

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

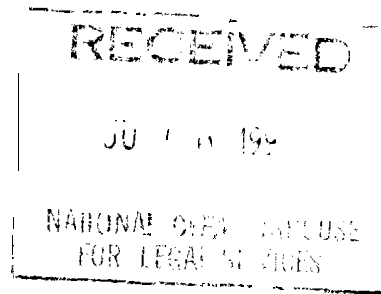
MARY HAWKINS, et al.,  
on behalf of themselves  
and others similarly situated,  
  
Plaintiffs,

vs.

JACK KEMP, Secretary of the United  
States Department of Housing and  
Urban Development; THE  
UNITED STATES DEPARTMENT OF  
HOUSING AND URBAN DEVELOPMENT;  
HOUSING AUTHORITY OF THE  
CITY OF OMAHA, and  
THE CITY OF OMAHA,  
  
Defendants.

CIV. NO. 90-o-55

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PLAINTIFFS' BRIEF IN OPPOSITION  
TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Prepared and submitted by:

Mary P. Clarkson #10701  
BROOM, JOHNSON, FAHEY & CLARKSON  
1722 St. Mary's Avenue  
310 Flatiron Building  
Omaha, NE 68102  
(402) 346-8323  
Attorney for Plaintiffs

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## INTRODUCTION

The federal and local Defendants (hereinafter "HUD" and "OHA") have moved for summary judgment. In addition, HUD has renewed its request that this Court restrict its standard of review of HUD's actions. We show below: (1) that this is not a case for summary judgment; there are substantial disputes about material facts; and (2) that HUD's actions are subject to full review of this Court.

### I. STATEMENT OF THE FACTS:

The issue in this case is whether HUD and OHA (and the City, though its position is not extensively discussed as it did not file a summary judgment motion) are liable for the segregation and inequality that have characterized Omaha's public housing and Section 8 programs since 1937. There is no dispute about when and where public housing projects were built. There is also no dispute about many of OHA's policies and practices such as its Tenant Selection and Assignment Plans (TSAP) or its use of special eligibility criteria for its scattered site program. There also is no argument about the regulatory relationship among all three Defendants. What is in sharp dispute is: the context of the decisions to construct projects; whether there was racial animus involved in location decisions; whether administrative practices violated the law; and, in those cases where HUD agrees a practice was in violation, whether or not HUD did enough to remedy the violation. There is also sharp dispute about the effects of the Section 8 program: Plaintiffs submit that black families are more

racially segregated than their black counterparts in the private market. Defendants disagree and believe, even if there is racial isolation, that there is nothing HUD and OHA should or can do about it. Plaintiffs show that the quality of public housing in majority black neighborhoods -- whether in the projects or Section 8 -- presents further proof of unequal treatment. Defendants dispute this and, even in those instances in which they agree deficiencies exist, they point the finger at some other entity as the responsible party. Full discussion of Plaintiffs' position with regard to these disputes follows infra. In compliance with Rule 56.1(b), Plaintiffs present the following summary of disputed issues and the reference to the sources of fact in support of their position':

(1) The location of housing projects in or on the borders of predominantly black neighborhoods from 1938 to 1985 (i.e., Logan, Hilltop, Spencer, Pleasantview, Good Neighbor Homes n/k/a Tommie Rose Gardens, and Spencer replacement projects) was:

- (a) influenced by racial animus;
- (b) supported and condoned existing private housing discrimination;
- (c) failed to fulfill duties to affirmatively promote fair housing; and

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<sup>1</sup> References herein will be to the documents Plaintiffs submitted in 1991 in their Cross-Motion for Summary Judgment, marked as CM followed by the page of the exhibit; to the additional Plaintiffs' Response exhibits filed with this brief marked as PR followed by the exhibit and page reference; to Defendant HUD's submission by using its numbering system, Ex.; and to HUD's Statement of Undisputed Material Facts marked as UF followed by the paragraph number.

(d) caused or contributed to the identification of North Omaha public housing as housing for black families.

(CM: 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 22, 32, 33, 35, 40, 54, 56; PR: 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 20, 37, 76; Ex.: 2, 3, 4, 5, 7, 9, 10, 12, 14, 25, 57, 58, 59, 61, 62)

(2) That the policies of HUD's predecessors (e.g., the Federal Housing Administration's (FHA) Underwriting Manual, the Public Housing Administration's (PHA) pardon of internal racial segregation at Logan Fontenelle and Southside) and the federal approval of OHA's siting decisions for Hilltop, Pleasantview and Spencer and of the siting decisions for Good Neighbor Homes and the Spencer Replacement Units had the natural, probable and foreseeable consequence of resulting in racially identifiable projects, and thereby constitutes intentional segregation;

(CM: 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 32, 33, 35, 40, 56; PR: 1, 2, 3, 4, 5, 6, 7, 8, 8A, 9, 10, 11, 12, 13, 14, 18, 29, 37, 61, 76; Ex.: 3, 4, 5, 9, 11, 12, 14, 25, 59, 61, 62; UF: 23, 24)

(3) That OHA's TSAPs and the failure to maintain a centralized waiting list allowed free choice of location and were:

- (a) a violation of Title VI and Title VIII;
- (b) condoned racially motivated choices by white applicants to avoid predominantly black North Omaha projects;
- (c) known to have the above results by HUD and, nevertheless, was condoned for many years; and
- (d) a cause of the persistent racial identifiability in North Omaha projects.

(CM: 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 41, 42, 43, 44, 45, 47, 49, 50; PR: 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 52, 54, 56; Ex.: 1, 6, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, 30, 31,

32, 36, 37, 38, 44, 45, 46, 66; **UF**: 24, 25, 26, 27, 28, 29, 30, 31,  
32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48,  
49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 63, 64).

(4) That OHA's administration of the Section 8 program, and HUD's monitoring and knowledge thereof, has resulted in black families in the Section 8 program being racially segregated and the quality of housing available through the Section 8 program being unequal;

(CM: 51; PR: 17, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72; Ex.: 8, 31, 55; **UF**: 15, 87)

(5) That the policies and practices of OHA -- again known and condoned by HUD -- have effectively excluded victims of the Defendants' racial discrimination from available desegregated remedies because:

(a) OHA officials have engaged in racial steering by blocking black project residents from utilizing desegregated options and discouraging them from choosing locations in white neighborhoods;

(b) OHA has had a history of imposing illegal special eligibility criteria which has resulted in the denial of desegregated opportunities to Logan Fontenelle displacees;

(c) The continued use of special eligibility criteria for scattered sites via OHA's current Home Ownership Program has a disparate impact on project residents and thus excludes them from a desegregated remedy.

(CM: 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54; PR: 15, 16, 44, 46, 49, 50, 51, 53, 55, 57, 62, 63, 64; Ex.: 31, 32, 34, 35, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54; **UF**: 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86)

(6) That HUD has condoned unequal maintenance of identifiably black projects both by OHA and other recipients of federal housing funds.

(CM: 36, 43, 51, 52, 55, 56; PR: 36, 51, 58, 59, 63, 70, 71, 73, 74, 75; Ex.: 8, 63; UF: 89, 90)

## II. ARGUMENT:

### A. Introduction:

The central issues in this case are:

(1) Whether HUD and OHA actions and omissions constituted intentional racial discrimination;

(2) Whether HUD and OHA violated their obligations affirmatively to promote fair housing; and

(3) Whether HUD and OHA actions and omissions had the effect of perpetuating segregation in the community or otherwise discriminating on the basis of race.

