equitable" in this case. Gautreaux v. CHA, 503 F.2d 930, 936 (7th Cir. 1974). In the opinion written by retired Justice Clark, the Seventh Circuit reasoned that "[t]he equitable factors which prevented metropolitan relief in Milliken v. Bradley are simply not present here." *Id.* In distinguishing *Milliken,* the court first pointed to the absence of a deeply rooted tradition of local control in the public housing context, which the Supreme Court had found to exist in the public school situation. The court also pointed to a hundred-year-old federal commitment to non-discrimination in housing and the Secretary of HUD's statutory mandate to administer the agency's programs affirmatively to further non-discrimination. This pattern added up to a pervasive federal involvement in public housing, unlike public schools. *Id.*

Secondly, the Seventh Circuit distinguished *Milliken* in terms of the administrative problems involved in a metropolitan form of relief. The court asserted that the "administrative problems of building public housing outside Chicago are not remotely comparable to the problems of daily bussing thousands of children to schools in other districts run by other local governments." *Id.* No restructuring of the kind envisioned in *Milliken* would be necessary here, since HUD and CHA could build housing in the same way as a private developer. *Id.*

Thirdly, the Seventh Circuit found evidence in the record of discrimination in the public housing program in the Chicago suburbs. The Supreme Court had found no such evidence in *Milliken.* The court pointed to Plaintiff's Exhibit 11, which showed the location of twelve suburban public housing projects, ten of which were in, or adjacent to, predominantly black census tracks. *Id.* at 936-37.

Finally, the Seventh Circuit distinguished *Milliken* on the basis that in this case the parties all agreed that the metropolitan area is a "single relevant locality for low rent housing purposes and that a city-only remedy will not work." *Id.* at 937. The court referred to HUD regulations and in-court and out-of-court statements by the Secretary of HUD and other high level departmental officials to this effect, as well as uncontroverted expert testimony by a recognized demographer that the "general public housing area" (the white areas) within the city would disappear by the year 2000. Based on these distinctions, the Seventh Circuit remanded the case to the district court for "the adoption of a

request of the federal government to examine the Seventh Circuit decision in *Gautreaux*.[5]

This Article argues that *Milliken* is not applicable to the public housing context because the appropriate housing "district" is the metropolitan area rather than simply the central city. Since *Gautreaux* involves federal housing programs and the development of a remedy for constitutional and statutory violations by the Department of Housing and Urban Development (HUD),[6] the federal government's definition of the "district" should apply. That definition can be gleaned from statutes, regulations, policy statements, and administrative practices related to the *planning* and *implementation* of housing programs. These materials reveal that the proper definition of a "housing district," insofar as the federal government is concerned, is the metropolitan area or region, rather than a local municipality.[7]

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comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago which has resulted from CHA's and HUD's unconstitutional site selection and tenant assignment procedures but will increase the supply of dwelling units as rapidly as possible." *Id.* at 939.

In the order denying a rehearing, the Seventh Circuit also distinguished *Milliken* by asserting that the impact of site-selection practices within the city of Chicago had a profound impact throughout the Chicago metropolitan area, further justifying metropolitan relief. The court then reaffirmed its remand of the case "for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in Milliken v. Bradley." *Id.* at 940. The Supreme Court granted HUD's petition for certiorari on May 12, 1975. Hills v. Gautreaux, 421 U.S. 962 (1975).

For articles discussing the metropolitan relief aspect of *Gautreaux* see Kushner & Werner, *Metropolitan Desegregation after* Milliken v. Bradley, 24 CATH. U.L. REV. 187 (1975); 43 GEO. WASH. L. REV. 663 (1975); 1975 U. ILL. L.F. 135 (1975). *See also* 8 URBAN L. ANN. 265 (1974).

5. 421 U.S. 962 (1975).

6. *See* note 4 *supra.*

7. In *Gautreaux* itself, HUD stated that only metropolitan relief would be effective. HUD submited to the court a statement by the then Secretary of HUD George Romney that, "[T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding communities. The City and the suburbs together make up what I call the 'real city.' *To solve problems* of the 'real city' only metropolitan wide solutions will do." Record Document 283, Attachment 6, Memorandum 2, at 2, Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973) (emphasis added). HUD also joined the plaintiffs in the case stating to the district judge that a "metropolitan remedy is desirable." Record at 4, 6, Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973).

In the area of planning, HUD carries out its own housing market analyses on a metropolitan basis and funds comprehensive planning (including housing planning) on a metropolitan or regional basis. In addition, applications for federal housing and community development assistance are subject to review by a regional agency for consistency with a regional plan.[8] Federal housing materials also show that the implementation of federal housing programs is carried out on a metropolitan basis. That is, the location of the housing, the groups to whom developments are to be marketed, and the definition of eligibility for the programs are all determined with reference to regional criteria. Thus insofar as the federal government is concerned, the proper definition of a "housing district" is the metropolitan area or region, rather than a local municipality.

If the "district" for federal housing purposes is the metropolitan area, then *Gautreaux* does not present the Court with an instance of inter-district relief because only one district is involved. In addition,

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Courts have also recognized that rational land use and housing planning can only take place on a broad geographical basis. The first Supreme Court decision upholding the constitutionality of zoning foreshadowed this recent trend toward recognition of the regional nature of land use planning, particularly when it is related to housing. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court pointed to the position of suburban Euclid in the Cleveland metropolitan area and raised the "possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390.

Recent state court decisions, particularly in New Jersey and Pennsylvania, support the definition of the region as the appropriate geographical basis for housing planning and development. *See* Duffcon Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971); Molino v. Mayor & Council, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971); Appeal of Concord Township, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 515 A.2d 597 (1965). The most advanced state court decision using the regional definition is the recent New Jersey Supreme Court case, Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

In the Chicago area in a case that, like *Gautreaux,* involved discrimination against black homeseekers, the Seventh Circuit recognized the metropolitan character of the dual housing market in the Chicago area. After holding that plaintiffs had made a prima facie case of the existence of a dual housing market in the Chicago metropolitan area, the court took judicial notice of the high degree of racial residential segregation in the Chicago metropolitan area. *See* Clark v. Universal Builders, Inc., 501 F.2d 324, 334-35 (7th Cir. 1974).

8. *See* notes 32-51 and accompanying text *infra.*

Milliken is not applicable. Hence, the traditional equitable principles applied by the Seventh Circuit should govern, and there should be no reason for the Supreme Court to disturb that decision requiring metropolitan relief.[9]

I. The Federal Framework for Housing Planning

As the Supreme Court said in *Milliken,* public education is basically a matter for local control.[10] The local school district does the planning and implementation of educational programs. In contrast, the housing programs in *Gautreaux* are federal programs; moreover, the federal government has increasingly required that planning for public housing and other housing programs take place on a metropolitan or regional scale. Congress and HUD have become aware that housing problems do not stop at the boundary lines of the central city. As a result, a number of significant steps have been taken: HUD conducts its own housing planning, called the Housing Market Analysis, on a metropolitan-wide basis; Congress has increasingly funded regional and metropolitan housing planning; and the Office of Management and Budget (OMB), pursuant to statutory mandate, has established a review process to ensure that local proposals, including housing projects, are consistent with regional plans. In short, the federal government has taken a series of statutory and administrative steps over the last twenty years that evidence its position that the "district"

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9. When constitutional rights have been violated, the Supreme Court has consistently held that the federal courts not only have broad remedial powers but an obligation to provide effective relief. In Louisiana v. United States, 380 U.S. 145 (1965), a voting rights discrimination case, the Court stated that a federal district court "has not merely the power but the duty to render a decree which [would] . . . so far as possible eliminate the discriminatory effects of past as well as bar like discrimination in the future." *Id.* at 154. In the area of school desegregation the Court has stated, "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 15 (1971). *See also* Brown v. Board of Educ., 349 U.S. 294, 299-300 (1955). The Court has also recognized that such remedies "may be administratively awkward, inconvenient, and even bizarre in some situations, . . . but all awkwardness and inconvenience cannot be avoided in interim periods when remedial adjustments are being made . . . ." Swann v. Charlotte-Mecklenberg Bd. of Education, 402 U.S. 1, 28 (1971). *See also* Davis v. Board of School Comm'rs, 402 U.S. 33 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

10. 418 U.S. at 741-42.

within which housing planning is to be carried out is the metropolitan area. For planning purposes, therefore, the "district" in *Gautreaux* is the Chicago metropolitan area.[11]

A. *The Federal Housing Administration Housing Market Analysis*

For more than twenty-five years, the Federal Housing Administration (FHA), a component of HUD, has carried out housing market analyses in "housing market areas" throughout the country. The agency undertakes these analyses of the demand for housing in various areas in order to assist in the administration of its housing programs.[12] Through this analysis FHA assesses the demand for housing in an area for approximately a two-year period.

