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United States District Court, N.D. Texas, Dallas Division.

Debra WALKER, et al.
v.
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Highlands of Mckamey VI and V Community Association, Preston Highlands Homeowners' Association, Inc., et al.

No. 3:85–CV–1210–R.
|
Oct. 6, 1997.

MEMORANDUM OPINION

BUCHMEYER, Chief J.

***1** Over eight years ago, at the beginning of the opinion in *Walker III,*[1] this Court stated:

> *This is a class action that involves racial discrimination in low-income public housing in the City of Dallas and its suburbs.*

The history of this tragic discrimination—the deliberate isolation of public housing for the poor "*in niggertown,*"[2] away from the white areas of Dallas and its suburbs—was outlined by this Court at the August 25, 1997 hearing,[3] when it approved two small apartment buildings (no more than 40–units each) on sites selected by Dallas Housing Authority (DHA) for low-income housing in the non-minority areas of far North Dallas. This opinion explains in detail the findings of fact and conclusions of law that support this approval—and the Court's rejection of the attempts of the intervenors, Highlands of McKamay IV and V Community Association and Preston Highland Homeowners Association (the "Homeowners") to enjoin the construction of these two DHA projects near their neighborhoods.

A. *Introduction*

The class plaintiffs seek declaratory relief that the race conscious portions of the Remedial Order Affecting DHA—specifically, the site selection, tenant selection and assignment, and Section 8 mobility portions—are constitutional. The Homeowners oppose this relief, and they seek to enjoin DHA's development of the small public housing apartments (40 units each) on the two sites near their neighborhoods. DHA supports the class plaintiffs and opposes the Homeowners' request for injunctive relief. Although HUD and the City have taken no position with respect to the Homeowners dispute with the class plaintiffs and DHA, HUD has approved both sites,[4] and it supports the use of both public housing and Section 8 rent-subsidies to remedy the effects of the racial discrimination found in *Walker I* and *Walker III.*

The Homeowners, the class plaintiffs, and DHA agree that the need to remedy the racial segregation and other racial discrimination in DHA's programs is a compelling government purpose which will justify race conscious relief. They also agree that the specific race conscious elements of the DHA Remedial Order must meet the requirement that the remedy "fit the violation in a narrowly tailored manner." *U.S. v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735, 64 U.S.L.W. 4638; *U.S. v. Paradise,* 480 U.S. 149, 166, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987); *Black Fire Fighters Assoc. Of Dallas v. City of Dallas,* 19 F.3d 992 (5th Cir.1994).

However, the Homeowners contend that those portions of the Remedial Order which require the construction of new public housing units "is not narrowly tailored"—and that Section 8 certificates are the only permissible "narrowly tailored remedy" that may be used "to cure the vestiges of discrimination" found in *Walker I.* In response, the class plaintiffs and DHA maintain that both types of remedies provided in the DHA Remedial Order, the Section 8 certificates and the small number of units of new public housing, are "narrowly tailored" and necessary remedies. The resolution of this dispute presents one central legal question: *Are the race conscious site selection, tenant selection and assignment, and Section 8 mobility portions of the DHA Remedial Order constitutional?*

B. *The Homeowners' asserted interest*

***2** The Homeowners assert that the choice of the sites violates their equal protection rights because the sites were chosen, in part, based on race—i.e., the fact that almost all of the current residents of these neighborhoods are *white.*[5] Specifically, the Homeowners allege that these two public housing sites will injure them by causing a diminution in the values of their homes and real property because of these two factors:

> (i) supposedly, DHA will fail to properly manage and maintain the physical condition of the public housing units, and
>
> (ii) supposedly, the public housing tenants will be shunned by the non-public housing owners and occupants, and the resulting "social isolation" will cause (or make more likely) anti-social and illegal conduct by the public housing residents.

In assessing the validity of these claims by the Homeowners, this Court must first place their alleged affected interests in the proper legal context. The Homeowners *do not allege* that DHA is exercising any form of control over their property ... or that DHA is limiting the use of, or is physically invading, the Homeowners' property ... or that DHA's development of these two 40–unit public housing projects is, in itself, either a nuisance or an unlawful use of DHA's own property.

Nor do the Homeowners claim any abridgement of their contract rights; the properties purchased by DHA are not within the boundaries of the two neighborhood associations, so they are not subject to the deed restrictions of the associations. And, there is no allegation that DHA's use of the property will violate the applicable zoning or building codes.

In fact, the Homeowners do not even claim some general right to be free from the construction and operation of public housing near their neighborhood.[6] Instead, the only basis upon which the Homeowners rely is the assertion that the race based site selection pursuant to the DHA Remedial Order violates their rights not to be discriminated against because of their race (white), and their right not to suffer a supposed loss in property values because of that reverse discrimination.

Of course, this Court recognizes that any type of financial loss to the Homeowners is a serious matter. However, the constitutional protections afforded to property values for consequential damages arising out of lawful government use is limited. Indeed, a diminution in property value alone is simply not sufficient to present a cognizable claim for compensation under the due process provisions of the Fifth or Fourteenth Amendments. *Florida East Coast Properties, Inc., a Florida Corporation v. Metropolitan Dade County,* 572 F.2d 1108, 1111 (5th Cir.1978) (diminution of property values because of construction of a prison facility near neighborhood did not give rise to a "taking" claim).

This case does not involve the usual issues of affirmative action in which, *because of race,* one person is preferred over another for a job, a promotion, or a place in school. The Homeowners' assertion is that their neighborhoods are being subjected to unequal treatment because of the race of the residents. Their asserted injury occurs because of this area based action, not an individually focused action as in employment discrimination, school segregation, etc.

***3** This case, therefore, involves the question of whether or not a facially race neutral program—public housing—can be used in a race conscious manner, together with Section 8 certifications, to eliminate the racially segregated public housing conditions detailed in *Walker I and III.*

C. *The violations that the remedy must fit*

Site Selection violations.

As the court has found, the predominantly African–American location and racial composition of DHA's non-elderly projects is a direct result of purposeful racial segregation. *Walker III,* 734 F.Supp. 1289 (N.D.Tex.1989). As a result of past segregationist policies and practices and the failure to accomplish the West Dallas provisions of the decree, DHA has less than 300 units in predominantly white areas which can be offered to African–American non-elderly applicants.[7] DHA's Section 8 certificate and voucher program has been unable to place more than 19% of the Section 8 units in predominantly white census tracts.[8] The lack of integrated housing opportunities in DHA's public housing program means that each offer of a unit to an African–American applicant in the predominantly black projects 9–1 through 9–11 is an offer which perpetuates past segregationist policies and practices in which African–American applicants are assigned to a predominantly black project in a predominantly black area. MSJ 1.[9]

Throughout the first half of this century, racial segregation in housing was the official policy of the City of Dallas. State law gave Texas cities the power to enact ordinances providing for residential segregation by race. Tex.Rev.Civ. Stat. Ann. art 1015b (repealed 1969). The 1907 Dallas City Charter expressly provided for the City's power to "provide for the use of separate blocks for residences, places of abode, places of public amusement, churches, schools and places of assembly by members of white and colored races".[10] MSJ 7.

The initial City of Dallas survey and site selection report for the first DHA public housing projects chose the site for the Negro project in a Negro district while recommending that the site for the Mexican project should be located as close as possible to the Mexican district.[11] There were no recommendations for development of a white project site. DHA honored this recommendation and built the Roseland Home project for blacks in a black neighborhood. MSJ 9.

The DHA Board minutes for Oct. 30, 1950 show that DHA was honoring the racial residence lines drawn by the City.

> "Mr. Stephenson reported to the members of the Authority that he had a meeting with LLoyd Smoot, his attorney Alfred Sallinger, and approximately 25 white property owners who occupied property lying east of the Smoot property. This committee was representing a group of approximately 100 property owners who opposed the location of Project TEX–9–9 on the northwest corner of Dolphin and Haskell Avenues. He reported that they insisted that the line of demarkation between colored residents and white residents in that area was Haskell Avenue. He reported that he had explained to these people the plan of the Housing Authority to erect a very tall fence and to put shrubs, effectively separating the housing project which may be occupied by Negroes and the property now occupied by these people but he had little success in securing cooperation from them." MSJ 10.

***4** DHA went on to drop the contested site from consideration.[12] MSJ 11.

DHA successfully defended its policy of *de jure* segregation when the legality of the practice was challenged in the early 1940s. *Housing Authority of the City of Dallas v. Higginbotham,* 143 S.W.2d 95 (Tex.Civ.App.—Dallas 1943). MSJ 12.

The public debate in 1950 and 1951 which led to the creation of the West Dallas project was explicitly premised on the assumption that official action preserving separate residential districts for white and black was proper and would be forthcoming from the City.[13] MSJ 13.