We will show below that there are substantial genuine disputes about the facts material to these claims. We begin with a review of the legal standards governing motions for summary judgment in such cases and of the legal standards for liability. We then review the facts regarding each pattern of liability.

### B. The Governing Principles Applicable to Summary Judgment:

Summary judgment is:

an extreme remedy that is not appropriate unless the moving party has established its right to a judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover

under any discernible circumstances.  
The Court is required to view the  
facts in the light most favorable to  
the party opposing the motion.

Keys v. Lutheran Family and Children Service of Missouri, 668  
F.2d 356, 357-58 (8th Cir. 1981). (See also cases cited  
therein.)

The Court must also give the party opposing the motion the  
benefit of all favorable factual inferences. Holloway v.  
Lockhard, 813 F.2d 874, 878 (8th Cir. 1987). See also EEOC v.  
Zippo Manufacturing Co., 713 F.2d 32, 34-35 (3d Cir. 1983).

As noted in Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
255 (1986), credibility determinations, the weighing of the  
evidence and the drawing of legitimate inferences from the facts  
are jury functions, not those of a judge, whether he is ruling on  
a motion for summary judgment or for a directed verdict. The  
evidence of the non-movants is to be believed, and all  
justifiable inferences are to be drawn in their favor.

Plaintiffs' Section 1981/1982, Title VI/Title VIII claims  
raise issues of intent similar to those in a Title VII case, so  
summary judgment standards for employment discrimination are  
relevant to Plaintiffs' case. The Court in Hayden v. First  
National Bank of Mt. Pleasant, Texas, 559 F.2d 994 (5th Cir.  
1979) notes in employment discrimination cases:

which usually necessarily involve examining  
motive and intent as in other cases which  
involve delving into the state of mind of a  
party, granting of summary judgment is  
especially questionable. In these cases  
summary judgment should be used cautiously and  
all procedural requirements given strict

adherence . . . [o]rdinarily summary disposition of Title VII cases is not favored especially on a potentially inadequate factual presentation.

Id. at 997

Likewise, as noted in Rosen v. Thornburgh, 928 F.2d 528 (2d Cir. 1991) :

A victim of discrimination is, therefore, seldom able to prove his or his claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence . . . consequently, in a Title VII action, where a defendant's intent and state of mind are placed at issue, summary judgment is ordinarily inappropriate.

Id. at 533 (citations omitted). See, also, McKenzie v. Sawyer, 684 F.2d 62, 67 (D.C. Cir. 1982) (" . . . The factual disputes involved in most Title VII suits preclude their resolution on summary judgment"); Porta v. Rollins Environmental Services, Inc., 654 F.Supp. 1275 (D. N.J. 1987) (quoting McKenzie, supra).

Similarly in Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir., 1988), the Court stated the test for granting a summary judgment is "particularly rigorous when the dispute issue turns on a question of motive or intent." As noted in Lipsett:

In a discriminatory discharge case, particularly, a Plaintiff will rarely, if ever, be able to produce a 'smoking gun' that provides direct, subjective evidence of an employer's [animus]. Rather a Plaintiff must try to convince the fact-finder to draw an inference from a broad array of circumstantial and often conflicting evidence . . .

Id. (quoting Stepamischen v. Merchants Dispatch Transport Corp., 722 F.2d 922, 928 (1st Cir., 1983). Id. at 895 (quoting). The facts presented in Plaintiffs' 1991 Cross Motion for Summary Judgment, buttressed by their latest Response, establish an uncontroverted pattern of unconstitutional conduct by the Defendants. However, in light of this Court's prior ruling denying summary judgment to both Plaintiffs and OHA, Plaintiffs have not filed a cross motion for summary judgment. The central issues are of "intent" and "impact" -- factual issues which are in sharp disagreement. This Court needs to hear all of Plaintiffs' evidence and Defendants' renewed request for summary disposition is totally inappropriate.

c. **Affirmative Duty To Desegregate:**

The Defendants present a disturbing view of their responsibilities under the constitution and civil rights laws. HUD and OHA see themselves as either passive bystanders or helpless observers of societal forces. Nothing could be further from the truth. Residential racial segregation was created and maintained by deliberate government policies and support of private real estate and financing discrimination.<sup>2</sup> Public housing

<sup>2</sup> Massey and Denton, American Apartheid: Segregation and the Making of the Underclass, Howard University Press, 1993; Taeuber, The Contemporary Context of Housing Discrimination, 6 Yale L & Policy Rev. 339, 340 (1988); Lief & Goering, The Implementation of the Federal Mandate for Fair Housing, in DIVIDED NEIGHBORHOODS, 227, 227-231; Kushner, Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States, 22 How. L.J. 547 (1979).

discrimination infected school policy and contributed to separate and unequal education for black children. United States v. School District of Omaha, 521 F.2d 530, 534-535 (8th Cir. 1975). As the Kerner Commission said in 1968: ". . . White society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it"<sup>3</sup>.

HUD, OHA and the City of Omaha were direct participants in and enablers of a housing system which has divided white and black families and which has been both separate and unequal. All three have a constitutional and statutory duty to undo the effects of past segregation. Bazemore v. Friday, 478 U.S. 385 (1986). Where segregation exists, the Defendants must "take whatever steps might be necessary to [eliminate] . . . racial discrimination . . . root and branch". Green v. School Board of Kent County, 391 U.S. 430, 437 (1968).

The federal government's earliest involvement in public housing policy mandated separation of the races. The Federal Housing Administration (FHA) 1938 Underwriting Manual required areas to be investigated to determine:

whether incompatible racial and social groups are present, for the purpose of making a prediction regarding the probability of the location being invaded by such groups. If a neighborhood is to retain stability, it

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<sup>3</sup> Nat'l Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 2 (Bantam Books 1968).

is necessary that properties shall continue to be occupied by the same social and racial classes.

(CM1:2). The Manual criticized areas where residents' children are "compelled to attend schools . . . where . . . pupils represent . . . an incompatible racial element". (CM1:3) and recommended that , in order to get a higher rating, "restrictive covenants [should be] recorded against the entire tract [to] provide . . . protection against undesirable encroachment and inharmonious use". (CM1:7) Housing authorities, including Omaha's, acquiesced to these demands and pressures which kept black families confined in existing black neighborhoods.

In 1962, President Kennedy's Executive Order 11063 recognized that such federal assistance to segregated housing was "unfair, unjust, and inconsistent with the public policy of the United States . . . ". Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962). But for many years thereafter, HUD had no regulations directly addressing segregative tenant assignment practices, or requiring that local authorities avoid segregative project siting. (Ex. 66) The passage of Title VIII, in 1968, 42 U.S.C. §§3600 et seq. substantially changed the legal landscape.

In 1968, Congress determined that federal deference to local control had to be abandoned in light of pervasive housing discrimination in both the private and public sectors. As discussed below, Title VIII's central purpose was the imposition of affirmative duty on governmental entities to ~~promote~~ fair housing.

HUD would like this Court to find that the federal Defendants' only obligation is to not directly discriminate itself, "to do no evil". But the specific language of Title VIII creates a far greater obligation. Title VIII was passed in recognition of:

the sordid story of which all Americans should be ashamed developed by this country in the immediate post-World War II era, during which the FHA, the VA, and other federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.

Cited in Young v. Pierce, 544 F.Supp. 1010, 1017 (E.D. Tex. 1982) .