In its handbook to guide staff analysts, the agency states that the first step in undertaking a housing market analysis is the "delineation of the spatial entity" to be analyzed.[13] The housing market is defined as "the composite of negotiations between buyers and sellers (including lessees and lessors) in free communication for the acquisition or disposition of individual dwelling units which are in some degree of competition with each other."[14] Thus the "housing market area" is the geographic area within which "the units are in competition with one another as alternatives for the users of housing" or the "geographic entity within which nonfarm dwelling units are in mutual competition."[15]

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11. Presumably, a remedial order in *Gautreaux* would involve a "plan," perhaps analogous to that adopted by the district court with regards to CHA. Gautreaux v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969). Generally, that remedial plan specified both the location of remedial housing and tenant assignment requirements and mandated that CHA increase the supply of dwelling units pursuant to the order as rapidly as possible. *Id.*

12. Federal Housing Administration, U.S. Dep't of Housing and Urban Dev., FHA Techniques of Housing Market Analysis, Attachment to FHA Circular 1380.2, Jan., 1970. Originally developed as the relevant geographic area for determining the economic demand for housing within FHA's mortgage insurance program, the "housing market area" concept has now been carried over into HUD's subsidized housing program. Within these programs the housing market area constitutes the relevant district in which HUD is obligated to provide housing opportunities in a non-discriminatory manner. The failure of HUD to meet this obligation is the exact violation involved in *Gautreaux*. *See* text accompanying notes 65-88 *infra*.

13. Federal Housing Administration, *supra* note 12, at 9.

14. *Id.*

15. *Id.* at 9, 11.

The analysts are also instructed that "the housing market area usually extends beyond the city limits, regardless of the magnitude of the market under consideration . . . . In larger markets the market area may extend into several adjoining counties through the outward growth of the primary urban area."[16] Finally, the analysts are informed that "for practical purposes, the Standard Metropolitan Statistical Area (SMSA) may be delineated as the housing market area in those cases where an SMSA has been established."[17] For example, in *Gautreaux,* the six-county Chicago metropolitan area constitutes both the SMSA and the "housing market area."[18] Thus, in its periodic housing market analyses of the Chicago area, HUD assesses the demand for various kinds of housing, including units for lower-income people, based on the six-county metropolitan area, or the "housing market area." The agency's internal planning process, therefore, defines the metropolitan-wide "housing market area" as the relevant "district."

B. *The Comprehensive Planning Assistance Program*

Most housing planning, however, is not carried out by HUD itself, but by local, regional and state agencies funded by HUD under the Comprehensive Planning Assistance Program.[19] For twenty years planning bodies have received federal funds under the section 701 [20] program to carry out general comprehensive planning activities. As the program has evolved through a series of Congressional amendments and HUD regulations and practices, increasing emphasis has been placed on regional planning. Moreover, an explicit housing planning requirement has been imposed.[21]

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16. *Id.* at 13.

17. *Id.* at 14.

18. U.S. Dep't of Housing and Urban Dev., The Current Housing Market Situation: Chicago, Illinois, as of March 1, 1973 (March, 1974).

19. 40 U.S.C. § 461 (1970), *as amended,* (Supp. IV, 1974).

20. *Id.*

21. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 601, 82 Stat. 528, *amending* Housing Act of 1954 § 701, 40 U.S.C. § 461 (1970). In the Chicago metropolitan area, the regional agency that receives § 701 funds and that is therefore under a statutory mandate to undertake housing planning is the Northeastern Illinois Planning Commission (NIPC). NIPC was joined as a defendant in *Gautreaux* for remedial purposes. Gautreaux v. Romney, 66-C-1456 (N.D. Ill., Feb. 24, 1975).

Section 701 of the Housing Act of 1954 represented the initial explicit federal concern with comprehensive urban planning.[22] This Act has, more than any other single factor, stimulated the creation of regional planning bodies.[23] Originally, section 701 authorized planning grants to state, metropolitan and regional planning agencies for "planning work in metropolitan and regional areas,"[24] with a primary thrust being provisional grants to state planning agencies to assist cities of under 25,000 in formulating plans. In the several amendments to section 701, Congress has increasingly emphasized the importance of metropolitan and regional planning, particularly to meet housing needs.

First, the 1959 amendments required that "planning assistance under this section shall, to the maximum extent feasible, cover entire urban areas having common or related urban development problems."[25] The Housing Act of 1961 added language intended to encourage cooperation in planning and implementing plans "among all interested municipalities, political subdivisions, public agencies, and other parties in order to achieve coordinated development of entire areas."[26]

The next step in the development of a regional focus was the Housing and Urban Development Act of 1965. This act authorized planning grants to "organizations composed of public officials . . . representative of the political jurisdictions within the metropolitan

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22. Housing Act of 1954, ch. 649, § 701, 68 Stat. 640.

23. H. FRANKLIN, D. FALK & A. LEVIN, IN-ZONING, A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 147 (1974).

24. Housing Act of 1954, ch. 649, § 701, 68 Stat. 640. Originally, a primary thrust of § 701 was the provision of planning grants to state planning agencies to assist cities of under 25,000 in formulating plans.

25. Housing Act of 1956, Pub. L. No. 86-372, § 419, 73 Stat. 678, *amending* Housing Act of 1954, ch. 649, § 709, 68 Stat. 640. This amendment also increased the population eligibility requirements under the § 701 program to enable communities of up to 50,000 to receive planning funds.

26. Housing Act of 1961, Pub. L. No. 87-70, § 310(a), 75 Stat. 170, *amending* Housing Act of 1954, ch. 649, § 701(a), 68 Stat. 640. Further amendment of the program in 1964 provided for § 701 planning grants to counties regardless of population. If a county had a population of over 50,000 and was in a metropolitan area, however, grants were authorized only if planning "for such county will be coordinated with the program of comprehensive planning, if any, which is being carried out for the metropolitan area." Housing Act of 1964, Pub. L. No. 88-560, § 316, 78 Stat. 793, *amending* Housing Act of 1954, ch. 649, § 701(a), 68 Stat. 640.

area or urban region" for solution of "metropolitan or regional problems."[27] Three years later the Housing and Urban Development Act of 1968 added the important requirement that "[p]lanning carried out with assistance under this section [section 701] shall also include a housing element as part of the preparation of comprehensive land use plans."[28] Thus any metropolitan or regional planning agency that

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27. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, § 1102 (c)(1), 79 Stat. 502, *amending* Housing Act of 1954, ch. 649, § 701, 68 Stat. 640. This amendment, § 701(g), served as a powerful stimulus for the creation of metropolitan-wide planning agencies. In the first three years after the section was enacted, 273 councils of governments were formed and designated as areawide planning agencies. *See* D. McGrath, "Planning for Growth," in *Papers Submitted to the House Committee on Banking and Currency*, 92d Cong., 1st Sess., pt. 2, at 956-57 (1971).

28. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 601, 82 Stat. 528, *amending* Housing Act of 1954, ch. 649, § 701, 68 Stat. 640. The act states that,

> this consideration of the housing needs and land use requirements for housing in each comprehensive plan will take into account all available evidence of the assumptions and statistical bases upon which the projection of zoning, community facilities, and population growth is based, so that the housing needs of both the region and the local communities studied in the planning will be adequately covered in terms of existing and prospective in-migrant population growth.

Id.

Under § 701 HUD is authorized to provide planning grants to areawide planning organizations (APOs). HUD will not make planning or specified facilities grants within a metropolitan area or region unless the APO has met the planning requirements of HUD's certification process. President Nixon summarized the relationship between planning grants and planning requirements:

> Where comprehensive planning is supported by a Federal grant under the 1954 Housing Act, as amended in 1968, the plan must include a "housing element" to insure that "the housing needs of both the region and the local communities studied in the planning will be adequately covered in terms of existing and prospective in-migration population growth." This provision has broad application, since such planning grants are often used to prepare the areawide plans which are a prerequisite for Federal financial assistance under the water and sewer, open space, and new communities programs.

Statement by President Richard M. Nixon, Federal Policies Relative to Equal Housing Opportunity 8, June 11, 1971, in 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 892, 898 (1971).

In order to qualify for federal planning funds, an APO must first receive Certification I. This certification is given to a planning body that meets certain criteria, such as a sufficient percentage of elected officials on its policy making board and an adequate supply of non-federal financial support.

In order to qualify for federal funds for open space, water and sewer programs, an APO must first receive Certification II from HUD. HUD requires that an APO desiring Certification II institute a comprehensive planning process containing (1) a twelve-month work program, (2) a statement of areawide goals

applied for a HUD planning grant had to carry out housing planning as part of its work program.[29]

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and objectives, and (3) an acceptable areawide land use element. With regard to the second requirement, HUD has specifically mandated that the APO formulate a plan to provide all groups with adequate housing throughout the metropolitan region. HUD specified that,

> Areawide goals and objectives must reflect the distinctions among population groups that share substantially in the nation's prosperity and the groups that are largely disconnected from the majority—the poor, the disadvantaged, and minority groups. Specific goals and objectives should be directed toward providing channels of choices between central city and suburban development centers, insuring balanced new communities and providing housing for all income and minority groups. Housing, employment and transportation relationships must be considered in the goals and reflected in the land use element. The development and adoption of a statement of areawide goals and objectives will provide the APO with a basis for planning implementation and coordination activities, and will help to identify common areawide problems and potentials.

HUD, Areawide Planning Requirements MPD 6415.1A, July 31, 1970, at 18.

HUD's certification guidelines reveal a definite concern that the areawide goals and objectives be actually implemented. To achieve this result HUD directed that each APO institute a comprehensive planning process. HUD stated:

> It is essential that a continuing comprehensive planning process be developed and maintained. . . . Planning should be comprehensive in the sense that it encompasses elements for housing, employment, and other aspects necessary to address current and future problems of land use and development. Procedural matters should be so structured as to allow minority and low-income groups to significantly affect the decision-making process. Further, through comprehensive planning, programs should be effectuated to create areawide choices to house minority and low-income families.

Id. at 12.

If the comprehensive planning process does not lead to the implementation of the plans, an APO may lose its certification. An APO is recertified by the HUD Area Office upon its determination that the "APO has met or has demonstrated that it is progressing toward the objectives set forth in the Guidelines for Areawide Comprehensive Planning . . . [and that] appropriate action is underway to implement the goals and objectives . . . if implementation has not been completed." *Id.* at 20.

Thus HUD requires that the APO draw up plans and take steps to implement its areawide planning process. If the APO is not implementing its plans, HUD is authorized to deny recertification. The loss of certification is quite significant in that it then may lead to a cut-off of funds for other federal programs.

The certification requirements remain in effect, although they have limited practical effect currently because HUD's water and sewer and open space programs, to which they applied, have been "folded" into the community development block grant program of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-17 (Supp. IV, 1974). *See* note 54 and accompanying text *infra.*

29. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 601, 82 Stat. 528, *amending* Housing Act of 1954, ch. 649, § 701, 68 Stat. 640. The

Finally, the Housing and Community Development Act of 1974 (HCD Act) continued the emphasis placed by the section 701 program on regional planning and expressed the Congressional intention that such plans be implemented, rather than serve as an academic exercise.[30] Section 701 (f) authorizes the Secretary of HUD, in extending financial assistance, to require assurances of "reasonable progress in the development of the elements of comprehensive planning."[31] This provision reflects Congressional intent to foster the actual implementation of the plans.

Thus the development of section 701 demonstrates the Congressional attitude toward regional planning and implementation of housing programs. At its inception, section 701 program funding was directed primarily at smaller cities and only secondarily at metropolitan areas. Through successive amendments an increasing regional focus has emerged. This evolution has also placed particular emphasis on housing planning, which has become an essential element of the agencies' activities and, most recently, has emphasized the necessity of implementing these plans.

C. *Regional Planning Reviews*

Not only does HUD do its own planning and fund planning activities on a metropolitan basis, it also participates in a federal scheme requiring regional reviews of applications for federal assistance under

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§ 701 program provides a significant amount of funding for local planning, as well as for metropolitan or regional planning. The legislative history indicates that one of the Congressional purposes in enacting the housing plan requirement, however, was to "influence localities in the direction of considering and helping to meet the broad regional housing needs as part of local planning and land use." 2 U.S. CODE CONG. & AD. NEWS 2930 (1968).

30. 40 U.S.C. § 461 (Supp. IV, 1974), *amending* 40 U.S.C. § 461 (1970).

31. Housing and Community Development Act of 1974 § 401(b), 40 U.S.C. §461(f) (Supp. IV, 1974), *amending* 40 U.S.C. § 461(f) (1970). The report of the Senate Committee on Banking, Housing and Urban Affairs stated that:

> Chapter IV [Comprehensive Planning] also enjoins the Secretary from making grants to applicants which have not made a good faith effort to implement their comprehensive plans. The committee has no desire to encourage planning as an academic exercise or to subsidize the production of "paper plans" which merely sit on library shelves. . . . [I]t expects recipients to utilize planning as guidance for public action.

S. REP. No. 693, 93d Cong., 2d Sess. 63 (1974).

a variety of programs. These programs include those involved in *Gautreaux*.[32]

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32. In practice, this emphasis on a regional perspective in the § 701 program has resulted in the development of regional housing plans known as "fair share," or housing allocation plans in many parts of the country. These plans are designed to see to it that housing opportunities for lower-income people and racial minorities are provided throughout the planning body's metropolitan or regional jurisdiction.

HUD has encouraged, funded, rewarded and even required the development of "fair share" plans. The first such plan was adopted in the Dayton, Ohio, area in 1970 by the five-county Miami Valley Regional Planning Commission (MVRPC). Since that time over a dozen allocation plans have been adopted by regional planning agencies, and a like number are in the developmental stage. *See generally* M. BROOKS, LOWER INCOME HOUSING: THE PLANNERS' RESPONSE (1972); H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 23; L. RUBINOWITZ, LOW-INCOME HOUSING: SUBURBAN STRATEGIES (1974). For a detailed discussion of the development and implementation of the Dayton Plan see Bertsch & Shafor, *A Regional Housing Plan: The Miami Valley Regional Planning Commission Experience,* PLANNERS NOTEBOOK, Apr., 1971, at 1-8; Craig, *The Dayton Area's "Fair Share" Housing Plan Enters the Implementation Phase,* CITY, Jan.-Feb., 1972, at 50-56; National Comm. Against Discrimination in Housing, *Fair Share Idea Begins to Spread,* TRENDS IN HOUSING, July-Aug., 1972.