DHA's 3,500 unit West Dallas public housing project is the nation's largest low-rise public housing project and the second largest project of any type in the nation.[14] It was created by DHA at the City's request.[15] The City and DHA's purpose in developing the West Dallas project was to solve the "Negro housing problem" as that problem was perceived by the white community in Dallas in the early 1950s.[16] MSJ 53.

During the first half of this century, the City of Dallas aggressively pursued an official city policy mandating racial segregation in housing. This policy was subjected to a severe test in 1950 and 1951. MSJ 54.

White residents of South Dallas were publicly demanding that the City of Dallas take action to prevent black families from acquiring homes in white districts.[17] Several bombings of homes bought or built by blacks in white districts were reported.[18] All of the public debate on the resolution of this "Negro housing problem" as it was referred to, was based on the explicit premise that the City of Dallas should take action to make a substantial amount of housing available to black families while maintaining racial segregation.[19] See for example the joint report of the Dallas Chamber of Commerce and the Dallas Citizens Council.[20] MSJ 55.

The Joint 1950 Report stated that one of the fundamental factors to which any successful plan to solve the Negro Housing Problem must adhere was

> "The Committees feel that the only satisfactory and permanent solution to this problem can be realized where there is racial segregation. It is the opinion of the Committees that this basic factor is recognized by the Negro leadership of our community, so long as segregation in that is applied here does not mean discrimination."[21] MSJ 214

While it is apparent from the public accounts of the debate that issues of whether or not the creation of the housing should be left to private industry or should include federally assisted housing and where the housing should be located were open for question, there was universal acceptance of the principle that the solution had to be based on maintaining racial residential segregation in the city.[22] MSJ 56.

On Sept. 25, 1950, the City of Dallas requested DHA to combine its existing allocation of 1,800 new construction public housing units for which a site had not yet been

selected with 1,700 units of a new allocation and develop the total 3,500 units in West Dallas. DHA agreed.[23] DHA's purpose in acceding to the City request was to solve the "Negro housing problem".[24] MSJ 57.

***5** At that time, West Dallas was not within the Dallas City limits. DHA's application for the federal funding to develop the project described West Dallas in the following terms:

> "The area selected is in what is known as 'West Dallas', a sprawling slum community of approximately five square miles ... West Dallas is the largest concentration of sub-standard dwellings and slum conditions in and around Dallas ...".[25]

This description is supported by a 1948 survey of West Dallas conducted by the Council of Social Agencies.[26] MSJ 58.

The West Dallas project was funded by the federal government and developed on a *de jure* segregated basis.[27] MSJ 59. *Miers,* supra at 266 S.W.2d 490.

The 1962 public campaign against DHA's 3,000 unit proposal featured numerous ads raising the specter that the units would be integrated and placed in white neighborhoods.[28] MSJ 14.

The 1962 referendum opposing the construction of 3,000 additional units of public housing was endorsed by the Dallas City Council. The opposition was based on the fact that these units would not be placed in West Dallas. The referendum passed and no new low rent non-elderly public housing was built in Dallas from 1955, when West Dallas was opened, until the construction of the Country Creek project [now named Barbara Jordan Square] under the 1987 consent decree in this case. [Walker III, 734 F.Supp. 1296–1297]. MSJ 210.

Irving Statman was a HUD official in either the Dallas or Fort Worth HUD office from 1967 to 1982.[29] Mr. Statman made the following statements about the operation of DHA's low income housing programs during that period:

The director of DHA when the Turnkey projects were being developed specifically stated that the only place he would even consider putting the projects was "in niggertown".[30] MSJ 211.

Mr. Statman recommended that the site be turned down because of location and equal opportunity concerns. HUD approved the site because a HUD official was told that if HUD approved this site, there would be additional units placed in a white area. DHA never requested the additional units.[31] MSJ 212.

In 1978 DHA received an allocation of 224 units of low rent public housing.[32] Had these units been developed they would have been the first new, non-elderly public housing units to be developed by DHA on anything other than a *de jure* segregated basis. Through development of the units, DHA would have been able to offer black tenants the choice of housing in non-impacted areas. DHA was not able to develop these units because the City of Dallas vetoed the use of the units in non-minority areas.[33] DHA allowed the allocation to revert back to HUD.[34] HUD continued to fund the City and DHA. MSJ 41.

In 1980 DHA submitted an application for Section 8 Moderate Rehabilitation Program funds from based on an explicit certification that units located in an area of minority concentration would not be selected for the program.[35] None of the units selected for participation in the program were located in the predominantly white priority areas. All of the units were located in low-income or minority concentrated census tracts.[36] MSJ 42.

***6** In 1981 DHA acquired the Oakland Apartments in South Dallas from HUD.[37] It is located in a black census tract and has been predominantly black in occupancy.[38] MSJ 50.

DHA's site selection process honored the racial areas of the City outlined by the Dallas City Manager in 1938. [Walker III, 734 F.Supp. 1293–1294]. MSJ 213.

All of DHA's non-elderly public housing projects were built and maintained on a *de jure* racially segregated basis.[39] *Higginbotham,* supra at 143 S.W.2d 95; *Miers v. Housing Authority of the City of Dallas,* 266 S.W.2d 487, 490 (Tex.Civ.App.—Dallas 1954). MSJ 15.

DHA's scattered site projects were built in white areas only after a court order requiring such placement was entered in the Washington Place case in the early 1980s. *Walker v. HUD,* 734 F.Supp. 1289, 1302 (N.D.Tex.1989).

DHA continued its refusal to develop units in white areas even after the 1987 consent decree was entered. DHA violated the decree by failing to locate and develop the 100 units of public housing that were West Dallas replacement units in predominantly white areas. The Court had to order the use of the sites in white areas. *Walker v. HUD,* 734 F.Supp. 1231, 1244 (N.D.Tex.1989).

Tenant selection and assignment violations.

Each of DHA's elderly projects, its Turnkey III project, and its Section 8 program were developed and maintained in a manner which preserved racially segregated occupancy characteristics.[40]—DHA's first three elderly projects were occupied under a freedom of choice plan which resulted in predominantly one race occupancy.[41] DHA followed a practice of pre-registration and freedom of choice throughout the 1980s in the assignment of elderly tenants to all of its elderly projects which resulted in predominantly one race occupancy.[42] MSJ 16.

In 1969, when West Dallas was first subjected to a first come, first served tenant selection plan and was becoming all-black in occupancy, a substantial number of white elderly tenants requested transfers from West Dallas to the new elderly only projects. DHA requested and received HUD approval for the transfers.[43] These transfers had the obvious segregative effects of reducing the white population in the West Dallas project and increasing the white population in the white elderly projects. MSJ 17, 75.

In February, 1980 DHA was preparing to open for occupancy its Section 8 New Construction elderly project, Lakeland Manor.[44] The project is located in a predominantly white location.[45] DHA was faced with the choice of using a waiting list that was composed of persons who had specifically requested Lakeland Manor and who were not in the regular DHA applicant pool or using the regular applicant pool. The Lakeland Manor waiting list was 7% black. The regular applicant pool was 18% black. DHA adopted a plan which gave preference to the whiter Lakeland Manor waiting list rather than the regular, HUD approved waiting list.[46] Upon completion of initial occupancy, Lakeland Manor was predominantly white.[47] MSJ 49.

***7** In 1983 and 1984 DHA began to register applicants for the Audelia Manor elderly public housing project which was under development. Under the registration practices, those registered were allowed to sign up for a vacancy in Audelia Manor without being subjected to the normal waiting list procedures.[48] From its initial occupancy, Audelia Manor was almost exclusively white in occupancy.[49] Audelia Manor is located in a predominantly white census tract.[50] MSJ 51.

Throughout 1982 through 1986 the effect of DHA's tenant selection and assignment plan was, through either allowing freedom or choice or assigning on the basis of race, to steer black applicants to black projects and white applicants to white projects.[51] This steering resulted in predominantly one race elderly projects.[52] MSJ 52.

As the Court found in *Walker I,* DHA violated the Consent Decree approved in this matter by "its delay in putting a new, nondiscriminatory *Tenant Assignment & Selection Plan* into effect. 734 F.Supp. 1231, 1232 (N.D.Tex.1989). The late plan finally presented was defective and violated the decree in several ways. *Id.* at 1235. MSJ 76.

DHA used assignment of tenants by race in order to maintain racial segregation [Walker III, 734 F.Supp. 1297–1300]. The tenant selection and assignment plans were still discriminatory when the suit was filed in 1985. [Walker III, 734 F.Supp. 1300–1301]. MSJ 215.

DHA did not even comply on paper with the remedial tenant selection and assignment provisions of the 1987 consent decree until December of 1987. *Walker I,* 734 F.Supp. 1234–1235 (N.D.Tex.1989).

Section 8 violations.