The purpose of Title VIII is to remedy the "weak intentions" that led to the federal government's "sanctioning discrimination in housing throughout this nation". 114 Cong. Rec. 2281 (1968) at 2526-28. (Comments of Sen. Brooke). Title VIII drafters saw the law as a means to end discrimination and truly open the nation's housing stock to persons of every race and creed. Id. at 2274. It was "an absolutely essential first step toward reversing the trend toward "two separate Americas constantly at war with one another". Id. at 2524. Title VIII's purpose was to establish "a policy of dispersal through open housing . . . look[ing] to the eventual dissolution of the ghetto and the

construction of low and moderate income housing in the suburbs".  
Id at 2985 (Statement of Senator Proxmire). Otero v. New York  
Housing Authority, 484 F.2d 1122, 1134 (2d Cir. 1973).

Congress wanted "to have HUD use its grant programs to  
assist in ending discrimination and segregation, to the point  
where the supply of genuinely open housing increases". NAACP v.  
Secretary of Housing & Urban Development, supra at 155. HUD must  
not only refrain from discriminating itself but must also stop  
aiding discrimination by others. Shannon v. Department of  
Housing & Urban Development, 436 F.2d 809 (3d Cir. 1970).

Title VI regulations forbid programs with federal financial  
assistance to use:

criteria or methods of administration  
which have the effect of subjecting  
persons to discrimination . . . or have  
the effect of defeating or substantially  
impairing accomplishment of the  
objectives of the program or activity  
with respect to persons of a particular  
race, color, or national origin. (24  
C.F.R. 1.4(b) (2) (i) (emphasis added)

Title VIII built on that foundation by prohibiting racial, ethnic  
and other kinds of discrimination in virtually any kind of action  
with respect to almost every form of housing. The Secretary of  
HUD is:

(a) charged with responsibility for administering  
the full range of Title VIII's obligations and  
protections (42 U.S.C. §3608(a));

(b) directed to "administer the programs and  
activities relating to housing and urban development in  
a manner affirmatively to further the policies of" Title  
VIII (42 U.S.C. §3608(e) (5));

(c) directed to:

cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices (42 U.S.C. §3608(e)(3));

(d) required to make various studies and reports that specify "progress made nationally in eliminating discriminatory housing practices and furthering the purposes of this title, and recommendations for action . . ." (42 U.S.C. §3608(e)(2)(A))  
Title VIII also requires that:

all executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [Title VIII] . . . and shall cooperate with the Secretary [of HUD] to further such purposes.

(42 U.S.C. §3608(d)).

OHA would like this Court to find that its only obligation is to fill out HUD's forms saying it won't discriminate. But HUD's regulations go beyond that: they forbid federal fund recipients from using "criteria or methods of administration which have the effect of subjecting persons to discrimination. HUD's CDBG regulations require grantees such as Defendant City of Omaha to administer "all programs and activities related to housing and community development in a manner to affirmatively further the policies of the Fair Housing Act . . ." (24 C.F.R. §570.601(b)). Every jurisdiction's Comprehensive Housing Affordability Strategy (CHAS) must "include a certification that

the jurisdiction will affirmatively further fair housing".

(Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. §12705(b)(13)).

To judge whether the Defendants have obeyed these mandates:

The plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. (citations omitted) . . . The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated . . . (citations omitted) Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because ' . . . [w]hatever our law was once . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.' Hobson v. Hansen, 269 F.Supp. 491, 497 (D. D.C. 1967) . . . Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the government defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest. (citations omitted)

United States v. City of Black Jack, Missouri, 508 F.2d 1179, 1184-85 (8th Cir. 1974), cert. denied 422 U.S. 1042

As will be discussed below, the evidence shows intentional racial discrimination via: the history of private discrimination, indeed racial hostility in Omaha, and the decisions of the Defendants to bow to that prejudice when public housing was built; the long history of free choice tenant assignment

procedures which permitted racially motivated choices of white housing applicants; the existence of intolerable conditions in North Omaha projects; and the exclusion of black project residents from desegregated options. Disparate effects are shown by the persistence of identifiably black projects and identifiably white elderly projects and the persistent racial isolation of black Section 8 recipients. Defendants' deliberately disregard the evidence of the former and they have failed to make a showing that the latter is "necessary to promote a compelling government interest". The only contravening justification presented by Defendants as to the segregative effect of the siting of Good Neighbor Homes and Spencer replacement projects is that the decisions were accommodations to black community demands to place housing in the black community.

Courts have held that alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools . . . The fact that a governmental agency might have made numerous and consistent efforts towards desegregation has not yet been held to negate liability for an otherwise segregated result.

Gautreaux v. Romney, supra 448 F.2d at 737-738. These kinds of justifications are similar to those specifically rejected by the Eighth Circuit Court in Omaha's school desegregation case. Faculty segregation could not be justified by the belief that "black" role models:

should be assigned to teach black children . . . such . . . is contrary to the . . . underpinnings of Brown v. Board of Education . . . logically

suggest[s] herding black students into their own schools where they could be taught by their proper black role models . . . [and] . . . suggests that the defendants were 'effectuating the discriminatory designs of private individuals'.

United States v. School District of Omaha, supra at 538-539, n.14.

HUD and OHA also argue that predecessor's practices or societal forces are not their wrong doing. As Plaintiffs demonstrate, however, there is overwhelming evidence that government action and omission condoned and contributed to housing segregation.<sup>4</sup>

**D. Proof of Defendants' Segregative Intent:**

A central issue in this case is whether HUD or OHA actions constitute intentional racial segregation. The Supreme Court has held that direct evidence of intent is not **necessary**;

<sup>4</sup> -----  
Both HUD and OHA cite Jenkins by Agyei v. State of Missouri, 807 F.2d 657 (8th Cir. 1986) as support for their restricted view of agency responsibility. HUD uses Jenkins as Eighth Circuit approval of FHA underwriting criteria and permission of HUD's local policies. Defendants' reliance is misplaced. The Jenkins case imposed an intra-district remedy against the Kansas City School District and the State of Missouri, but rejected claims for inter-district relief. That decision was affirmed on a 4-4 decision. Circuit Judge Arnold concurred in the intra-district remedy, but dissented from the denial of inter-district remedy. He noted that although the plurality opinion announced the judgment, "it does not make law for this circuit except in those respects that command a majority vote of the judges sitting in this case". Judge Arnold also concluded, in agreement with Chief Judge Lay, Judges Heaney and McMillian, that there were numerous constitutional violations by HUD; past housing discrimination had inter-district effects; both HUD and its predecessors had ignored those effects and had failed to remedy the vestiges of discriminatory practices.

circumstantial evidence can suffice and, under Title VIII, effects of actions which impact more heavily on one race demonstrate intentional discrimination. Washington v. Davis, 426 U.S. 229, 242 (1976).

The Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination". Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960), citing Lane v. Wilson, 307 U.S. 268, 275.

In this day and age, when racial discrimination is no longer as fashionable as it was a generation or two ago, racists are more cautious than they used to be, and for that reason it is now much more difficult to provide direct or conclusive proof of discriminatory intent. The law would be as blind as the mythical figure of justice if it did not take account of that reality, rejecting the use of circumstantial evidence of intent.

Brown v. Artery Organization, Inc., 654 F.Supp. 1106, 1117 (D. D.C. 1987).

Proving intent demands a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and includes five areas of inquiry:

(1) Whether the impact of an official action bears more heavily on one race than another;

(2) Whether there is a clear pattern which cannot be explained other than on grounds of race as evidenced from the effect of the action;

(3) Whether the historical background of the decision reveals actions taken for invidious purposes;

(4) Whether the sequence of events leading up to the challenged decision reveals the decision-maker's purposes; and

(5) Whether the governmental act or the history of the decision process or the history of the agency reveals purpose and intent.

Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 266-268 (1977)

Crucial to utilizing these five criteria is the Eighth Circuit's guideline that "appellants should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clear after scrutinizing each." Alexander, 687 F.2d at 1207-08 (quoting Continental Ore Comp. v. Union Carbide Co., 370 U.S. 690, 699 (1962) as cited by the court in Griffin v. City of Omaha, 785 F.2d 620, 628 (8th Cir. 1986)). Discrimination cases require a court to view the totality of the circumstances:

. . . the district court should not carve the environment into a series of discrete incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that 'each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the . . . environment created may exceed the sum of the individual episodes.' Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1524 (N.D. Fla. 1991). 'A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents but on the overall scenario.' (cases omitted)

Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559, 564  
(8th Cir. 1992).<sup>5</sup>

HUD and OHA want this Court to separately judge the Plaintiffs' evidence on each of six areas: siting of projects, internal segregation, Section 8 oversight, scattered site replacement oversight, project maintenance and modernization. Plaintiffs shall respond below to each of these areas, referring to additional evidence ignored by HUD and OHA and which is admissible at trial. But in viewing both the facts which the Defendants believe are uncontroverted and additional evidence, the Court must review the evidence in its totality. This is a pattern and practice case which means that the actions of the Defendants are not separable: The stark reality of racially identifiable projects and a segregated Section 8 program did not occur overnight or by accident. The existence of private discrimination cannot be ignored; it provides evidence about the context of governmental actions and government acquiescence to it shows governmental discriminatory intent. Defendants' program administration and decisions must be analyzed not only in their historical context but also in their total effects.

<sup>5</sup>-----  
To the extent that proving discriminatory intent is analogous to proving a conspiracy in an anti-trust case, the further comment of the United States Supreme Court is a useful guide: "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole". Continental Ore Co. v. Union Carbide Corp., supra 370 U.S. at 699.

**E. Neither Sovereign Immunity nor the APA Limit this Court's Review:**

Once again HUD is using its self-serving view of the APA and sovereign immunity to try to narrow this Court's review of the facts, Plaintiffs' burden, and HUD's duties. This Court clearly spoke on HUD's attempts as to the first two issues in its August 3, 1992 ruling allowing Plaintiffs' broad discovery in order to investigate the intent elements of their §1981 and §1982 claims. The authority for that holding is equally applicable to HUD's latest effort.

Since at least 1908, the federal courts have been granted the power, despite sovereign immunity, to prevent government officials from acting outside of their statutory authority, from ignoring statutorily imposed duties, and from acting unconstitutionally. Ex Parte Young, 209 U.S. 123 (1908). This doctrine has been followed in numerous housing cases.<sup>6</sup>

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<sup>6</sup> See, e.g., Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Baker v. F&F Investment co., 489 F.2d 829 (7th Cir. 1973); Project Basic Tenants Union v. Rhode Island Hous. and Mortgage Fin. Corp., 636 F.Supp. 1453 (D.R.I. 1986); Young v. Pierce, 628 F. Supp. 1037 (E.D. Tex. 1985), subsequent decision, 640 F.Supp. 1476 (1986), vacated on other grounds, 822 F.2d 1368 (5th Cir. 1987); Little Earth of United Tribes v. United States Dept. of HUD, 584 F.Supp. 1292 (D. Minn. 1983); Commonwealth of Pennsylvania v. Lynn, 362 F.Supp. 1363 (D.D.C. 1973), rev'd on other grounds, 501 F.2d 848 (D.C. Cir. 1974); Hicks v. Weaver, 302 F.Supp. 619 (D. La. 1969); Powelton Civic Homeowners Ass'n v. Department of HUD, 284 F.Supp. 809 (E.D. Pa. 1968).

HUD's latest attempt to limit this Court's review is a misconception of the purposes behind 5 U.S.C. §701(a) and 5 U.S.C. §706(2) (A). HUD has discretion to administer funds and formulate programs pursuant to Title VIII, but that does not mean that HUD is immune from review for abuse of that discretion. ". . . The key question is not whether an agency action is committed to agency discretion by law, but the extent that it is so committed". (Emphasis in original.) (5 K.Davis, Administrative Law Treatise, §28-5, at 271.) HUD is trying to impose the §701(a)(2) exclusion (agency action is committed to agency discretion by law) to the §706(2)(A) reviewability for abuse of discretion.

This exception is narrowly construed and rarely applied because Section 701(a)(2) requires a determination that the agency acted unlawfully and these cases typically involve areas where review itself could impede the agency's abilities to carry out statutory functions. See, e.g., Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948). This is not such a case: therefore, the exclusion from de novo review HUD now advocates could apply only if the Court determined that Congress intended the type of actions at issue in this case to be totally exempt from review.

Such a view is clearly inappropriate given the significance of the open housing rights guaranteed by Title VIII. "Fair housing is a key and indispensable part of any solution of the interracial problems of our country". 114 Cong. Rec. 2275

(Statement of Sen. Mondale), Id. at 2703 (Statement of Sen. Javits). Fair housing is "more important than jobs-, and even more important than equal treatment under the law."); Id. at 2703 (Statement of Sen. Javits).

. . . plaintiffs claim that HUD's practices over time, its pattern of behavior, reveals a failure 'affirmatively . . . to further' Title VIII's fair housing policy. The [plaintiff] does not complain of individual instances so much as it uses individual instances to show a pattern of activity, which pattern constitutes the alleged violation. Thus, we need not decide how or whether a court can fashion standards governing when, or the extent to which, HUD should use an individual . . . decision affirmatively to bring about desegregation. . . . Rather, . . . the court must decide whether over time HUD's pattern of activity reveals a failure to live up to its obligation. . . . It should be able to determine whether the agency's practice, over time, . . . has been 'arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. §706(2)(A). . . . NAACP v. Secretary of Housing & Urban Dev., 817 F.2d 149, 158-159 (1st Cir. 1987).

There are waivers of sovereign immunity beyond Section 702 of the APA. There are three statutory provisions relating to federal housing programs which grant the Secretary of HUD the power to sue and be sued: 12 U.S.C. §1702 (National Housing Act programs); 42 U.S.C. §1404(a) (public housing and Section 8

programs) ; 42 U.S.C. §1456(c) (urban renewal programs). These authorizations to sue and be sued have regularly been considered to be explicit waivers of the sovereign immunity defense.<sup>7</sup>

Sovereign immunity also cannot be used to shield HUD from responsibility for a remedy. Congress has expressly provided for a waiver of sovereign immunity for actions

. . . in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.

5 U.S.C. 702. The congressional intent was to "eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity". H.R. No. 1656, 94th Cong., 2d Session reported at 1976 U.S. Code Cong. & Admin. News, 6121, 6129. Again, numerous courts have so held in housing cases.<sup>8</sup>

<sup>7</sup> Federal Housing Administration Region No. 4 v. Burr, 309 U.S. 242 (1940); C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co., Inc., 903 F.2d 114 (2d Cir. 1990); Mann v. Pierce, 803 F.2d 1552 (11th Cir. 1986); Niagara Mohawk Power v. Bankers Trust, 791 F.2d 242 (2d Cir. 1986); Falls River Realty v. City of Niagara Falls, 754 F.2d 49 (2d Cir. 1985); Burroughs v. Hills, 741 F.2d 1525, 1528 (7th Cir. 1984); Merrill Tenant Council v. United States Dept. Of HUD, 638 F.2d 1086, 1090 (7th Cir. 1981); Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848, 851, n.11 (D.C. Cir. 1974); Conille v. Secretary of HUD, 649 F.Supp. 1133 (D. Mass. 1986), aff'd on this ground, 840 F.2d 105 (1st Cir. 1988); Brown v. Lynn, 385 F.Supp. 986, 991 (N.D. Ill. 1974); English v. Town of Huntington, 335 F.Supp. 1369, 1373 (E.D. N.Y. 1970); Powelton Civic Homeowners Assn. v. Department of HUD, 284 F.Supp. 809 (E.D. Pa. 1969).