HUD's approval of regional housing allocation plans is indicated by a statement made by the then Under Secretary of HUD, Richard C. Van Dusen, who reported that he was "encouraged" by the growing number of fair share plans: "For a long time, the only specific example we could cite was the Dayton Plan. . . . [But now] it's good to see the extent to which the example of the Dayton Plan is being applied, with appropriate variations." HUD News Release 16-17, Feb. 29, 1972 (remarks prepared for delivery by Richard C. Van Dusen).

Virtually all of these "fair share" plans have been prepared with the assistance of HUD planning grants under the § 701 program. Moreover, HUD has provided financial support for the implementation of the regional housing allocation plans. For example, HUD rewarded the MVRPC and the Metropolitan Washington Council of Governments (COG) with "bonus" allocations of subsidized housing funds. In the case of the Metropolitan Washington COG, the then HUD Secretary Romney stated, "The Department would be happy to reward Metropolitan Washington with a bonus of housing units beyond what the area would normally receive as a means of encouraging the Council of Governments' effort to establish a fair share plan on a 'real city' basis." METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, FAIR SHARE HOUSING FORMULA i (1972).

Metropolitan Washington's COG began implementing its fair share program in October, 1972. In January, 1973, the Nixon Administration announced a national moratorium on subsidized housing programs, which threatened the Washington COG program. In August, 1973, however, HUD granted the Washington COG a special exemption from the moratorium to enable it to carry out its fair share program. 1974 METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS ANN. REP. 3-4.

Not only has HUD encouraged regional planning agencies to include fair share plans as part of the "housing element" required by the Housing and Urban

The regional review mechanism, called the A-95 review process, was developed by OMB pursuant to the Demonstration Cities and Metropolitan Development Act of 1966[33] and the Intergovernmental Cooperation Act of 1968.[34] The A-95 review process is designed to assure that federally assisted projects in metropolitan areas are consistent with, *inter alia,* regional plans and federal civil rights requirements.[35] The reviewing agencies are usually the regional planning bodies which are also recipients of section 701 planning grants.[36] The review process provides further evidence of the Congressional concern that local housing and development activities be consistent with regional plans.

Development Act of 1968, but in one instance HUD required a regional agency to prepare a housing allocation plan as a condition of receiving § 701 funds. On March 31, 1971, HUD withdrew its support of a housing study being conducted by the Southeastern Wisconsin Regional Planning Commission (SEWRPC) for Milwaukee and six surrounding counties. HUD stated that its primary concern was its lack of a "short term action plan or strategy" and offered "an example of what might be done to meet that need." Letter from Edward M. Levin, Jr., Acting Assistant Regional Administrator for Metropolitan Planning and Dev., Chicago Regional Office, to George C. Berteau, Chairman, SEWRPC, March 31, 1971. The example given was a fair share plan for the seven-county region.

SEWRPC acknowledged its compliance with HUD's demand when it prefaced its plan with a statement that, "[t]he special short-term action-oriented housing study, on which this report is based, was undertaken upon the specific request of the U.S. Department of Housing and Urban Development." Southeastern Wisconsin Regional Planning Commission, A Short-Range Action Housing Program for Southeastern Wisconsin—1972 and 1973, at *iii,* June, 1972.

HUD Assistant Secretary Jackson wrote the Chicago Regional Office, approving its action: "I regard your action as a model all HUD offices should follow when ineffective and unresponsive approaches are followed by client agencies." Letter from Samuel C. Jackson, Assistant Secretary, Community Planning and Management, to Edward M. Levin, Jr., Assistant Regional Administrator, Metropolitan Planning and Dev., Chicago Regional Office, May 12, 1971.

The following areawide agencies have developed housing allocation plans: Association of Bay Area Gov'ts (San Francisco); Delaware Valley Planning Comm'n; Denver Regional Council of Gov'ts; Metropolitan Council of the Twin Cities Area; Metropolitan Dade County Planning Dep't (Florida); Metropolitan Washington Council of Gov'ts; Miami Valley Regional Planning Comm'n; Sacramento Regional Area Planning Comm'n; San Bernardino County Planning Dep't; Southeastern Wisconsin Regional Planning Comm'n; Toledo Regional Housing Coalition & Toledo Metropolitan Council of Gov'ts; West Piedmont Planning Dist. Comm'n (plans on file with authors).

33. 42 U.S.C. § 3334 (1970).

34. *Id.* §§ 3301-74 (1970); *id.* §§ 4201-44 (1970).

35. Office of Management and Budget, Circular No. A-95, Revised Nov. 13, 1973.

36. *See* notes 22-32 and accompanying text *supra.*

1. Demonstration Cities and Metropolitan Development Act of 1966

One statutory basis for the A-95 review process is the Demonstration Cities and Metropolitan Development Act of 1966.[37] Title II of that statute seeks to promote planned metropolitan development. In enacting the statute Congress found that the continued rapid growth of metropolitan areas makes comprehensive planning essential.[38] Congress concluded that "present requirements for areawide planning and programming in connection with various federal programs have materially assisted in the solution of metropolitan problems."[39] Accordingly, Congress intended to provide "additional encouragement and assistance to States and localities for making comprehensive metropolitan planning and programming effective."[40] Consistent with this emphasis on metropolitan planning, Congress required that applicants for certain types of federal assistance submit their plans for review and comment by a metropolitan-wide comprehensive planning agency.[41] This statute, therefore, not only provides for regional review of applications for federal assistance, but also requires that local planning efforts take into account regional needs.[42]

2. The Intergovernmental Cooperation Act of 1968

The Intergovernmental Cooperation Act of 1968 provides another indication of the Congressional intent that planning and program implementation take place on a metropolitan-wide basis.[43] The purpose of Title IV of this Act is "the sound and orderly development of all *areas,* both urban and rural."[44] The executive branch is authorized to "establish rules and regulations governing the formulation, evaluation, and review of Federal programs and projects having a significant impact on area and community development."[45] This provision is a second statutory basis for Circular A-95.[46]

37. 42 U.S.C. § 3334 (1970).
38. *Id.*
39. *Id.*
40. *Id.* § 3331(b).
41. *Id.* § 3334.
42. *Id.* § 3335.
43. *Id.* § 4231.
44. *Id.* § 4231(a)(1) (emphasis added).
45. *Id.*
46. *Id.* § 4233 (1970). The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970), *as amended,* 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975), is an additional statutory basis for Circular A-95.

3. The A-95 Review Process

The A-95 review process is the vehicle developed by OMB to implement the Demonstration Cities and Metropolitan Development Act and the Intergovernmental Cooperation Act. This process is one of the most important administrative vehicles for ensuring regional planning and implementation of housing programs.[47] Circular A-95 provides for the designation of "clearinghouses" to review and comment on applications for assistance under a long list of federal programs.[48] It requires that the review agencies be given an opportunity to comment on, and make recommendations with reference to, the regional impact of housing and other federally assisted programs.[49]

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47. Bureau of the Budget Circular No. A-95, July 24, 1969, *revised* in Office of Management and Budget, Circular No. A-95 Revised, Feb. 9, 1971.

48. In 1971 OMB expanded the list of programs subject to the A-95 review process to include over 100 programs that it considers central to metropolitan development. Housing projects subject to the A-95 review include (1) those of 50 or more lots involving any HUD home mortgage plan; (2) multifamily projects with 100 or more units under any HUD mortgage insurance program, either subsidized or unsubsidized or under the public housing program; and (3) HUD-assisted mobile home courts with 100 or more spaces. Office of Management and Budget Circular No. A-95 Revised § 8, Nov. 13, 1973. The program under consideration in *Gautreaux* is covered by Circular A-95. Although the review process covers some programs involving schools, these are basically ones related to construction of educational facilities, rather than educational programs.

49. Procedurally, a local or state agency or voluntary organization that plans to apply for federal assistance under a program covered by the circular is required to notify the regional clearinghouse of its intention. The clearinghouse then reviews the application and solicits comments from appropriate agencies, such as local governments and civil rights agencies. When the review process is completed, the application is submitted to the relevant federal agency, along with comments made by the clearinghouse and other commenting agencies.