DHA first began to operate the Section 8 existing program in 1975 .[53] In 1978 DHA's attorney stated in a letter to HUD that DHA not only had the authority to honor Section 8 Existing certificates for housing located in the Dallas County suburbs, DHA had the duty to do so in order to comply with its constitutional duty to disestablish the effects of its prior racial segregation.[54] DHA allowed only a few tenants to go to the suburbs and subsequently put a complete halt to the practice.[55] The occupancy patterns of DHA's Section 8 Existing Housing Program were racially segregated.[56] MSJ 44.

Beginning in 1978, the City of Dallas conducted the housing quality inspections for DHA's Section 8 Existing Housing Program under a contract with DHA.[57] The City inspectors consistently approved units for black families in black neighborhoods which units were in serious violation of the HUD housing quality standards. Between Jan. 20, 1987 and Jan. 20, 1988 DHA's own quality control inspections found that 60% of the units which had previously been inspected and passed, most by City inspectors, did not meet housing quality standards upon reinspection.[58]

In 1980 HUD ordered DHA to use its Section 8 program to increase housing opportunities for the minority public housing residents as part of a Title VI non-compliance remedy. Rather than comply, DHA adopted a new policy

which required public housing applicants to move out of public housing and wait for 90 days before they could even apply for Section 8. The obvious practical effect of this policy was to prohibit most if not all public housing residents from using Section 8 to move into non-segregated housing. *Walker III,* 734 F.Supp. 1300 (N.D.Tex.1989).

***8** The 1987 consent decree contained several provisions designed to use the Section 8 program as a means of providing desegregated housing opportunities for class members. DHA engaged in massive violations of those provisions of the consent decree and took other actions which had the clearly foreseeable effect of denying class members housing opportunities in white areas. *Walker v. HUD,* 734 F.Supp. 1231, 1235–1243 (N.D.Tex.1989).

Remaining vestiges of the violations.

The lingering effects of the violations that remain include:

a. As of 9/27/94, 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units[59] resided in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[60] 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[61] The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance.[62] *Walker v. HUD,* 734 F.Supp. 1231, (N.D.Tex.1989).

b. As of 9/27/94, at least 2,850 [59.2%] of the black households on DHA's Section 8 certificate and voucher program lived in predominantly black or racially concentrated and low income areas. Only 21% of those households lived in predominantly white areas. 45.6% of white DHA Section 8 households lived in predominantly white areas. The neighborhood conditions are substantially inferior to the conditions in which low income whites receive HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside.[63] MSJ 245–280.

D. *The race conscious remedial measures*

Race conscious public housing site selection.

HUD has awarded DHA the present allocation of development funds for 674 units of new public housing units over a period of time. The first 339 units were allocated in October, 1991. These funds were originally intended for use in West Dallas.[64] MSJ 315.

These units, and any others allocated in the future, must be developed in predominantly white areas until there are approximately as many non-elderly public housing units in those areas as in minority areas.[65] The one exception is the possible use of no more than 200 units in the reconfiguration of much smaller West Dallas project.[66] The race conscious site selection remedy is limited. It applies only until there is a comparable number of public housing units in white and minority areas. If DHA and HUD can ensure that a new allocation of Section 8 will be used in predominantly white areas, then Section 8 can be used to substitute for future allocations of public housing.[67]

DHA must achieve and maintain the conditions at all of its projects to a standard that is substantially equal to the unit and project conditions at the HUD assisted projects in predominantly white areas.[68]

***9** DHA is implementing the race conscious site selection in a manner that minimizes any impacts on the surrounding property owners.[69] This is in contrast to the implementation of the previous race conscious site selection in black areas. DHA is constructing new units in small complexes of less than 100 units. The Frankford and Marsh site will have 75 units. The sites now at issue will have no more than 40 units on each site. The projects in the minority areas ranged in size from 3,500 units to 102 units.

DHA is giving adjoining and nearby property owners the opportunity to provide guidance and input into the design and management of the new projects. There is no such process in the minority areas.

DHA is imposing higher qualifications on the tenants who will reside in the new public housing units than on those in the other projects. Each tenant in the new units will be required to participate in the Family Self Sufficiency

program.

DHA is attempting to design and build the units to blend structurally and aesthetically into the surrounding neighborhoods. The barracks style and design used in the historical black projects will not be used.

The City of Dallas is already under court order to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units. City Consent Decree ¶ 3.10. This obligation should protect adjoining property owners as well as the project residents.

Race conscious tenant selection and assignment.

The race conscious tenant selection and assignment procedure does not operate to deprive anyone of housing because of race. The existing system uses race in a very limited fashion. It does not use race to move persons up or down the waiting list. Race is used only if there are units available in both white and minority areas or locations. Then the person at the head of the list will be offered a unit in the location where her race does not predominate. No one is skipped over because of race. No one is denied housing because of race.[70]

Each applicant is also given the right to refuse a unit in the remaining 950 units in the West Dallas project without losing her place on the waiting list.[71] Each black applicant is given the right to refuse a unit in West Dallas without losing her place on the waiting list. Each white applicant is given the right to refuse a unit in a predominantly white location without losing her place on the waiting list but there is no barrier to the acceptance of such a unit if offered.[72]

The remedy seeks to make use of the limited desegregative housing opportunities that do exist and to prevent anyone from being forced into the West Dallas project.

Because there is a preference for Section 8, every person accepting a unit in any public housing project is automatically placed on the waiting list for Section 8. If the applicant has already applied for Section 8, then the applicant remains on the Section 8 waiting list even though she has moved into public housing .[73] This procedure has worked in the past to allow many families to use public housing only as a temporary expedient and then move to Section 8. *Walker I,* 734 F.Supp. 1246 (N.D.Tex.1989). Whatever adverse effects will flow from residence in public housing, the participant will be able to end her exposure to those effects by choosing to move to Section 8.

Race conscious Section 8 mobility program.

***10** The racial element of the Section 8 remedy is limited in its scope and its effects. There are no race conscious limits on who gets Section 8 or any racial preferences for applicants of any race. The mobility services are to be provided to black DHA participants for the purpose of achieving and maintaining a percentage of DHA's Section 8 in predominantly white areas. No Section 8 participant is denied the right to use the Section 8 assistance in any area.[74]

White participants do not get the mobility services required under the decree. There is no record that white Section 8 participants encounter any problems finding housing in white areas.

Black Section 8 participants do not get the use of mobility services to help locate housing in minority areas. There is no record that black Section 8 participants encounter any problems finding housing in minority areas.

All Section 8 participants are provided with the same basic Section 8 program assistance.

E. *Efficacy of possible alternatives*

Prior record on color blind remedies.

Site selection.

DHA, HUD, and the City have been under the obligation to provide desegregated housing opportunities in public housing since at least 1955 when de jure racial segregation in public housing was declared unconstitutional. *Walker v. HUD,* 723 F.Supp. 1289, 1297 n. 26 (N.D.Tex.1989). Despite this obligation, no units of family public housing were developed in white areas until

a 1984 settlement in a federal lawsuit required the construction of 106 units of public housing in white areas. *Id.* at 1301–1303.

The initial remedy order, the 1987 consent decree, did not require race conscious site selection for any public housing units other than the 100 units allocated as replacement units for West Dallas. While these units were ultimately placed in a white area by court order, HUD, DHA and the City continued to propose the development of all additional new public housing units in the predominantly minority West Dallas area. This was true under the Sextant Plan, the West Dallas Agreement, the Cisneros Plan, and the Lakewest Master Plan.

Any and every attempt to select public housing in white areas, whether under a court order or a color-blind selection process has met with strenuous and effective neighborhood and political opposition. Absent a court order requiring the construction of public housing in white areas, the housing either is developed in minority areas or is not developed at all. *Walker v. HUD,* 723 F.Supp. 1289 (N.D.Tex.1989).

Tenant selection and assignment

From 1965 to the present, the federal government has relied upon a race neutral tenant selection and assignment plan as its only desegregation procedure in Dallas and in the nation. The federal government admits that the procedure did not operate to desegregate either DHA's public housing program or public housing nationally. These facts have been the subject of a prior summary judgment holding by the Court.

***11** The primary HUD response to the obligation that the *de jure* public housing be disestablished was to require public housing authorities to adopt remedial tenant selection and assignment plans.[75] MSJ 22.

Appendix 2 to the 1985 HUD Report recounts, in detail, the failure of HUD's reliance on tenant selection and assignment plan remedies to disestablish either the *de jure* segregation or its continuing effects.[76] The first plans required the adoption of a freedom of choice tenant selection and assignment plan which allowed each applicant to choose the project or site. These plans resulted in no significant change in public housing occupancy patterns.[77] In 1967 HUD required public housing authorities to adopt a first come, first served tenant selection and assignment approach.[78] It soon became apparent that first come, first served was not accomplishing any more desegregation than did freedom of choice.[79] Despite various attempts over the years to revise HUD's tenant selection and assignment practices, it has remained the same as has the segregation it was intended to cure.[80] MSJ 23.