<sup>8</sup> NAACP, Boston Chapter v. Pierce, 817 F.2d 149 (1st Cir. 1987), rev'g 624 F.Supp. 1083 (D. Mass 1985), on remand, 721 F.Supp. 361 (1989); Panola Land Buyers Assn. v. Schuman, 762 F.2d 1550 (11th

Over the last 13 years, OHA has received almost 22 million dollars in public housing development funds, over 59 million dollars for Section 8 certificates, over 26 million dollars for Section 8 vouchers, almost 35 million dollars for Section 8 moderate rehabilitation, over 45 million dollars for modernization programs, over 39 million dollars in public housing operating subsidies, and almost three million in other grants. (PR77) Clearly, this Court has the power to assure, through injunctive orders, that those monies are spent to dismantle the current segregated system and to affirmatively further fair housing. In addition, there is no question that this Court has the power to order relief in the form of new funding. The effect of the amendments to 5 U.S.C. §702 is:

to demonstrate conclusively that the exception for an action seeking 'money damages' should not be broadened beyond the meaning of its plain language . . . [Suits to enforce federal statutes and regulations are not suits] seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, [they are suits] seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.

Bowen v. Massachusetts, 487 U.S. 879, 900 (1988).<sup>9</sup>

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Cir. 1985); Jaffe v. United States, 592 F.2d 712 (3d Cir. 1979), cert. denied 99 S.Ct. 2406 (1979); Tinsley v. Kemp, 750 F.Supp. 1001 (W.D. Mo. 1990); Almonte v. Pierce, 666 F.Supp. 517 (S.D. N.Y. 1987).

<sup>9</sup> Of course, there is also no question that this Court can order remedies which require the City of Omaha to use its taxing and bonding authority to remedy the unconstitutional conduct. Missouri v. Jenkins, 495 U.S. 33 (1990).

**F. OHA's Segregative Project Siting:**

As required by Arlington Heights, the historical context in which the siting decisions for the multi-family projects were made must be considered. This historical context includes the following:

(1) On September 18, 1919, thousands of whites mobbed the courthouse in Omaha and shot and hanged a black man accused of raping a white woman. William Brown's body was burned and then hung from a trolley poll at a downtown intersection. Martial law was declared and the U.S. Army restored order. Order was restored, but no examination of the racism behind the rioting ever occurred.

Omaha violence set a precedent that was to be followed in the urban conflicts of the 1960s. The power of the federal government was available to limit conflict and to establish a monopoly on the use of physical coercion, but that power was not to confront the social roots of violence.

Heibert, Shapiro, U. of Mass. Press, White Violence and Black Response; Patterns on the Landscape: Heritage Conservation in North Omaha; Report prepared by Omaha City Planning Department, Martin H. Shukert, Director. June, 1984, (hereinafter cited as PR76). (PR76:43-44)<sup>10</sup>

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<sup>10</sup> This City of Omaha publication, detailing the formation of Omaha's ghetto, the 1919 riot, internal segregation of Logan Fontenelle and Southside, the widespread use of restrictive covenants, the concentration of public housing in the 1950s and thereafter on the Near Northside, the civil rights struggle of

(2) In the 1930s and 1940s, Omaha had the largest black population in any city west of Illinois, east of California, and north of Kansas City, and it was severely segregated.

Weiss, Nancy J., Whitney M. Young, Jr. and The Struggle for Civil Rights, "St. Paul and Omaha", 47-54, Princeton University Press (PR76:42; 52-55)

(3) In the 1930s and 1940s, there was wide-spread use of restrictive covenants in Omaha's private land sales (CM6). Such covenants<sup>11</sup> were actually enforced, as late as 1950, by private parties in lawsuits against those who failed to obey the restrictive covenants. (PR1, CM33:1675, PR76:56) This occurred despite Shelley v. Kramer, 344 U.S. 1 (1948) which found the existence and enforceability of such covenants unconstitutional. Continued enforcement of the covenants was publicized in Omaha (PR2).<sup>12</sup>

(4) There was overt discrimination in the advertisement of rental and sales properties as late as 1965 (PR3).

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the 1960s and the 1966, 1968 and 1969 riots, was included in its entirety as Tab D, Exhibit 75 in HUD's 1986 Title VI compliance review of OHA. (Ex.25) Omaha's history of racial oppression was fully known by HUD.

<sup>11</sup> The exemplar deeds contained in CM6 are authenticated in accordance with evidentiary rule 901(b)(7) and (b)(8), are also self-authenticated (as Register of Deeds records) and are admissible pursuant to Rule 803(14), (15), and (16).

<sup>12</sup> These documents are admissible under Fed. R. Evid. 803(8), (14), and (16). See, also, n.13 infra.

(5) From 1965 to 1968, the code word "conditions" was placed on listings of homes to signal the refusal of a homeowner to sell to blacks. Realtors openly honored the code in every area but the Near North Side, the boundaries of which were well-known and generally accepted. (PR6, deposition testimony of real estate broker Robert Herink, CM8, affidavit of Robert Herink CM7, affidavit of N.P. Dodge, Sr.).<sup>13</sup>

(6) Such overt discrimination was approved and condoned by the federal government and specifically by HUD's predecessors. (CM1, CM2). Such encouragement by the government of private racial discrimination is unconstitutional. Reitman v. Mulkey, 387 U.S. 369 (1967); Palmore v. Sidati, 466 U.S. 429, 433 (1984). The segregative impact of such historical actions by the government was recognized by the U.S. Commission on Civil Rights in 1971 (PR2a) and has consistently been cited as proof of intentional segregation. Young v. Pierce, 628 F.Supp. 1037, 1045 (E.D. Tex. 1985); Cohen v. Public Housing Administration, 257 F.2d 73, 74 (5th Cir. 1958); cases cited in footnote by Judge Arnold in Jenkins by Agyei v. State of Missouri, supra at 692.

(7) The siting decisions for Logan Fontenelle, Southside, Pleasantview, Hilltop and Spencer were all made in a racially hostile environment as evidenced by:

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For this and other depositions taken by Defendants' counsel, Plaintiffs' counsel was unable to file the original transcripts with the Court, since those are in the possession of the Defendants' counsel. Copies of relevant excerpts are included in the Addendum to Plaintiffs' Response at the PR cites indicated.

(a) A black World War II veteran had to enlist the help of a white civil rights group to prevent violence when he moved west of 30th Street. (PR4:14:3-24, testimony of Denny Holland, a white male, who lived and worked in the black community in the late 1940s, CM33; PR76:55; Meier and Rudwick, CORE: A Study in the Civil Rights Movement, 1942-68, University of Illinois Press);

(b) Blacks had to seek the assistance of whites to view homes they were thinking of buying outside of the black community. (PR4:16:16-17:13);

(c) In 1948, a black child wanting to swim at the Morton Park Pool in South Omaha was badly beaten. (PR4:17:23-25);

(d) Blacks experienced difficulty in moving beyond the Near North Side well into the 1960s. (Testimony of Rev. Tyler, black minister, PR5:26-29; 89-90);

(e) In the early 1950s, Reverend Tyler's daughter was refused admission to a white Sunday School. (PR5:30);

(f) Blockbusting by realtors created tension and fear. (PR5:30).