This review includes injury into:

(1) the extent to which the project is consistent with or contributes to the fulfillment of comprehensive planning for the state, area or locality.
(2) The extent to which the project contributes to . . . appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes . . . .
(3) The extent to which the project contributes to more *balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups.*

Office of Management and Budget Circular No. A-95, pt. 1, § 5a, b, c (1970) (emphasis added).

Although federal agencies are not bound by the comments of regional A-95 clearinghouses, HUD Secretary Hills told a national organization of regional agencies that, "If any of you are concerned that the A-95 process is viewed lightly by HUD, let me disabuse [you] of that notion right now. Washington looks hard at your comments in judging the local plans against the realities of

Until 1972 the A-95 process did not specifically consider the civil rights impacts of proposed projects. Early that year OMB revised the circular to "provide for the consideration of civil rights implications in review of applications for assistance under Federal programs covered therein."[50] This authority mandates the regional agency to determine the extent to which a housing project increases locational choice, particularly for minorities. The Miami Valley Regional Planning Commission, the Metropolitan Washington Council of Governments, and the Metropolitan Council of the Twin Cities Area have successfully used the A-95 process to implement regional housing allocation plans, with the cooperation of HUD.[51]

D. *The Housing and Community Development Act of 1974*

In 1974 Congress fundamentally revised the community development programs.[52] This revision dramatically demonstrates Congress' increased concern that local planning designed to meet housing needs be carried out on a regional basis. In addition to strengthening the comprehensive planning assistance program,[53] the HCD Act establishes a community development block grant program under which local governments can apply for funds to be used for purposes in the

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regional development." HUD News Release 4, May 28, 1975 (remarks prepared for delivery by Carla A. Hills to the annual meeting of the National Association of Regional Councils, in Boston, Mass.).

50. Office of Management and Budget Circular No. A-95, Revised Transmittal Memorandum No. 2, § 1(9), Mar. 8, 1972.

51. *See* Espenshade & Walther, *Planning for Housing,* VI HUD CHALLENGE 30, 31 (Oct., 1975). Ms. Espenshade and Ms. Walther are program officers in HUD's Office of Community Planning and Development. *HUD Challenge* is HUD's official departmental magazine.

In the Dayton, Ohio, region, MVRPC has commented, under its A-95 authority, on housing projects that failed to increase housing opportunities in the region. The planning commission has adopted a regional "fair share" housing allocation plan for low- and moderate-income housing. *See* note 32 *supra.* MVRPC exercises its A-95 responsibilities by measuring proposed projects against that plan. In at least two instances MVRPC has commented negatively on proposed HUD-assisted housing developments. In both instances, HUD did not approve the project once the regional agency had commented adversely. Letter from Roberta Diehl, Housing Planner, MVRPC, to John W. Egan, Center for Urban Affairs, Northwestern University, June 26, 1975.

52. Housing and Community Development Act of 1974, P.L. 93-383, 88 Stat. 633 (codified in scattered sections of 5, 12, 15, 20, 31, 40, 42, 49 U.S.C. (Supp. IV, 1974)).

53. *See* note 31 and accompanying text *supra.*

general area of community development.[54] The application for these federal funds must not only state their proposed use, but must also include a "housing assistance plan" (HAP).[55] If the housing assistance plan does not meet federal standards, HUD must reject the entire community development application.[56]

The Congressional finding in the HCD Act and a speech by the Secretary of HUD elaborating these findings put forth the basic policies underlying the housing assistance plan and the statute. Congress initially found that urban communities face critical problems in part because of "the concentration of persons of lower income in central cities."[57] They also noted that "[t]he spatial deconcentration of housing opportunities for persons of lower income" is one of the law's primary objectives.[58]

Commenting upon these findings specifically, and discussing the purpose of the statute in general, Secretary of HUD Hills emphasized the regional perspective inherent in the statute:

> The undue concentration of poor people in a central city may only be capable of mitigation on a regional-wide basis.
> . . . .
> . . . [I]t is clear that a community's plan, drawn without reference to regional planning, is a program drawn in a vacuum, bound for disaster in a real world.
> . . . [T]he Act itself embodies a concept of regionalism, necessitated by the modern realities of regional growth and development.
> . . . There will be communities which will strongly oppose efforts to place their interests in the larger mosaic of our metropolitan areas. Strong opposition will meet efforts to take away a town's enjoyment of the benefits of economic development without sharing its burden of housing the low-income families who are employed by its industries.
> But rational metropolitan development will be furthered, and I think eventually our efforts will be applauded.[59]

Within this policy context, the statute defines specific requirements for the housing assistance plans. HAPs must assess housing conditions

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54. 42 U.S.C. § 5306 (Supp. IV, 1974).
55. *Id.* § 5304(a)(4).
56. *Id.* § 5304(c).
57. *Id.* § 5301(a)(1).
58. *Id.* § 5301(c)(6).
59. HUD News Release 2-7, May 28, 1975 (remarks prepared for delivery by Secretary Carla A. Hills to the annual meeting of the National Association of Regional Councils, in Boston, Mass.).

and needs, establish goals for lower-income housing, and identify general locations where such housing is to be provided. Most importantly, the analysis of housing needs must extend beyond the present local community residents; it must also include those who are expected to reside there, but who are currently living in other parts of the metropolitan area or region.[60] This assessment is to be based on "generally available" data, which includes, of course, the metropolitan planning agency's housing element.[61]

In addition, the statute requires that applications for community development funds receive an A-95 review by the appropriate regional body to evaluate their consistency with previously established regional plans and policies, including those related to housing.[62] If the regional

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60. 42 U.S.C. § 5304(a)(4)(A) (Supp. IV, 1974). The legislative committee's report states that, "[t]he Committee wishes to emphasize that the bill requires communities, in assessing their housing needs, to look beyond the needs of their residents to those who can be expected to reside in the community as well." H.R. REP. No. 1114, 93d Cong., 2d Sess. 7 (1974).

Secretary of HUD Hills has indicated that, "we are asking each community to give an assessment not of a purely local, but rather of a regional phenomenon. Communities are asked to assess expectations of needs that by definition extend to the commuters living elsewhere in the region." HUD News Release, May 28, 1975, at 6 (remarks prepared for delivery by Secretary Carla A. Hills to the annual meeting of the National Association of Regional Councils, in Boston, Mass.).

61. *See* 42 U.S.C. § 5304(c)(1) (Supp. IV, 1974).

62. *Id.* § 5304(e). Secretary of HUD Hills has stated the rationale for incorporating the A-95 review process into the community development program:

> A metropolitan area may include many small townships, cities, or counties. The process of its growth and development may ignore the artificial lines on a map delineating the constituent communities. . . .
>
> Regional development, like the law, is a seamless web. . . .
>
> The 1974 Act takes account of this reality with the A-95 review of local communities' applications by areawide agencies such as yours. This is an essential element of the required planning process. . . .
>
> Thus, the Act itself embodies a concept of regionalism, necessitated by the modern realities of regional growth and development.

HUD News Release 2, May 28, 1975 (remarks prepared for delivery by Secretary Carla A. Hills to the annual meeting of the National Association of Regional Councils, in Boston, Mass.). In the same speech, Secretary Hills laid out a blueprint for regional agencies to meet their responsibilities under the 1974 Act:

> Accordingly, this is what I would like to see you do. Draw an areawide housing plan for your metropolitan area which is factually unassailable in assessing the housing needs of workers in relation to the locations of their employment. Then, use your metropolitan plan as the A-95 standard against which to measure local HAPs. If you can do this, I can promise that HUD can and will make very good use of your A-95 comments on the submissions of your constituent communities.