Under DHA's 1965 desegregation plan, DHA adopted a freedom of choice policy under which an applicant would be able to apply at the project of her choice for that project. Before an applicant of the race that was not the predominant race of the project could be housed at that project, the plan required DHA board notification and approval before accepting the tenant. The plan called for selection of four black families to move, without publicity, into the predominantly white George Loving West Dallas project. An explicit condition of the desegregation plan was that there would be no notice given to applicants that they could apply to the project of their choice. The federal government accepted the DHA plan.[81] The only change in racial occupancy under the freedom of choice plan was in the West Dallas white project. The other white projects, Washington Place and Cedar Springs Place, remained all white and the minority projects remained all minority.[82] MSJ 28, 40.

In 1967 HUD formally rejected the use of freedom of choice tenant selection and assignment plans by public housing authorities on the grounds that such plans did not disestablish racial segregation or its effects in public housing.[83] HUD required all public housing authorities to adopt a first come, first served tenant selection policy using a community wide waiting list for all projects administered by the authority.[84] DHA's board overtly defied HUD's Title VI mandate to cease using freedom of choice and adopt a first come, first served policy.[85] The City of Dallas became involved when HUD threatened to sue DHA and withhold federal funds from DHA and the City.[86] At the request of the City of Dallas, DHA agreed to end freedom of choice and adopt a first come, first served plan.[87] MSJ 29.

The City Attorney, N. Alex Bickley, participated in the negotiations with the U.S. Department of Justice on the specifics of the plan to be adopted.[88] The plan negotiated with Mr. Bickley's assistance and adopted by the DHA board was one which, in the opinion of the Justice Department was "likely to result in little or no change in the racial composition of any of your other locations, all of which are presently segregated".[89] The plan was accepted by the federal government even though it would have little desegregative effect. MSJ 30.

***12** In 1969, HUD found that DHA was not following its formally adopted first come, first served plan but was rather continuing to operate under freedom of choice.[90] While DHA staff were negotiating with HUD and the Justice Department on resolving the new finding of Title VI noncompliance,[91] the DHA board passed a resolution instructing the staff to first ask HUD for a waiver of the first come, first served requirement and that if such a waiver was not immediately forthcoming, to return to freedom of choice.[92] HUD received the request for a waiver but took no action on it.[93] MSJ 31.

In January and February of 1970 DHA obtained HUD final approvals for the site and funding of Cliff Manor, an elderly project.[94] A week after the telegram announcing the final approval, DHA formally rescinded its first come, first served plan and returned to its pre–1968 freedom of choice plan.[95] MSJ 32.

The federal government notified DHA that DHA's actions were in violation of Title VI and HUD seemed to have deferred funding for all projects not already approved.[96] The funding deferral was pointless since DHA had obtained HUD approval for the pending predominantly white elderly projects before DHA returned to its freedom of choice tenant selection plan. As set out below, the only funding actually deferred was the rehabilitation money for West Dallas. MSJ 33.

HUD requested assistance from the City of Dallas in obtaining an end to DHA's blatant violation of Title VI.[97] MSJ 34.

From 1970 through 1974, HUD continued to defer modernization funds for DHA's projects because of DHA's willful noncompliance with Title VI.[98] During this period HUD continued to provide the development and subsidy funding for the predominantly white elderly projects already approved. MSJ 35.

HUD did a Title VI review of DHA and found DHA to be in noncompliance with Title VI.[99] Contrary to its action in 1968 when City funds were immediately at stake, the City took no action to resolve this impasse until late 1974. MSJ 37.

On August 22, 1974, the federal Community Development Block Grant program came into existence. 42 U.S.C. 5304, et seq. The City of Dallas was to receive $195,065,845.00 in funds from this HUD administered program over the next 14 years.[100] The CDBG Act prohibited race discrimination by recipients. 42 U.S.C. 5309. MSJ 38.

During the 1970s, one of the conditions for DHA to receive HUD modernization funds for West Dallas was that DHA adopt a tenant selection and assignment plan that would allow HUD to make an administrative determination that DHA in was in compliance with Title VI.[101] With the assistance of the City of Dallas' Fair Housing Administrator, a City Fair Housing department law student intern, and the assistant City attorney, Mr. Darnall proposed a series of freedom of choice tenant selection and assignment plans.[102] Upon DHA Board adoption of the plans, HUD made the determination that DHA was in compliance with Title VI.[103] The plans did nothing to offer a desegregated housing opportunity to DHA's black residents by DHA's own subsequent admission.[104] MSJ 40.

Section 8 Mobility.

***13** Despite numerous violations of the 1987 consent decree, DHA did achieve the race neutral goal of 50% of its units in non-Section 8 impacted census tracts. This accomplishment did not erase the effects of discrimination.

Prior to the entry of the Remedial Order Affecting DHA, DHA stated that its goal was merely to comply with the 1987 consent decree requirement to avoid concentrations in census tracts that had 10 or more Section 8 certificates as of January 20, 1987.[105] MSJ 311.

DHA objected to any requirement that a mobility program for its Section 8 participants concentrate on finding available units in predominantly white areas and encouraging class members to move to those areas on the grounds that it was illegal racial steering.[106] DHA expressed concern about the racial steering effect of a program for locating available housing in predominantly white areas, providing information about that housing and the neighborhood services and facilities to African–American families and encouraging African–American families to consider using such housing. MSJ 313.

Following the racially neutral standard replaced one list of Section 8 impacted census tracts with another. In 1987 the highest number of Section 8 certificates in one tract was 235 units in tract 62. In 1994 while there were 59 certificates/vouchers in tract 62, there were 410 certificates or vouchers in census tract 109. In 1987 the ten most impacted tracts had a total of 1,546 certificates.

In May, 1994 the ten most impacted tracts had a total of 1,483 certificates.[107] MSJ 311.

While the overall racial concentration of DHA's certificate holders has improved somewhat, less than 21% of the black families on the program live in predominantly white areas while over 45% of white DHA white Section 8 families live in such areas.[108] The indicators of neighborhood quality in the predominantly white census tracts show that DHA's policy of focusing solely on the Section 8 non-impacted standard has caused class members to be subjected to racially separate and unequal conditions.[109] MSJ 312.

Since 1994 and the entry of the Court's remedial order against HUD, an additional 285 black Section families have been able to find housing in white areas.[110]

Alternative remedial measures.

Race conscious public housing site selection.

There are several logical alternatives to the use of the race conscious site selection requirement in the remedial order. The order could contain no provision controlling the racial composition of the areas within which public housing is to be developed. The order could allow or require the housing to be built in minority or racially integrated areas.

The units could be developed in minority areas which would perpetuate the vestige of prior segregation. The use of up to 200 of the units in the West Dallas project will have this effect. The segregative effect is balanced by the remedial effect that the units can have on the living conditions in that part of the West Dallas project which remains. There would be no such countervailing effects from the development of the remaining 474 units in minority areas.

***14** The units can be developed in racially mixed areas. This decision would also involve a race conscious decision, a decision to avoid placing the units in a predominantly white area.

Use of the racially mixed areas in the City of Dallas would not further elimination of the unequal conditions vestige. The racially mixed areas of Dallas are also areas with high concentrations of poverty households, low-income families, high unemployment, high percentages of families on public assistance, and substantial numbers of HUD assisted units already in place.[111]

HUD and DHA did provide alternative remedies which were not accepted.

HUD's proposed remedy for the location vestige.

HUD proposed that an undetermined number of the replacement units for demolished units in the Lakewest Development will be "developed on a scattered site basis in non-impacted neighborhoods."[112] There was no definition of "non-impacted neighborhood" in the plan. The maximum units available would have been the 335 new public housing units in the URD grant.

HUD also proposed that some large number of Lakewest units will be demolished and replaced with an additional 533 vouchers previously promised and 165 URD vouchers.

The net effect of the implementation of this portion of HUD's plan would have been to leave approximately 86% of the family public housing units in predominantly minority and poverty concentrated areas:

concentrated areas	total
No.	No.

current	6,133		6,411
total WD demolished	(2,650)		(2,650)
total built in WD		250	250
total built in white			335
new total	3,733 (86%)		4,346

DHA's proposed remedy for the location vestige.
DHA proposed that HUD provide funding for construction in 50% or greater white or 40% or less black areas for:

a) every unit of new construction developed in West Dallas,[113]

b) 1000 units of replacement housing to reduce the density in Turner, Roseland, Frazier, and/or Rhoads Terrace by one-half.[114] DHA also stated that it "has no funds with which to buy, build or operate public housing or to subsidize housing rentals unless funding is provided by an outside source."[115]

Unless HUD had provided additional funding, which was not in the HUD plan, the only new units would be the 335 URD units, and the effect of the plan would be, at best, the same as the HUD plan. If the Court had approved DHA's request to build the units in areas that are less than 40% black, then the all of units could have been developed in racially concentrated and low and lower income areas. All of the predominantly Hispanic areas are less than 40% black and there are many areas where the combined Hispanic and black percentages reduce the number of non-Hispanic white to 33% or less.[116]

The use of minority concentrated areas would also conflict with HUD's site selection regulations. These regulations require the consideration of race in its approval decisions. 24 CFR 941.202 "(c) The site for new construction projects must not be located in: (1) An area of minority concentration unless (i) sufficient comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot feasibly be met in that housing market... (2) a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area." HUD reviewed the Sites under this regulation.[117] HUD has approved these Sites in white areas.[118] HUD considers these sites appropriate given the Court's finding of discrimination and HUD supports the use of public housing and Section 8 in the remedy.[119]

***15** The units can be developed at sites in predominantly white areas such as the sites at issue.

The Court has already discussed why public housing units need to be in predominantly white areas.