(8) There can be no doubt that the black community was tightly constricted, well-defined and its boundaries were generally known and accepted. (PR4:15-16, 25, 28; PR5:32; PR6:23:4-9, 26:13-21, CM33)

(9) The Defendants cite only the construction dates for the North Side projects and ignore both the sequence and the context of the siting decisions. A careful examination of the history of those decisions as set forth below reveals that: (a) from the beginning of its consideration of where to place additional units funded by the federal government, OHA and HUD's predecessor viewed units built on the North Side as being for black families; (b) the boundaries of the black community were well-known and widely recognized; (c) the rejection of sites in

South Omaha was based on public opposition which, in the context of racial attitudes at the time, must be seen as racially biased; (d) protests by North Omaha property owners and groups were ignored in contrast to the affirmance of South Omaha neighbors; (e) the City of Omaha, through the actions of its City Council bowed to this public pressure and acquiesced to the OHA priorities.

The chronology of newspaper accounts<sup>14</sup> and the public records of the decision-makers affirms this.

November 21, 1948: A private housing project designed "for Negro families" is planned for Spencer between 27th and 30th. (PR7:1)

August 12, 1949: OHA debates how many housing units it should request from the federal government for whites and negroes both or "negroes alone". (PR7:2)

The press reports that OHA had voted in June to limit future housing requests to units "for Negroes on the Near North Side", but this was changed and the request was extended for 1,800 units. (PR7:3)

September 27, 1949: Omaha's City Council approves OHA's application for 700 housing units. (PR7:4)

October 6, 1949: At a public forum, David Beber, attorney for OHA, says some of the 700 units will be for the Omaha's "Negro area", defined as Cuming to Spencer, 19th to 30th. (PR7:5)

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<sup>14</sup> Defendants denigrate the use of newspaper accounts as a reflection of the attitudes of the times, but such documents are clearly admissible under Fed. R. Rev. 803(16) and 901(b) (8) and they are reliable under the requirements of Fed. R. Evid. 403. In addition, they have been cited as credible evidence in other racial discrimination cases such as Ammons v. Date City, Florida, 594 F.Supp. 1274, 1280, n.8 (D.C. Fla. 1984) (aff'd 783 F.2d 982 (per curiam, rehearing denied 788 F.2d 1570 (11th Cir. 1986))).

January 25, 1950: Harry Burke, Superintendent of Omaha Public Schools (hereinafter OPS), says schools on the south side have too much vacant space and argues against building projects in areas where schools are overcrowded, such as the North Side. (PR7:6)

January 27, 1950: OHA chair says two sites on "Near North Side are being considered. (PR7:6)

August 8, 1950: The City Council approves Projects 1-3 and 1-4, 400 units to be located at 30th & Lake and 30th & Spencer. (PR7:7-9)

August 15, 1950: Omaha's City Attorney issues the legal opinion that "only weighty evidence of the unsuitability of the sites should induce [the Council] to disapprove the selections made by the Housing Authority". (PR7:10-12)

January 4, 1951: Property owners at 30th & Lake sue OHA claiming the proposed project will damage them. (PR7:13)

January 4, 1951: Public report that OHA is considering two new sites in Central South Omaha for 300 units; sites are close to under-capacity public schools. (PR7:14)

January 6, 1951: Groundbreaking for 30th & Lake project of 235 units; another 165 to be at 30th & Spencer; report that 300 units will be erected in South Omaha. (PR7:15)

January 9, 1951: City Council approves site for Project 1-5 at 42nd & F, in South Omaha, for 300 units. (PR7:16)

January 9, 1951: OHA approves 42nd & F Street site; school officials agree with decision because existing school buildings can handle the expected increase in students. (PR7:17)

January 11, 1951: South Omaha Sun makes the same report and specifies Robbins School which has dwindled from a peak enrollment of 600 to less than 300. (PR7:18)

January 16, 1951: Construction company asks OHA to give up the 42nd & F Street site because it is thinking about building a freezer plant and warehouse. World Herald reports that a site near Southside Terrace was abandoned earlier because the Roth Packing Company was interested in using the property but later decided not to build in Omaha. (PR7:19)

January 18, 1951: OHA board member<sup>15</sup> plans to fight abandonment of the 42nd & F Street site; says there are only

<sup>15</sup> The map in HUD Exhibit 4 shows 42nd and F (4100 South) as falling in Tract 34 which, in 1950, was 100% white.

three houses in the area and some of the tract has been a "wilderness" for years. (PR7:20)

January 25, 1951: Home owners circulate petition against industrial use of the site at 42nd & F; word received by OHA that neighbors don't want public housing either. (PR7:21)

January 30, 1951: OHA proposes a compromise so that the plant can be built along with public housing. (PR7:22)

January 30, 1951: Home owners file petition with the Omaha City Council protesting any construction of low rent housing in the area of 42nd & F. (PR7:23-24)

February 1, 1951: Public press reports the petition to stop 42nd & F Street site. (PR7:25)

February 2, 1951: OHA members declare they are in favor of the City Council rescinding its approval of the 42nd & F Street site. (PR7:26)

February 4, 1951: OHA chair announces 42nd & F Street site has been abandoned because OHA is "responsive to the wishes and the will of the people". (PR7:27)

February 6, 1951: Based on the OHA statement citing the considerable opposition from the residents of the neighborhood to the use of the 42nd & F Street site for public housing, and based on the filing of the petition protesting the housing, the City Council moves to reconsider its January 9, 1951 approval of the site. (PR7:28-29)

February 6, 1951: City Council reversal reported in the public press. (PR7:30)

February 8, 1951: OHA proceeds cautiously in its search for other South Omaha sites: "We don't want a repetition of this when we propose another site". (PR7:31)

February 9, 1951: OHA survey of the area for Project 1-3 shows 39 houses, 37 of which were "occupied by Negroes". OHA abandons further discussion of possible sites on the south side, and directs the architects to explore additional sites on the north side east and west of 30th and south of Lindsey to Parker. (PR7:32-34)

February 9, 1951: OHA chair agrees to abandon further south side sites because of neighborhood opposition. (PR7:35)

March 2, 1951: OHA formally moves to drop south Omaha sites: "We might as well go where we are welcome". (PR7:36)

March 9, 1951: Site for remaining 300 units to be known as Pleasantview is chosen on north side: both sides of 30th, west to Prospect Hill Cemetery, and east to 29th Avenue, - Burdette on the north and Blondo on the south; two elevator-type apartments of 60 units each and the rest, family units. (PR7:37)

March 24, 1951: North Omaha Commercial Club protests further building of public housing in North Omaha on the basis that it would "throw a huge overload on our schools and streets" (PR7:38); March 30, 1951: OHA defends its selection of North Omaha (PR7:41).

March 27, 1951: City Council receives information from Housing Authority regarding north side site for 300 additional units (PR7:39-40) and on April 3, 1951, approves Project 1-5 for 300 units in North Omaha. (PR7:42)

April 12, 1951: The City issues building permits to OHA for Spencer Homes. (PR7:43)

July 2, 1951: OHA sends its director to Chicago to find out why the PHA has delayed approval of the last 300 units of housing; Board says it believes PHA objects because "too many units were being allotted for Negro families". (PR7:44)

September 14, 1951: OHA asks PHA permission to condemn land for the 300 unit North 30th Street project. (PR7:45)

In addition to this documentary history, there is the observation of a contemporary witness, Rev. Charles Tyler<sup>16</sup>.