Id. at 7.

agency finds the HAP inconsistent with regional plans and policies, the entire community development application may be rejected.[63]

The HCD Act exemplifies an increasing awareness on the part of Congress, OMB and HUD that housing problems and programs are metropolitan-wide in nature and that planning to meet housing needs must recognize that the "housing district" is the metropolitan area.[64] The Chicago metropolitan area, the geographical context for the *Gautreaux* case, illustrates the point clearly. HUD undertakes its "Housing Market Analysis" on a six-county "housing market area" basis. It funds the Northeastern Illinois Planning Commission (NIPC) through the section 701 program and gives NIPC jurisdiction over the same six-county metropolitan area. NIPC is also the A-95 clearinghouse for the six-county area; it reviews local applications for federal assistance from jurisdictions in the metropolitan area, including those under the HCD Act. In reviewing the applications for community development block grants, NIPC reviews the housing assistance plans for their consistency with the "Plan for Balanced Distribution of Housing Opportunities in Northeastern Illinois," developed by NIPC as its "housing element" under the section 701 planning program. In short, for planning purposes the housing "district" is the six-county Chicago metropolitan area. A metropolitan remedial plan in *Gautreaux* would be entirely consistent with this federal definition of the "district."

II. Implementation of Federal Housing Programs

Not only does HUD carry out, fund and otherwise encourage housing *planning* on a regional basis, it also implements its own subsidized housing programs within this broad geographical "district." In the public housing program involved in *Gautreaux*, as well as its other programs, HUD repeatedly uses the concept of the "housing market

63. 42 U.S.C. § 5304(a)(4) (Supp. IV, 1974).

64. The Urban Growth Act of 1970, 42 U.S.C. § 4501 (1970), also demonstrates Congressional intent that planning and implementation of housing and other development activities take place on a regional basis. The major goal embodied in the Act is "sound, orderly, and more balanced development" patterns offering a wide "range of alternative locations and encourag[ing] the wise and balanced use of physical and human resources in metropolitan and urban regions." *Id.* § 4502. Congress declared that implementation of this policy should lead to the "develop[ment] [of] means to encourage good housing for all Americans without regard to race or creed." *Id.*

area" as the geographical area within which housing programs are to be administered to provide housing opportunities for lower-income people and racial minorities.[65]

A. *The Public Housing Program*

The public housing program was initiated under the United States Housing Act of 1937.[66] It is this program that HUD was held to have administered in a discriminatory manner in *Gautreaux*.[67] HUD has interpreted this public housing statute to encompass a regional definition. In the "leased housing program," a variation of the public housing program involved in *Gautreaux*, the statute requires that leased housing be "calculated to meet the total housing needs of

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65. *See* notes 12-17 and accompanying text *supra*.

66. 42. U.S.C. § 1401 (1970). All of the programs involved in *Gautreaux* are established under this statute. Each provides federal funds to subsidize the cost of housing for low-income people, although there are variations among the programs. The original public housing program, commonly called "conventional" public housing, was the only form of public housing from 1937 to 1965. In conventional public housing the housing is constructed, owned and managed by a public, state-created housing authority. The federal subsidy covers the entire capital cost of the projects and, in recent years, has covered part of the operating costs as well. In addition to providing the subsidies for this housing, the federal government has regulated the activities of the housing authorities in a wide variety of ways.

In 1965 variations of the public housing program known as "turnkey" and "leasing" were created, the former administratively and the latter through legislation. *Id.* §§ 1409, 1421b (1970). Under the turnkey approach, the housing is privately constructed, and perhaps privately managed, but is owned by the housing authority. Under the leasing program, the housing is privately owned (it may be new construction or existing housing) and leased by the housing authority on behalf of low-income tenants. The initial remedial orders in *Gautreaux* applied to these three programs, since they were the only ones then in existence.

In the Housing and Community Development Act of 1974, Congress enacted the "housing assistance" program, commonly referred to as the "section 8 program" after the section of the statute in which it appeared. 42 U.S.C. § 1437f (Supp. IV, 1974). Under this program the housing is owned by either a public agency or a private owner and is leased by an eligible lower-income family. As under earlier programs, federal funds are used to subsidize housing costs on behalf of the family. This recent program came within the ambit of *Gautreaux* explicitly through an order of the district court of May 5, 1975 (unreported opinion), which stated the way housing for the plaintiff class was to be provided under the new program.

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

the community in which [housing units] are located."[68] HUD has interpreted that provision to authorize administration of the program on a regional basis:

> [W]e have concluded that Section 23 [42 U.S.C. § 1421b] units in a given 'locality' may be used to meet housing needs beyond the political boundaries of the locality. . . .
> [W]hat Congress intended by the term 'community,' as used in Section 23(a)(3) [42 U.S.C. § 1421b(a)(3)], was not a political subdivision, as such, but the housing market area in which the housing to be leased is located.[69]

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68. 42 U.S.C. § 1421b(a)(3) (1970).

69. Record Document 274, CHA Report, No. 5, at 1, Gautreaux v. Romney, 66-C-1410 (N.D. Ill.).

A second way in which HUD has recognized the regional nature of the public housing program relates to the jurisdiction of local housing authorities, the agencies that have traditionally operated the local public housing programs. These housing authorities are created by state statute, and their jurisdiction is defined by those statutes. In many states the jurisdiction of the local housing authority extends beyond the boundaries of a central city. In Hawaii, for example, the housing authority's jurisdiction is statewide. HAWAII REV. STAT. §§ 356-10 (1968). In Ohio the local housing housing authorities have virtually county-wide jurisdiction. OHIO REV. CODE ANN. § 3735.27 (1971). In Illinois the normal area of operation of a city housing authority extends three miles into any unincorporated area beyond the city boundary, while county housing authorities generally have jurisdiction throughout the county. ILL. ANN. STAT. ch. 67½, § 17(b)(1), (2) (Smith-Hurd Supp. 1974). In addition, housing authorities may operate outside their normal jurisdiction by contract with other public bodies. *Id.* § 27(c) (Smith-Hurd 1959). In New Mexico the legislature has created six regional housing authorities, which share staff with regional planning organizations covering the same geographical areas. N.M. STAT. ANN. §§ 4-30-1 to -6 (1974). Recently the state legislature enacted legislation creating a state housing authority to assist and coordinate the efforts of local and regional housing authorities. *Id.* §§ 4-30A-1 to -8. *See* Espenshade & Walther, *supra* note 51.

The HUD General Counsel has recognized that this pattern evidences an awareness that the program is metropolitan in scope:

> The provisions in State housing authorities law which authorize a city housing authority to operate in an area 5 or 10 miles beyond the city's limits and which authorize it to operate in a county or other city with the consent of the governing body concerned, were included in these laws because *it was realized that many cities would have to utilize the areas outside their borders in meeting their low rent housing needs.* It was recognized that the elimination of slums and the *provision of decent housing for families of low income in the locality are matters of metropolitan area scope.* . . . In effect, therefore, *the State legislatures have determined that the city and its surrounding area comprise a single "locality" for low-rent housing purposes.*

Record Document Exhibit 13, Gautreaux v. HUD, 66-C-1459 (N.D. Ill.) (emphasis added).