> "No one wants low-income public housing in their neighborhood, certainly not a project that may be predominantly black. *It should be placed in someone else's neighborhood—or just kept in the minority areas of town,* as has been done historically by DHA (with the support of the City of Dallas). However, unless this pattern is broken, then public housing in Dallas will continue to be segregated—and, as the inevitable corollary, public housing for minorities will continue to be substandard, at best, and it will never even approach the quality of low-income housing for whites." *Walker v. HUD,* 734 F.Supp. 1289, 1302 (N.D.Tex.1989).

There is also the logical alternative of no more public housing. The units could be ordered to be forfeited back to HUD or the Court and the parties could just let this happen. This choice will deprive poor families of desperately needed assisted housing. The only basis for this choice would be to keep from constructing the units in white areas. Similar decisions by the City were part of the scheme of racial segregation. *Walker v. HUD,* 734 F.Supp. 1289, 1296, 1301 (N.D.Tex.1989). Such a decision by the Court would be similarly segregationist.

Homeowner proposals.

The Homeowners have proposed several alternatives: use of color blind site selection methods[120] and conversion of the public housing allocation into either Section 8 certificates or vouchers or some form of court ordered voucher program.[121] The Homeowners expert Prof. Thibodeau succinctly outlined the combined elements of the Homeowners' proposed least intrusive remedy:

Public housing is too costly and too intrusive for use in white areas.[122] Public housing should be built only for those who want to live in minority areas where it is not intrusive.[123] Public housing is not intrusive in minority areas because there is already public housing there and because property values are lower—there are few $300,000 homes.[124] Minority households who want to live in white area should have to use vouchers.[125] The findings of Prof. Thibodeau's own study make it clear that the minority households who want to live in white areas will face the effects of multiple forms of discrimination by landlords.[126] Upon cross examination Prof. Thibodeau admitted that this less intrusive plan would not remedy the segregation in DHA's programs.[127]

A color blind site selection method would ignore the reality of the issues in the case. Whether or not race is an explicit element of the site selection criteria, any site chosen will be in a white area, a minority area, or a racially mixed area. Ignoring race in the process will not result in a race neutral location. If the selection method chose sites in minority or racially mixed areas, the choice would continue the racially segregated pattern. Only if the selection method chose sites in predominantly white areas would the vestiges of racial segregation be directly addressed. The record is clear that the choice of white areas for public housing sites has not been accomplished in Dallas absent judicial compulsion.

***16** The use of a color blind remedy would not benefit the Homeowners. The sites at issue could be chosen even if the race conscious site selection language was not in the Remedial Order Affecting DHA. The Order also requires the sites to be selected in areas with less than a 13% poverty population.[128] The Homeowners do not challenge the use of the poverty concentration rate. The Sites are located in census tract 317.98. Of the total population of 20,109, only 655 or 3.26% are below poverty level.[129] 96.74% of the total population is above poverty level.[130]

Jacob Cherner, the designated representative for the Preston Highlands Homeowner Association, testified in a Fed.R.Civ.P. 30(b)(6) deposition that such a race blind choice of the site would not violate their rights or afford them an claim for a remedy.

> "Q. Would the sites that are at issue in this lawsuit meet your criteria for use under a color-blind public housing site selection remedy?
>
> A. They could.
>
> Q. You're saying they could as opposed to they would. Why are you saying they could as opposed to they would?
>
> A. They could as opposed to they would because in our definition that we used for our purposes today, we've said that that the environmental issues would also be met, and although those are not before us right now, I do believe that there are concerns with the two particular tracts, but there is other vacant land near Preston Highlands Homeowners' Association that would certainly fall within the guidelines and be available for purchase.

> Q. So if DHA was to pick these sites or the other sites you referred to on a color-blind basis, would these same injuries we talked about earlier also impact the adjoining homeowners?
> A. If they picked one of the sites that was in my Homeowners' Association, the injury could be the same, yes, sir."[131]

> Q. So, if the site that's across the way from Preston Highlands was selected because it was a good site for public housing and it didn't have anything to do with the fact that it's a predominantly white area, that wouldn't be a problem then?
>
> A. I don't think there would be a remedy—
>
> Q. Or a violation of your constitutional rights?
> A. Yes, ma'am. No ma'am. I don't think it would be a violation of our constitutional rights for them to have selected that site at random."[132]

If the court ordered construction of units in minority areas, instead of white areas, the perpetuation of the racial segregation previously found to be illegal would continue.

If the Court ordered transmutation of the federal funds allocated for public housing into either another federal housing program or its own program, it would run afoul of the Appropriations Clause of the U.S. Constitution. The Appropriations Clause of the Constitution, Art. I, @ 9, cl. 7, provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law. This rule applies to judicial orders as well as to executive decisions. *Office of Personnel Management v. Richmond,* 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990).

***17** The Homeowners argue that at least some of the public housing units can be changed into Section 8 pursuant to the appropriation statute making those funds available. This argument is based on the deposition statements of Chris Hornig, a HUD official. The Hornig deposition does not discuss a key factor in deciding the question, the appropriation statute. The HOPE VI statute appropriating the funds for the West Dallas grant specifically limited the number of replacement units which could be funded by Section 8. "Provided further, that notwithstanding the provisions of section 18(b)(3) of the Act, units demolished, disposed of or otherwise eliminated under this demonstration may be replaced as follows: and the balance by any combination of conventional public housing and units acquired or otherwise provided for home ownership under section 5(h) of the Act, housing made available one-third by certificates under section 8(b) through housing opportunity programs of construction or substantial rehabilitation of homes meeting essentially the same eligibility requirements as those established pursuant to sections 603–607 of the Housing and Community Development Act of 1987 (Public Law 100–242), or under the HOPE II or III programs as established under sections 421 and 441 of the Cranston–Gonzalez National Affordable Housing Act;".[133]

The West Dallas Hope VI grant included 500 replacement units. The maximum one-third of those units, 135, were Section 8 vouchers. The remainder, 335, must be some form of unit based assistance.

The Hope VI argument does not apply to the additional units which were allocated under the usual public housing appropriation. There is no constitutional basis for converting this allocation of appropriated funds into a certificate or voucher program.

Even if the funds could be reprogrammed to Section 8, there would still be the need for public housing in the desegregation plan. As set out in other parts of these findings, Section 8 is subject to various conditions which can make its initial or continued use by class members in white areas difficult. While placing public housing in white areas is also difficult, once placed the units will remain available. There is a need for both Section 8 and public housing in the remedy.

Race conscious tenant selection and assignment.

The record on the failure of race neutral tenant selection and assignment procedures to bring about desegregation in public housing is clear. Given the predominance of black families in DHA's programs and on its waiting lists, even a race conscious tenant assignment plan will not accomplish much desegregation. The Remedial Order does seek to provide opportunities for desegregation when the occasion is present—a vacancy in a white location and a black family at the top of the waiting list or the other way around.

One alternative is to do nothing about tenant selection and assignment in the Remedial order. If this option will not cause or maintain racially identifiable projects, DHA has that option.[134] Another alternative is to use race more

aggressively in the selection process to prevent or reduce racial identifiability by skipping over persons of one race on the waiting list in order to make offers to others whose race would reduce the racial identifiability of the project.[135] This option cannot be used without prior court approval and compliance with conditions ensuring that any persons skipped over because of race will be offered an equivalent housing opportunity. DHA has not yet chosen to seek court approval for either option.

***18** The tenant selection method is not intrusive.

The existing race conscious tenant selection and assignment procedure does not operate to deprive anyone of housing because of race. The existing system uses race in a very limited fashion. It does not use race to move persons up or down the waiting list. Race is used only if there are units available in both white and minority areas or locations. Then the person at the head of the list will be offered a unit in the location where her race does not predominate. No one is skipped over because of race. No one is denied housing because of race.[136]

Each applicant is also given the right to refuse a unit in the remaining 950 units in the West Dallas project without losing her place on the waiting list.[137] Each black applicant is given the right to refuse a unit in West Dallas without losing her place on the waiting list. Each white applicant is given the right to refuse a unit in a predominantly white location without losing her place on the waiting list but there is no barrier to the acceptance of such a unit if offered.[138]

The existing tenant assignment method seeks to utilize the desegregative housing opportunities that do exist and to prevent anyone from being forced into the West Dallas project.