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<sup>16</sup> Defendants challenge the admissability of Rev. Tyler's testimony, but it is, in fact, clearly admissable. Fed. R. Evid. 803(20) excludes from the hearsay objection:

reputation in a community arising before the controversy, as to boundaries or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located. (emphasis added)

The Advisory Committee in the proposed rules explains that the nature and scope of the exception in the federal system is based on the trustworthiness of reputation evidence.

When the topic is such that the facts are likely to be inquired about and that persons having personal knowledge have

Rev. Tyler's affidavit in support of the Plaintiffs' Cross-Motion for Summary Judgment (CM 13) and his deposition testimony (PR5:17-25) leave no doubt that the community opposition was racially based and that OHA and the City acquiesced in the racist opposition.

(10) It is well-established that during these years, HUD was participating in racial segregation. The Home Owners Loan Corporation:

initiated and institutionalized the practice of 'red-lining' [coding of minority neighborhoods in such a way as to deny loan financing within them] . . . and the FHA and VA contributed significantly to the decline of the inner-city by encouraging the selective out-migration of middle-class whites to the suburbs".

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disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any, has been formed, is likely to be a trustworthy one: quoting from 5 Wigmore §1580, p.444, and see, also, §1583. On this common foundation, reputation as to . . . customs, general history, character . . . have come to be regarded as admissible.

The proper testimony usually must report a general consensus of opinions and not just an assertion of an individual's personal observation.

Goodover v. Lindsey's, Inc., 757 P.2d 1290 (1988). On questioning of Defendants' counsel, Rev. Tyler established his links throughout the black community and the ongoing reports he received as chair of several civil rights and community organizations. This lays foundation for his testimony regarding the context of the citing decisions which were, as proved by the historical documents in PR7, matters of general interest.

American Apartheid, supra at 51-53. Because HUD "could have halted the discrimination [i.e., segregative site selection and other discriminating practices] at any step in the program", HUD violated the Constitution and laws. Gautreaux v. Romney, 448 F.2d at 740 (7th Cir. 1971).

(11) Defendants' contentions that North Omaha projects -- including Logan Fontenelle -- were built in white or integrated census tracts is erroneous. Census tract analysis is inaccurate and can be misleading when analyzing siting decisions made on the basis of neighborhood identifiability. In King v. Harris, 464 F.Supp. 827, 833 (E.D. N.Y. 1979), the court rejected HUD's use of census tract data when there was a smaller identifiable neighborhood which would be affected by the siting decision. "Based on the testimony of area residents . . . and the natural and man-made boundaries in the area, the court finds that the relevant neighborhood extends beyond the imaginary boundaries of Tract' 29 . . .". Id. at 832. Analyzing the effects of siting decisions on neighborhoods is the correct focus in housing cases. Shannon v. HUD, supra at 821; Otero v. New York City Housing Authority, supra at 1129; U.S. v. Younkers Board of Education, 837 F.2d 1181, 1193 (2d Cir. 1987).

This is true in Omaha as shown by the testimony of people who lived and worked in the black community in the late '40s through the '60s (Mr. Holland (PR4) and Rev. Tyler (PR5)), the testimony of an experienced realtor (Robert Herink (PR6)), as well as the characterization of North Omaha by the decision-

makers themselves. (PR7) There can be no doubt that the neighborhood identifiability of the Logan Fontenelle, Spencer, Hilltop, and Pleasantview projects was such that census tract data, based on a far larger geographic area, is misleading. Therefore, the census block analysis by Plaintiffs' expert, Dr. Patricia Funk, is much more accurate and reliable with regard to the racial composition of the affected neighborhoods. (CM:12) Thus it cannot be disputed that these projects were located in or on the border of the black community and the law with regard to such decisions is clearly applicable.

. . . a municipality [may not] construct housing . . . with segregative intent and effect to confine housing for minority occupancy to areas in which minority residence is already concentrated, thereby enhancing and perpetuating racial segregation in residential patterns.

U.S. v. Younkers Bd. of Educ., 837 F.2d 1181, 1219 (2d Cir. 1987).

(12) It is uncontroverted that internal segregation existed at Logan Fontenelle and Southside both before and after the Housing Authority formally voted to discontinue this practice.<sup>17</sup> HUD's predecessor, the Public Housing Administration (PHA) certainly knew internal segregation existed in 1951 when the Urban League asked the federal government to intervene (PR8:5). The PHA weak response affirmed the federal policy to not dictate to local housing authorities or usurp their powers.

<sup>17</sup> HUD answer to Plaintiffs' Interrogatory. (PR8a)

Even if HUD were allowed to deny responsibility for a predecessor's action, it clearly was aware of the unconstitutional practice by 1986 through its own investigation when its equal opportunity specialist amassed the relevant historical data. (CM32:4794, CM33).

(13) OHA's 1951 adoption of an "integration" policy is further evidence of the racial prejudice of the time, as well as OHA's own reluctance to resist community bias. OHA now characterizes this decision as "voluntary", at the initiative of the Housing Authority (with "input of various citizens"), undertaken without the threat of a lawsuit, and "remarkable". Closer examination of the facts surrounding this policy demonstrates that it was, in fact, incomplete, inadequate and taken only after months of political struggle by Omaha's major civil rights group. Whitney Young, supra at 50.

June 5, 1951: the Urban League Housing Committee asks Omaha Mayor Cunningham for his assurance that segregation would not be permitted in the new housing projects at 30th & Spencer and 30th & Lake. Cunningham says only that he will "discuss it" with OHA. (PR8:1)

June 15, 1951: Urban League representatives tell OHA that practical segregation exists at Logan and Southside; that 22nd Street is the Mason/Dixon line at Logan Fontenelle (see, also, CM3) and that Negro families live in separate buildings at Southside Terrace Homes. Whitney Young, Jr. admits that it would not be "practical" to disrupt this situation but asks that the new projects be opened on an integrated basis. (PR8:2)

July 13, 1951: OHA delays action on the integration issue because a PHA racial relations expert plans to attend on July 23. The PHA official "may be discussing the ratio of allocating units in the new projects to Negroes and whites". At the time, 972 non-Negroes and 487 Negroes had applied for housing. (PR8:3)

August 10, 1951: The Urban League Housing Committee presents a request for a policy of integration in the new projects stating that 175 other housing authorities have abolished segregation. Mr. Hill tells OHA's Board that the PHA backs the Urban League proposal but "makes no attempt to dictate to you or usurp your powers . . . and that such decisions must be made on a local level". (PR8:5) OHA delays a vote in order to gain City Council participation. (PR8:4,5)

October 22, 1951: A motion to accept a policy of racial integration is defeated. (PR8:6) A supporter of the integration resolution discusses the constitutional and sociological aspects of the issue. (PR8:7)

October 24, 1951: An OHA board member explains his negative vote as: "Unpractical in a small community . . . will turn more heat on public housing which already is having a tough time in our area". (PR8:7,8)

November 9, 1951: Public supporters of the integration proposal pack the OHA board room. Edith Hall, principal of Kellom School, reports on how the races are separated at Logan Fontenelle -- Negroes to the west, whites to the east. (PR8:15) The Board passes a policy of racial integration "immediately in the new projects and gradually upon the old projects". The motion is described as a compromise because of the distinction made between old and new projects. (PR8:9-15)

This delay of integration at Logan and Southside is itself evidence of intentional discrimination. The Supreme Court explicitly rejected the "all deliberate speed" timetable in non-school desegregation cases:

. . . The rights . . . asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise . . . [U]nless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.