The Housing and Community Development Act of 1974 establishes the concept of fair market rents, which establish a maximum monthly rental for "an area," limiting the amount of monthly assistance payments under Housing Assistance

B. *The Civil Rights Act of 1968*

In addition to its regional focus in administering the public housing program—the specific program involved in *Gautreaux*—HUD has a general Congressional mandate to administer its housing programs on a regional basis to achieve equal opportunity in housing. This affirmative obligation grows out of Title VIII of the Civil Rights Act of 1968, the federal fair housing law,[70] and requires the Secretary of HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing]."[71]

On June 11, 1971, the President issued a statement on Federal Policies Relative to Equal Housing Opportunity.[72] That statement helped to clarify the "affirmative action mandate";

> Based on a careful review of the legislative history of the 1964 and 1968 Civil Rights Acts, and also of the program context within which the law has developed, I interpret the "affirmative action" mandate of the 1968 act to mean that the administrator of a housing program should include, among the various criteria by which applications for assistance are judged, the extent to which a proposed project, or the overall development plan of which it is a part, will in fact open up new, nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination. . . .
>
> In furtherance of this policy, not only the Department of Housing and Urban Development but also the other departments and

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Plans and the public housing program. 42 U.S.C. § 1437f(c)(1) (Supp. IV, 1974). In administering this important part of its programs, HUD has interpreted the statutory "an area" language to refer to housing market areas. 24 C.F.R. § 881.101(b)(1) (1975); *see* 40 Fed. Reg. 14,502, 14,504-64 (1975). *See also* U.S. Dep't of Housing and Urban Dev., FHA, Housing Production and Mortgage Credit, Notice HPMC-FHA 75-8, Feb. 26, 1975. This interpretation also evidences HUD's belief that housing programs, including the program at issue here, must be administered on a metropolitan-wide basis.

70. 42 U.S.C. § 3608(d)(5) (1970).

71. *Id.* Although the statute does not explicitly state that the affirmative mandate is to be carried out on a regional basis, the President and HUD have so interpreted it. *See* notes 72-88 and accompanying text *infra*.

72. Statement by President Richard M. Nixon, Federal Policies Relative to Equal Housing Opportunity, June 11, 1971, in 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 892 (1971).

> agencies administering housing programs—the Veterans Administration, the Farmers Home Administration, and the Department of Defense—*will administer their programs in a way which will advance equal housing opportunity for people of all income levels on a metropolitan areawide basis.*[73]

Subsequent to the President's statement, HUD adopted two sets of regulations in furtherance of the "affirmative action" mandate. The Project Selection Criteria were developed to enable HUD to select from among applications for housing subsidies those projects that would be most helpful in furthering equal opportunity and other national housing goals.[74] The Affirmative Marketing Regulations were designed to assure that the housing sponsors who were selected to receive HUD assistance took affirmative steps to attract minorities to their developments.[75] Both sets of regulations define the metropolitan "housing market area" as the geographical basis for administering housing programs.

1. Project Selection Criteria

The impetus for HUD's adoption of its Project Selection Criteria came not only from Title VIII and the President's statement, but also from several court decisions, including *Gautreaux* itself.[76] For example,

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73. *Id.* at 901 (emphasis added). Title VI of the Civil Rights Act of 1964 provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1970).

74. 24 C.F.R. § 200.700 (1975). *See generally* Maxwell, *HUD's Project Selection Criteria—A Cure for 'Impermissible Color Blindness'?*, 48 NOTRE DAME LAW. 92 (1972). Mr. Maxwell was then the HUD General Counsel.

75. 24 C.F.R. § 200.600 (1975). The regulations state:

> [T]he applicant shall meet the following requirements or, if he contracts marketing responsibility to another party, be responsible for that party's carrying out the requirements:
>
> (a) Carry out an affirmative program to attract buyers or tenants of all minority and majority groups to the housing for initial sale or rental. An affirmative marketing program shall be in effect for each multifamily project throughout the life of the mortgage. Such a program shall typically involve publicizing to minority persons the availability of housing opportunities through the type of media customarily utilized by the applicant, including minority publications or other minority outlets which are available in the housing market area.

Id. § 200.620.

76. Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969).

in *Shannon v. United States Department of Housing and Urban Development,* [77] the Third Circuit held that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts."[78] The Project Selection Criteria constitute this "institutionalized method." They establish several criteria that are intended to provide rational guidelines for selection of public housing and other projects to be funded from HUD's limited resources. Of the eight criteria, three relate directly to the location of the proposed development. One of these, Minority Housing Opportunities, has as a stated objective "to provide minority families with opportunities for housing in a wide range of locations."[79] HUD must determine whether a proposed project "will be located . . . . [s]o that, within the *housing market area,* it will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racially mixed."[80]

A second criterion is titled Improved Location for Low[er] Income Families, and its objectives include "avoid[ing] concentrating subsidized housing in any one section of a metropolitan area or town" and "locat[ing] subsidized housing in areas reasonably accessible to job opportunities."[81]

A third criterion re-emphasizes the metropolitan thrust of the Project Selection Criteria. It is called Relationship to Orderly Growth and Development, and its objectives include "develop[ing] housing consistent with officially approved State or multijurisdictional plans" and "encourag[ing] formulation of areawide plans which include a housing element relative to needs and goals for low- and moderate-income housing as well as balanced production throughout a metropolitan area."[82]

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77. 436 F.2d 809 (3d Cir. 1970).

78. *Id.* at 821.

79. 24 C.F.R. § 200.710 (1975).

80. *Id.* (emphasis added).

81. *Id.*

82. *Id.* The then Secretary of HUD, George Romney, stated that, "[t]his criterion envisions the implementation of regional or metropolitan allocation plans to encourage housing choice, as well as the use of the criterion itself as an inducement to develop allocation plans." HOUSE COMM. ON BANKING AND

In adopting the regulations, HUD specifically rejected arguments "that the term 'housing market area' should be defined to coincide with the boundaries of local political jurisdictions," asserting that "housing market areas often are independent of arbitrary political boundaries."[83] Thus in instituting the Project Selection Criteria, HUD expressed a clear intent to implement its subsidized housing programs on a metropolitan-wide basis.

2. Affirmative Marketing Requirements

To complement the Project Selection Criteria, HUD adopted affirmative fair housing market regulations. These regulations require that HUD assisted housing developments be marketed in a manner that will provide the same range of housing choices to all persons in a housing market area.[84] With regard to these regulations the Secretary of HUD stated that,

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CURRENCY, REAL ESTATE SETTLEMENT COSTS, FHA MORTGAGE FORECLOSURES, HOUSING ABANDONMENT, AND SITE SELECTION POLICIES 92d Cong., 2d Sess. 39 (1972) (statement of Secretary of HUD George Romney).

83. 24 C.F.R. § 200.710 (1975).

84. Under several variations of the public housing program involved in *Gautreaux*, affirmative marketing activities are required. Some provide for outreach efforts by the local housing authorities which are administering the program. Others require private developers of housing that will be occupied by public housing tenants to use affirmative marketing techniques. *See Recent HUD Regulations and Issuances on Fair Housing and Equal Opportunity*, V HUD CHALLENGE, Apr., 1974, at 32.

Since housing covered by the affirmative marketing regulations is generally a minority of the total new housing supply in any metropolitan area, HUD has encouraged builders to adopt voluntary affirmative marketing plans for housing that is not federally assisted. In Dallas, for example, builders throughout the metropolitan area are committed to marketing all of their housing so as to affirmatively attract minorities.

Even before HUD adopted its own regulations, the agency was cooperating with the association of homebuilders in the Dallas metropolitan area to develop what became the "Dallas Plan" for affirmative marketing. In mid-1972 HUD's Assistant Secretary for Equal Opportunity signed a formal memorandum of understanding between the Dallas group and HUD. The objectives of the plan, as stated in the agreement, are:

> 1. To increase substantially the opportunities of minority families to reside in neighborhoods outside areas of predominant minority concentration, through advertising and other methods intended to inform minority families *in the Dallas metropolitan area* that all housing by the builder group is available to them on an equal opportunity basis.
>
> 2. To inform the Dallas area general public that, in terms of equal housing, the *Dallas metropolitan area* is an open community, and to promote the benefits of this fact to Dallas.