Race conscious Section 8 mobility program.

The racial element of the Section 8 remedy is limited in its scope and its effects. There are no race conscious limits on who gets Section 8 or any racial preferences for applicants of any race. The mobility services are to be provided to black DHA participants for the purpose of achieving and maintaining a percentage of DHA's Section 8 in predominantly white areas. No Section 8 participant is denied the right to use the Section 8 assistance in any area.[139]

White participants do not get the mobility services required under the decree. There is no record that white Section 8 participants encounter any problems finding housing in white areas.

Black Section 8 participants do not get the use of mobility services to help locate housing in minority areas. There is no record that black Section 8 participants encounter any problems finding housing in minority areas.

All Section 8 participants are provided with the same basic Section 8 program assistance.

The mobility remedy could continue the race neutral program which was previously in effect. That program had limited results. The alternative chosen, mobility services for black class members seeking housing in white areas, fits the problem. No one is denied housing or housing opportunities because of race.

F. *Flexibility, duration, waiver*

All of the elements of the remedial order are limited by the general standard for the duration of judicial supervision in a desegregation case.[140] Only reasonable methods need be employed. The test is not whether all vestiges have been eliminated, only whether the vestiges have been eradicated to the extent practical.

Public housing site selection.

***19** Up to 200 of the presently allocated units can be developed in a minority area as part of the reconfiguration of the West Dallas project.[141]

DHA and HUD have the option to propose a plan for Court approval that would use Section 8 certificates and vouchers to substitute for at least part of any future allocations of new public housing in white areas. The plan must meet various requirements to ensure that the Section 8 units will be an actual addition to DHA's housing assistance inventory and that the assistance will actually provide units in white areas.[142]

The race conscious site selection will remain in effect only until a comparable number of units are provided in white areas. The adoption of a Section 8 plan to substitute

for future public housing allocations would also limit the duration of this remedial requirement.

Tenant selection and assignment

DHA has several options under this provision, including the option of adopting a freedom of choice plan if there will be no segregative effect.[143] If there is no substantial change in racial identifiability after equalization of conditions, then DHA must propose a magnet project plan for possible Court approval.[144]

Section 8 mobility program.

The Remedial Order recognizes various limitations on DHA's ability to provide Section 8 housing opportunities. Paragraph C.4. recognizes that DHA's ability to meet the target goals depends on the availability of funding for mobility services, the availability of willing landlords with units in appropriate areas, the Fair Market Rent and voucher payment standard levels, the choices of the program participants, and the need to avoid concentrations of assisted persons in individual locations.

G. *Relationship of numerical goals to the relevant objective standard*

Public housing site selection.

The public housing site selection remedy is limited to the development of enough units to create the number of public housing units in white areas that is comparable to the number in minority areas.[145]

The Remedial Order sets a goal of an additional 3,205 units in predominantly white areas. This goal, plus the few units already in predominantly white areas, is equal to the number of non-elderly public housing units in predominantly minority areas.[146] The population of the City of Dallas is now approximately 50% minority and 50% white. The equal number standard reflects this population mix. If race had not been a factor in the original placement of the public housing units, DHA would have been as likely to place a unit in a white area as in a black area.

The equal number is also consistent with the HUD policy which prohibits approval of units in minority areas unless there is a comparable number of units in white areas.[147] HUD's policy does not require equal numbers in every locality but rather describes a reasonable distribution of units which will approach an appropriate balance. While proportions other than 50–50 might be consistent with policy, 50–50 is within the range of a reasonable distribution which will approach an appropriate balance given the uncontested findings of discrimination in this case.

Goals for Section 8 mobility.

***20** The Remedial Order anticipates the use of numerical goals for the provision of Section 8 housing opportunities in predominantly white areas.[148] The decree does not set out specific goals but calls for a court supervised process to determine goals based on a consideration of the area preferences of the Section 8 eligible persons and participants. That process has not been completed and no numerical goals have been submitted to the Court.

H. *Impact on the rights of third parties*

There are numerous types of third parties which may be affected by the race conscious elements of the Remedial Order Affecting DHA:

a) low-income white and other non-class member participants in or applicants for DHA's programs,

b) property owners adjacent to or nearby DHA's existing family projects in minority areas,

c) property owners adjacent to or nearby the sites selected for new public housing developments, and

d) low or lower income tenants seeking to reside in the same rental housing available for Section 8 families in white areas,

e) the landlords of the rental housing available in white areas, and

f) the landlords of the housing located in minority and low-income areas which housing is currently being used for Section 8.

None of the race conscious remedial elements deny housing or housing opportunities to any non-class member participant in DHA's programs. The only DHA benefit which is distributed on a racial basis is the Section 8 mobility program. This restriction is justified on two grounds. There is no showing that non-class members have encountered racial prejudice or other barriers which limit their ability to use Section 8 in white areas. The inclusion of non-class members in the mobility program would divert limited resources away from class members who need the assistance in order to use Section 8 in white areas.

The property owners in the minority areas around the existing DHA family projects will not be directly affected unless the requirement that conditions around the projects be improved results in neighborhood improvements.[149]

The Court has already considered, in general, the impact of new public housing on property owners in predominantly white areas. *Walker v. HUD,* 734 F.Supp. 1289, 1301–1302 (N.D.Tex.1989). The Remedial Order Affecting DHA and DHA's implementation of the order limit any adverse effects on adjoining property owners.

DHA must achieve and maintain the conditions at all of its projects to a standard that is substantially equal to the unit and project conditions at the HUD assisted projects in predominantly white areas.[150]

DHA is implementing the race conscious site selection in a manner that minimizes any impacts on the surrounding property owners. This is in contrast to the implementation of the previous race conscious site selection in black areas. DHA is constructing new units in small complexes of less than 100 units. The Frankford and Marsh site will have 75 units. The sites now at issue will have no more than 40 units on each site. The projects in the minority areas ranged in size from 3,500 units to 102 units.

***21** DHA is giving adjoining and nearby property owners the opportunity to provide guidance and input into the design and management of the new projects. There is no such process in the minority areas.

DHA is imposing higher qualifications on the tenants who will reside in the new public housing units than on those in the other projects. Each tenant in the new units will be required to participate in the Family Self Sufficiency program.

DHA is attempting to design and build the units to blend structurally and aesthetically into the surrounding neighborhoods. The barracks style and design used in the historical black projects will not be used.

The City of Dallas is already under court order to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units.[151] This obligation should protect adjoining property owners as well as the project residents.[152]

There are theoretically possible economic effects from both the public housing development and the Section 8 elements of the remedy on the price of housing. As discussed below in the section on the Homeowners' experts, developing new units may lower the price of housing for everyone while the Section 8 program may result in higher rents for everyone. None of the experts were willing to hazard a quantified estimate of any of these possible economic impacts. These are the effects of any increase in the low income housing supply, not the race conscious elements of the decree. Eliminating the race conscious elements of the decree would not eliminate these effects. Only freezing in the status quo of both the Section 8 program and the public housing program would accomplish an economically neutral remedy. There is no such requirement.

The landlords in the predominantly minority areas may experience a decreasing demand for their units from Section 8 families if the race conscious mobility provisions are effective. The provision of information, tours, and available units in white areas are designed to give Section 8 families more choices. These effects on the landlords will be the result of choices by Section 8 families, not from any compulsion by the remedy order.

The landlords in the predominantly white areas will still be free to choose whether to participate in the Section 8 program unless that decision is racially discriminatory.

The quality control provisions of the order—review inspections,[153] perimeter inspections for code violations,[154] and relocation from crime plagued projects[155]—apply to units in any part of town.

In general, the impacts on third parties are either neutral, positive, or if possibly adverse, limited and diffuse.

I. *Specific issues raised by Homeowners*

Asserted injuries to Homeowners' property values.

The Homeowners assert that the location of public housing on the Sites will injure them by causing a decline in property values. They assert that the decline will be caused by DHA's anticipated failure to competently develop, maintain, or manage the units on the Sites. They make the corollary assertion that DHA's announcement of intent to locate public housing on the Sites has already caused a measurable decline in property values. The DHA remedial order and the City Consent Decree contain provisions which, if enforced, should prevent any such failures by DHA. The present administration of DHA has not generally failed to competently develop, maintain, or manage its units. Neither the specific evidence of recent changes in property values nor the general learned studies on the subject confirm these assertions. There is evidence that property values were already declining in the area because of competition from newer housing in other areas.