Watson v. Memphis, 373 U.S. 526, 533 (1963).

(14) OHA now justifies its placing all of the post-World War II projects in North Omaha by saying it was mandated to locate housing in blighted areas and to satisfy the National Housing Act's purpose of slum clearance. This holds no weight in light of the evidence that the census blocks of the Pleasantview site were vacant (CM12, PR76:55) and the Hilltop site required demolition of privately owned homes and businesses (PR7:13). Nor does it hold weight in light of the effect: these projects were predominantly black from their beginning. (UF24)

(15) Defendants' current contention that the census tracts were in non-black areas and that the sites were "integrative" is ridiculous. Everyone involved in the decision knew or should have known that the new housing units were for black families. Both the public press and OHA Board members characterized the planned units this way. (PR7:2,5)

In addition, the Omaha Public Schools concluded that new schools would have to be built or old schools expanded because of the new public housing, and that the housing would cause an increase in the Negro population of the affected schools. (PR9). In 1951, the Board of Education did a survey of school plant facilities and requirements of the public schools of Omaha (excerpts contained in PR10). That study showed in graph, table and text form that the decisions to concentrate public housing in specific areas caused sudden and substantial population density increases which affected the burdens on tax payers. (PR10:2-7).

The proposed housing projects at 30th & Lake and 30th & Spencer were also expected to cause increased density problems and this density was identified as an increase in the segregated Negro population of those areas.

Ratios of Negro population with the City's total population have remained relatively constant during the three decades previous to 1940. The United States Census Bureau in 1940 reported that 5.4% of Omaha's population was Negro. [There has been] a gain of 1.6% in the ratio of Negro children to the total elementary school population in Omaha during the 10-year period, 1939 - 1949 . . . The Negro element in the population is particularly significant in the administration of the public schools. There is a tendency toward the restriction of the residence of Negroes which has caused a certain amount of geographical segregation. In some elementary schools, this has tended to limit enrollments to Negro children although the residential requirements for enrollment in the schools are identical for both Negro and white children. Segregation, even though it is a result of residence rather than administration, is most undesirable educationally. Certainly it is a factor which must be taken into consideration in the redistricting of the elementary schools and in the location of new school structures.

(PR10:11-13). Thus OPS officials predicted that because of residential segregation, the new housing projects would be predominantly black.<sup>18</sup>

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<sup>18</sup> Despite this foreknowledge, no governmental entity acted to halt the segregative siting plans. Despite evidence that the segregative action would cost the taxpayers more, the government chose to confine black families rather than disperse their housing choices.

In 1955, that prediction came true. The 1955 "Study of School Enrollment and Plant Facilities" (PR11) reported that the census tracts in which the new housing developments were built showed a "40% gain in population". The school district attributed the rise in the black population directly to the construction of this new housing.

Omaha has experienced considerable immigration of Negroes from outside the City. The immediate and direct result has been a serious overloading of certain schools -- Druid Hill, Howard Kennedy, Kellum, Lake, Long and Lothrop. This pressure on school facilities is now the most acute in the whole school district. Likewise, the number of pupils per dwelling unit attending school is the highest in the City.

(PR11:5).

A look at the map on E11:8 shows the locations of the schools referred to therein as well as the public housing projects in existence at the time. See, also, text at pp. 11, 13, and 14 specifically analyzing increases in black children of school age as caused by the new public housing.

(16) Further proof that the new projects, located in or on the border of the black community, opened as identifiably black projects is found in the Census. All four North Omaha projects were identifiably minority at the time they opened. 1952-53 data shows that Logan Fontenelle was 40% black and, in 1956, Hilltop, Spencer and Pleasantview were 69% black. This is in stark contrast to the overall black population which, according to HUD's Exhibit 4, was 6% black in 1950.

Thus there can be no doubt that OHA knew that the projects built on the north side in 1951 and 1952 were designed for blacks and would be identified as such by the community-at-large.

It is incredible that this dismal prospect of an all Negro public housing system in all Negro areas came about without the persistent application of a deliberate policy to confine public housing to all Negro or immediately adjacent to changing areas.

Gautreaux v. Chicago Housing Authority 296 F.Supp. 907, 910 (1969) (emphasis added); Hirsch, Making the Second Ghetto, 40-99; American Apartheid, supra at 56.

The demographic effect of concentrating minority-intended housing in the already concentrated minority areas was predictable . . . the City had 'stigmatized' those neighborhoods and thereby made them both less likely to attract new white families and less likely to retain the white families already there . . .

U.S. v. Younkers, supra at 1220.

Even if one accepts HUD's and OHA's argument that Pleasantview and Spencer were placed on "border areas"<sup>19</sup>, the inference would not be negated: "The mere fortuity that [the] site was included in a 72.8% white census tract does not make it relevant to negate the inference of a policy against choosing sites in white neighborhoods". Id. at 911. It should be noted that the Chicago history of sitings -- including alder-manic

<sup>19</sup>-----  
At the very least, these areas were "immediately adjacent to changing areas" as in Gautreaux.

vetoing of white sites -- was found by the district court to entitle plaintiffs to a judgment as a matter of law. Id. at 912.

G. The Segregative Siting of Good Neighbor Homes and the Spencer Replacement Units:

The historical context of HUD and the City's approval in 1966 of the site for Good Neighbor Homes (which remains today identifiably black) further confirms a policy of defining public family housing projects as projects for black families and locating family housing in the black community. Despite the persistent, forceful and highly vocal protests of the majority black civil rights group, 4CL, and of the integrated community group, Franklin Community Council, both the City and HUD approved and funded the project. (PR12, testimony of Winifred J. Peterson and her affidavit, CM40). Despite those groups' specific citation of the negative impact on further concentrating public housing in an already impacted community, the project was approved. Despite the community expressing its belief that a scattered site alternative would be far preferable socially, economically, and in terms of healthy race relations, HUD and the City approved the project. Despite the specific request not to "extend the ghetto", HUD and the City approved and funded the project. HUD officials had received these messages both in writing and in person via Russell Bailey, Regional Director of

the HUD subsidiary, Farmers' Home Administration. The City Planning Board and City Council had received these messages at open meetings. (PR13)

A similar decision was made in 1980 by OHA, HUD and the City in the building of the Spencer replacement projects and it had the same effect: continued concentration of black families in an impacted neighborhood. There is no evidence that any of the parties complied with the 1980 standards for site selection passed by the City (PR14) and even these standards fail to consider racial concentration.

OHA may have considered scattered sites but it quickly rejected that option. As explained by OHA Director James Hanry, because Spencer families were

81% headed by female heads of households I feel we might do a gross injustice-to many of these family groups by placing them at the mercy of an outraged and hostile community if we attempt to disperse them widely throughout the City.

(PR15:4)

This type of paternalism and racial steering by OHA directors has continued to the present. On August 15, 1991, OHA Director Robert Armstrong spoke to Logan Fontenelle residents who were to be displaced by the demolition of Logan North. As witnessed by Deb Baker (testimony at hearing on Preliminary Injunction and noted at Exhibit 71, now marked as PR16), he gave various reasons why it would not be feasible for Logan residents to move into scattered site housing: the houses are far away;