> We have developed in tandem with the Project Selection Criteria, new affirmative marketing regulations which will require, effective February 25, [1972] that users of our housing programs take affirmative steps to make minority citizens aware of the availability of that housing. To the extent the criteria operate to open up new housing opportunities for minorities, we believe it is evident that affirmative steps should be taken to make the intended beneficiaries aware of these opportunities.[85]

Again, the relevant geographical area within which these housing opportunities are to be provided is the "housing market area." HUD's instructions to housing sponsors state that "the affirmative fair housing marketing plan . . . shall be designed to attract applications for the

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The "Dallas Plan" for Affirmative Marketing, IV HUD CHALLENGE, Apr., 1973, at 21 (emphasis added). *See* Pearl, *Equal Opportunity in Housing the First Five Years,* IV HUD CHALLENGE, Apr. 1973, at 12. Mr. Pearl is Director of the Office of Program Standards and Data Analysis of the HUD Office of Equal Opportunity. *See also* 2 U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, at 80 (1974).

In 1974 HUD's Assistant Secretary for Equal Opportunity signed another voluntary plan, the Affirmative Fair and Equal Housing Plan for the Miami Valley Region. This plan complements the housing allocation plan for the Dayton area discussed at note 32 *supra.* Its preparation was financed, in part, through a grant to the MVRPC under HUD's § 701 Comprehensive Planning Program. The plan was developed by representatives of real estate related associations, other citizen organizations, and governmental agencies with the purpose of correcting racially segregated housing patterns in the region. To achieve the objectives of the plan, the signatories agreed to "make special outreach efforts to inform minorities of the various types and location of housing opportunities available in all areas of majority concentration in the region. . . ." An Affirmative Fair and Equal Housing Plan for the Miami Valley Region 2, July 16, 1974 (voluntary plan developed by representatives of real estate related associations, other citizen organizations and governmental agencies to correct racially segregated housing patterns in the region).

Not only did HUD approve the plan, but in doing so it agreed to accept the affirmative marketing plan from any signatory applicant whose plan provided the information called for in the region-wide plan. Because of its concern that this region-wide plan actually be implemented, HUD insisted that the plan contain a provision permitting the agency to terminate its endorsement of, and participation in, the plan, if, at any time, reasonable progress was not being made toward achieving its objectives. *See id.*

85. HOUSE COMM. ON BANKING AND CURRENCY, *supra* note 82. The Secretary of HUD at that time, George Romney, described the steps to be taken by housing developers to attract minorities: "Such a program shall typically involve publicizing to minority persons the availability of housing opportunities through the type of media customarily utilized by the applicant, including minority publications or other minority outlets which are available in the housing market area." *Id.* at 41.

housing from all groups in the SMSA, or if there is no SMSA, the housing market area . . . ."[86] The sponsor's statement of anticipated results, in terms of actually attracting minority persons, is to "be realistic in terms of the proportion of minority persons at the appropriate income level in the metropolitan area (or if outside an SMSA, the housing market area)."[87] Thus the housing market area is the geographic area within which housing developers must affirmatively market their housing to minority groups.

C. *Housing and Community Development Act of 1974*

Consistent with the policies and practices discussed above, HUD has chosen to implement the housing program initiated in the HCD Act on a metropolitan-wide basis. The location criteria adopted are identical to the Project Selection Criteria in their geographical focus. The HUD regulations provide that new housing constructed under this program is not to be located in areas of minority racial concentration unless there are sufficient comparable housing opportunities for minorities outside such areas or there are over-riding housing needs "which cannot otherwise feasibly be met in that housing market area."[88] In addition, the affirmative marketing regulations, which are administered on a "housing market area" basis, apply to developments under the new program. Moreover, the "housing market area" is used as the basis for determining income eligibility for the program.

In sum, the "housing district" within which HUD administers its housing programs is the metropolitan area. Specifically, it is the "housing market area," which, in the *Gautreaux* context, is the six-county Chicago metropolitan area. This is, of course, the same geographical basis on which housing planning takes place. Since the housing programs that HUD administers on a metropolitan-wide basis include precisely the ones involved in *Gautreaux*, a metropolitan-wide remedial

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86. Implementational Affirmative Fair Housing Marketing Regulations, HUD Handbook, 8030.2 Rev., June, 1973, app. 2, at 4.

87. *Id.* at 3.

88. 39 Fed. Reg. 45,169, 45,173 (1974). For a discussion of the subsidized housing program enacted as part of the Housing and Community Development Act of 1974, the so-called "section 8 program," see Note, *Federal Leased Housing Assistance in Private Accommodations: Section 8*, 8 MICH. J.L. REFORM 676 (1975).

plan would be entirely consistent with this federal definition of the "district."

CONCLUSION

The federal government, in general, and HUD, in particular, are deeply involved in the process of planning and implementing housing programs. In developing these programs Congress, over a twenty-five year period, has increasingly demanded a regional focus for HUD's activities. Congress has come to require not only regional planning but regional implementation of HUD's housing programs.

In the planning context, the federal government's consistent emphasis is on the metropolitan area as the appropriate geographical area within which to carry out housing planning. HUD carries out its own planning effort, the Housing Market Analysis, on a metropolitan "housing market area" basis. HUD, however, is more heavily involved in funding planning activities than engaging in this itself. In the funding of planning, there has been an increasing emphasis on regional housing planning; HUD funds the operations of metropolitan and regional planning bodies throughout the country. Indeed, the establishment of most of these agencies was stimulated by the availability of federal planning funds, and many of these agencies' continued existence is dependent on such funds. HUD also shapes the agendas of these agencies in very significant ways, by the conditions placed on the section 701 grants. Most importantly, these agencies must undertake a "housing element" as a result of a specific Congressional mandate in 1968. HUD has interpreted that requirement to encourage strongly the development of metropolitan-wide "fair share" housing allocation plans. The plans are designed to provide metropolitan-wide housing opportunities for lower-income people, particularly racial minorities, the precise purpose of the requested relief in *Gautreaux*. Indeed, in at least one instance, HUD required the development of such a plan by a regional planning agency as a condition for receipt of further planning funds.[89] Where housing allocation plans have been carried out, HUD has rewarded the agencies involved by increasing funds for planning and for subsidized housing, even when there was a national moratorium on the subsi-

89. *See* note 32 *supra*.

dized housing programs. HUD has also stated its position that the A-95 review process is to be used to implement regional housing plans. In short, there is an elaborate federal scheme designed to see to it that housing planning is carried out on a metropolitan-wide basis.

On the program implementation side as well, Congress and HUD have amply demonstrated their definition of the metropolitan area as the geographical basis for carrying out housing programs such as those involved in *Gautreaux*. Congress provided HUD with a mandate to carry out its programs to affirmatively further fair housing, and the executive branch, through the President and HUD, have consistently interpreted this mandate as being metropolitan-wide in character. HUD requires that housing which it assists be located to provide metropolitan-wide housing opportunities for minorities and lower-income people and that the housing be marketed to reach those groups throughout the metropolitan area. Indeed, except in this aspect of *Gautreaux*, HUD has consistently taken the position, both in and out of court, that metropolitan remedies for housing discrimination are appropriate and necessary.

In contrast, as the Supreme Court said in *Milliken*, the educational process is an essentially local one. The federal government did not initiate public schools as it has initiated the public housing program, nor has it created a regional framework for the planning and implementation of educational programs comparable to the metropolitan-wide framework for housing planning and implementation discussed in this Article. To the extent that Congress has become involved with funding of educational programs, it has essentially worked within the pre-existing jurisdictional framework of state and local school boards and districts. Congress has not stimulated the creation of significant metropolitan educational planning entities as in the housing context, nor has it required that educational programs be implemented on a metropolitan-wide basis.

In short, the request for metropolitan relief in *Gautreaux*, unlike that in *Milliken*, is not a request for interdistrict relief since the federal government, particularly the defendant HUD, has defined the "district" as the metropolitan area, through a variety of statutes, regulations, policy statements, and administrative practices which lead to one conclusion: from the federal government's perspective, the appropriate "district" for planning and carrying out housing programs is the metropolitan area. Thus when HUD has been guilty of dis-

crimination in these housing programs, as in *Gautreaux*, it is necessary and appropriate to provide relief on a metropolitan-wide basis. Congress and the Constitution require no less.

NOTES