***22** The Homeowners presented the following evidence on the issue of future property value losses: individual homeowners' assertions that their property values would decline or had declined, Prof. Berry's opinion that there would be some decline in property values, a Ph.D dissertation finding that on a national basis there was little (2% at most) or no decline in property values associated with nearby public housing, and another Ph.D dissertation finding little or no decline in property values around scattered site public housing units in Charlotte, N.C..

Mr. Jacob Cherner asserted that the cause of the loss in value will be either DHA's construction of an eyesore in the community or DHA's failure to maintain the premises.[156] Mr. Cherner pointed out that there also could be a loss of funding for adequate maintenance.[157]

The risk of an eyesore is always with us, no matter who owns the property. Whether or not it is DHA or a private developer who builds on the Sites, there is no requirement that the aesthetics of the buildings do more than comply with local building codes. If DHA builds according to the same building codes and standards then that aspect of the public housing would not be intrusive on the Homeowners.[158] DHA or private developer deviation from those codes can be addressed by litigation to enforce those codes.[159] DHA is not exempt from those codes but neither is DHA held to a higher standard under those codes.[160] DHA is representing that the housing developed will be consistent with the other housing in the area.[161] DHA is working successfully with homeowner groups on design and other development issues at the Frankford and March area.[162] The Homeowners did not contradict this testimony.

DHA has failed to adequately maintain its properties in the past. The West Dallas project was a gigantic monument to segregation and neglect. To prevent this from happening in the future, the remedy order and the City consent decree impose specific obligations on DHA to maintain and on the City to enforce maintenance standards. DHA must achieve and maintain the conditions at all of its projects to a standard that is substantially equal to the unit and project conditions at the HUD assisted projects in predominantly white areas .[163] The City of Dallas is already under court order to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units.[164] This obligation should protect adjoining property owners as well as the project residents.[165]

There is the risk that the federal government will not supply adequate funding for maintenance of DHA's projects. There is the risk that adequate funding for the Section 8 portion of the remedy will not be provided.[166] There is a risk that a private developer will go broke and fail to maintain structures placed on the Sites.[167] Everyone will be subject to the risks of inadequate funding.

***23** Ms. Ginger Lee's and Mr. David Beer's arguments were the same as Mr. Cherner's.[168]

The Homeowners also presented evidence on the corollary issue of present property value loss caused by the announcement of DHA's plans in support of their allegation of future property value loss. The argument is that if the mere announcement of the proposal will cause property values to decline, then surely the actual development will cause a decline. The strongest and most specific evidence in support of this assertion was the opinion of a real estate agent, Mr. Couch, that property values in the Highlands McKamy neighborhood had already declined. Mr. Couch refused to make a causal connection between the announcement of DHA's plans for the sites and the perceived decline in property values. He claimed only a chronological connection.

> "Q. You're saying that this—that this decrease in selling price is because of DHA's announcement, are you not?

> A. I'm saying there is a decrease in the selling price and DHA did make an announcement.
>
> Q. So you're not saying it's because of the announcement?
> A. I can't say what the cause of it is."[169]

Professor Berry's testimony was based, in part, on the conclusions in the Kamely study which was plaintiffs' 10/28/96 exhibit # 27. Professor Berry did not testify that he had done any independent analysis of the issue for this case.

The Kamely study made the following conclusions, among others.

Kamely hypothesized that the racial composition of a public housing project, if different with that of its neighborhood would have a significant influence on property values of that neighborhood. He found, with no exceptions, the results of all his models suggested that there is no statistically significant difference in median housing prices across census tracts with PHPs based on differences in racial composition of projects and their neighborhoods.[170]

Kamely also made another general finding. "The result of the second model indicates that there is no statistically significant variation in the median housing prices (in census tracts with PHPs) that can be attributed to the relative size of those projects. In other words, public housing projects, generally, have no significant impacts on property values in surrounding areas. This confirms the findings of the majority of previous studies[171] on the housing price effects of PHPS ....

The results indicate that the aggregate effects of all attributes related to public housing projects (PHPs) on the property values of neighboring areas are both quite small and statistically negligible. In other words, less than two percent of the median housing price variation across census tracts with PHPs can be explained by variations in the characteristics of PHPs and their residents."[172]

Prof. Berry could not apply the conclusions of the Kamely report to the Homeowners property values because he had no idea of the number of housing units in the relevant census tract and could not input the values necessary to determine the actual impact.[173] Prof. Berry claimed that Kamely found a national average impact on property values of 2%. Even using this national average, a local impact of 0%, 2% or 4% were equally likely.[174]

***24** The other studies cited in Prof. Berry's initial report did not support the allegation of a decline in property values.

The Varady, "Indirect Benefits of Subsidized Housing Program,"[175] article found little support for the belief that there could be positive neighborhood spillover effects but no evidence that there would be negative spillover effects.[176]

The Rabiega, "The Property Value Impacts of Public Housing Projects in Low and Moderate Density Residential Neighborhoods,"[177] article found:

> "From both statistical analyses it is clear that properties in Portland Oregon, gain value after the location of public housing proximate to them." "A policy of dispersed location of small-scale public housing projects in inherently viable neighborhoods, then, compensates local homeowners for some degree of site-related disamentity with neighborhood amenity. This is reflected in sales prices over time. Not all owners are as well compensated, particularly those closest to the projects, but they are not damaged in the particular of property value. The evidence here is that such a policy works."[178]

The Galster, "Subsidized Housing and Racial Change in Yonkers, NY,"[179] article did not mention property values but predicted small increases in the black population of tracts in which court ordered scattered-site public housing is being built.[180]

Prof. Berry's supplemental report cited a study of the effect of scattered site public housing on property values in Charlotte, N.C. This report found little or no evidence that the sites had caused a decline in property values.[181]

Another version of the Puryear study reporting no adverse effect on property values and a January, 1996 article in The Appraisal Journal finding no adverse effects were in the possession of the Homeowners before they filed the lawsuit.[182] Neither article supported their assertion of property value loss.[183]

The cited articles do not support the individual homeowners' concern that they will suffer property value loss in the future.

The Homeowners subsequently offered into evidence the sales data and other information upon which Mr. Couch based his opinion.[184] At the Court's request, additional information was provided and Court's exhibit No. 2 summarizing the Homeowners' data was produced by Dusty Rhodes, the paralegal and investigator for plaintiffs' counsel. This data does show a decline in the price per square foot after DHA's announcement. The

price per square foot for 1996 before the announcement was $71.13, after $65.11. The year to date average is $67.52. These figures compare with the 1995 average of $68.88, the 1994 average of $70.71, and the 1993 average of $69.69.[185] The 1996 year to date average is the lowest of all the years.

Using only the data provided by the Homeowners, the decline from before to after the announcement was 8.5% while the 1996 average was down 2% from 1995, down 4.5% from 1994, and down 3.1% from 1993. However, another exhibit casts doubt on the usefulness of the Homeowners' data or Mr. Couch's conclusions.

***25** Ms. Rhodes filed a declaration stating that the County tax rolls and other sources of data showed that there had been numerous other sales in the area which had not been included in the Homeowners' data. Plaintiffs' 10/28/96 exhibit # 107 summarizes the Homeowner data and the other sales during the relevant time period. Mr. Couch used 4 sales for his before the DHA announcement price per square foot. There were at least 3 other sales during that period for which the sales price was not available. Mr. Couch used 6 sales to arrive at a $65.11 average for after the DHA announcement. He failed to include another sale at $78.88 per sq. ft. This sale alone increases the average post DHA sale price to $67.08, a 3% jump. The sale increases the 1996 year to date average from $67.52 to $68.55.

Ms. Rhodes also found numerous additional sales for 1995, 1994, and 1993. While price information was not available for all of the sales, inclusion of the data available changes the year to year comparisons. The 1996 year to date average is $68.55, the 1995 average is $69.20, the 1994 average is $68.82, and the 1993 average is $65.91. The 1996 year to date average is no longer the lowest of recent years but is within the range of averages for the past years. In fact the post DHA announcement average is more than the 1993 average.[186]

The Homeowners did not introduce any evidence of the effect of DHA's announcement on the sales prices of homes in the other Homeowner Association area, Preston Highlands. Plaintiffs did.

Plaintiffs' 10/28/96 exhibit # 7 is a summary of real estate sales data in the Preston Highlands Homeowner Association area collected by the Homeowners. The price per square foot before the announcement was $63.97, after $66.42, an increase of 3.8%. The before average total sale price was $163,588, after $166,493. The before sale price as a percent of list price was 95.46%, the after percent was 98.02%. While the limited number of sales in the after category limit any generalizations from this report,[187] the data is inconsistent with a decline in property values caused by DHA's announcement.

Plaintiffs also introduced a Preston Highland Homeowners' Association newsletter published after the DHA announcement.[188] The newsletter includes a message from the association president on the issues raised by DHA's announcement. The message includes the following statement under the heading "WHAT CAN YOU DO?". "STAY CALM—Everyone is concerned about home values, and rightly so. However, the quickest way to ensure that our home values do decrease is to encourage the perception that our values have already been significantly impaired or that we expect our values to decrease. Crying wolf too early to the wrong ears will do no good."[189]

The same newsletter contained an article by a local real estate agent, Carole Beasley with Henry S. Miller Realtors. The article points out that market values have been flat or declining since 1991. She states that the cause is "The severe competition of new/newer homes throughout Collin County is why we do not see market values increasing." Ms. Beasely also urges the property owners to update their homes. "The look of the early 1980s is not popular in the 1990s, and trying to force feed that look to the potential buyers that are shopping for a home in our area typically does not work."[190]

***26** The evidence does not support a conclusion that DHA's announcement caused a decline in property values. The corollary argument that the development of the public housing will cause a decline in property values is not supported by this argument.

Plaintiffs also introduced a spreadsheet showing the change in property values from 1980 to 1990 for census tracts with public housing. The change in median value is computed for each tract, the City of Dallas, and the County of Dallas.[191] The Kamely study also used census tracts with public housing projects as the basis for its conclusions.[192] Dallas County median value increased 60.78%, City of Dallas value by 76.03%. Only 3 census tracts for which there was both 1980 and 1990 data available either decreased in value or failed to increase by at least as much as the Dallas County median value increased. Thirteen census tracts with public housing experienced percent changes in median value higher than the City of Dallas overall average increase. Census tract 16, the location of DHA's Roseland Homes project increased in median home value from $22,900 to $123,600, a 439.74% increase.[193]

Plaintiffs did not introduce any analysis, expert or otherwise, to explain this data. Standing alone it certainly would not support a conclusion that public housing causes property values to increase. As a piece of the evidence, it is consistent with the findings in the previously cited academic studies that there is no necessary decline in property values that is caused by public housing.

The weight of the evidence does not support a finding that the development of public housing has caused or will cause a measurable impact on the property values of the single family homes in the area.

Section 8 efficiency in providing desegregated housing opportunities.

Summary of argument on Section 8 efficiency.

Section 8 has been most of the additional housing resources provided by HUD to provide desegregated housing opportunities for class members since 1987. The prior record in this case and the record at the 10/28/96 hearing show that the Section 8 program is subject to substantial and specific shortcomings in providing desegregated housing opportunities. The record shows that both Section 8 and public housing can be instruments of segregation and practical means of desegregation. The studies of Section 8 and the similar housing allowance program presented by the Homeowners confirm the experience with Section 8 in this case. Minority families do face substantial discriminatory barriers using Section 8. Neither Section 8 nor housing allowances have been conspicuously efficient at providing desegregated housing opportunities.

The Homeowners counter the experience with Section 8 in this case with several arguments. First, through professors Sa–Aadu and Thibodeau, the Homeowners argue that as a matter of economic principle reflected by the consensus of economic thought, Section 8 is economically more efficient than new construction of public housing. However, the articles, journals, reports, and studies cited show neither superiority as a matter of economic principle or a consensus among economists.

***27** Professor Berry makes two corollary arguments on behalf of the economic efficiency argument. First he argues that class members, like every one else, prefer cash to in-kind. His second conclusion is that new construction of public housing will hurt other poor people by decreasing the number of units available to them and by raising the rent on the remaining units. Section 8 is argued to have neither effect. Prof. Berry's first conclusion is unremarkable but irrelevant. Cash is not an alternative, only public housing and Section 8. His second argument is not supported by the authority cited and is in fact contradicted by that authority. Construction of new units increases the supply of housing and lowers rents in both the long term and short term. Vouchers raise the price of housing for everyone.

Professor Thibodeau, starting from the premise that new construction is justified only if it is either cheaper than Section 8 or if enough vacant units are not available, attempts to show that neither condition is satisfied in the Dallas area.

Professor Thibodeau uses two data sets in support of his argument that there are vacant units available at rents which can be paid under the Section 8 program. The first data set is a special compilation of 1990 census data which shows where tenants paying Section 8 rents or below were living in 1990. This data set does not even include the area of the Sites. It does not include race data and thus does not show the extent to which black families were able to find housing in white areas.

The second data set is reported occupancy units in apartment complexes in the City of Dallas as of Oct. 17, 1996. While Prof. Thibodeau's analysis of the data is seriously flawed and biased, that same data for various time periods shows a serious lack of available units at Section 8 rents in white areas of the City. The market is particularly tight for 3 and 4 bedroom units. The units that are available are disproportionately one bedroom units while the class members' need is disproportionately three and four bedroom units.

Professor Thibodeau also argues that the public housing at issue will cost an average of $134,000 a unit to construct which will make these units over twice as expensive as Section 8 units. Prof. Sa–Aadu based his opinions, in part, on Prof. Thibodeau's comparative cost analysis. Prof. Thibodeau's comparative cost analysis fails, in part, because he did not know and the Homeowners did not ask what DHA was going to build.[194] The HUD cost limitations would not allow $134,000 public housing units. DHA's prior experience and plans for new public housing units show that the HUD cost caps can and will be met. Using the HUD cost caps and more realistic assumptions about the operating cost of public housing, the new construction units will be only 20% higher in cost than a

FMR unit and almost the same cost as an 120% FMR Section 8 unit.[195]

The Homeowners' presentation does not support a change in the Court's use of both Section 8 and public housing in the remedy. Neither Section 8 nor public housing is a panacea.

Past record of Section 8.

***28** The first occasion upon which evidence was presented to the Court on the issue of public housing versus Section 8 in the remedial proceedings was in connection with the submission of the proposed HUD and DHA consent decree to the Court on Nov. 6, 1986. The proposed consent decree included provisions which would have lead to the demolition of 2,600 units of public housing in the West Dallas project. The units were to be replaced by a combination of new public housing units in and Section 8 certificates and vouchers.[196]

Hundreds of class members and others signed a written objection to the proposed decree. The objection was based in part on the use of Section 8 to replace the demolished public housing units.[197]

The Committee to Save Public Housing filed a detailed written objection to the proposed consent decree. The objection was premised on the differences between public housing units and Section 8 certificates and vouchers. The objection pointed out that the actual use of certificates or vouchers depended on a supply of private housing being actually available throughout the 15 year term of the certificates and vouchers. The Committee made the irrefutable point that the availability of the units would depend on important factors not under the control of the Court such as the effect of tight rental markets, rents higher than allowed for the program, and racial and other discrimination.[198]

The Committee, public housing tenants, officers of DHA's Resident Councils, the representative of U.S. Congressman Martin Frost, the Texas Tenants Union, and City Council person Lori Palmer presented these objections to the Court at the December 12, 1986 hearing.[199] The Court itself questioned the witnesses on the use of Section 8.[200]

There was already opposition to the use of public housing in other neighborhoods.[201]

The Court elicited plaintiffs' counsels' commitment that no class member would be forced to take a Section 8 certificate or voucher.[202]

Plaintiffs' counsel presented many of the potential problems with the use of Section 8 as replacements for public housing.[203]

The Court's statements in open court approving the consent decree made clear the consideration given to the issues of public housing versus Section 8.[204] The Court specifically recognized that there were risks in Section 8 that not all class members would want to take. The Court declined to force the risks upon unwilling class members.[205] The Court recognized the difficulties inherent in the selection of sites in white areas for the replacement public housing units.[206] The Court recognized and considered the risks and uncertainties of public housing and Section 8.[207]

The Court explicitly considered all of the risks and potential benefits when it approved the replacement of the West Dallas units with a mix of new public housing and Section 8.[208]

The Court's Findings and Conclusions approving the Consent Decree reflected its consideration of the issues involving the use of Section 8 to replace public housing. *Walker v. HUD,* 734 F.Supp. 1231, 1271 (N.D.Tex.1989).

***29** During the first year of the 1987 consent decree, the Court was forced to consider various problems in the implementation of the Section 8 program and the public housing program.[209] The problems included site selection for public housing, provision of mobility services for Section 8, adequacy of Section 8 Fair Market Rents, enforcement of Section 8 Housing Quality standards, discriminatory enforcement of limits on the number of Section 8 participants at complexes in white areas, and under-utilization of the program. These problems combined to put fewer Section 8 units in use at the end of the first year of the Consent Decree than were in use when the Consent Decree was signed.[210]

The problems with the use of public housing units to provide desegregated housing opportunities have surfaced repeatedly in the record of the case. *Walker,* 734 F.Supp. at 1301—1303 (opposition to DHA units in white areas based on cost, failure to maintain the units, increased crime, resegregation, lack of amenities).[211]

The problems with the use of Section 8 units to provide desegregated housing opportunities have surfaced

repeatedly in the record of the case. In addition to the findings in Walker I, the Section 8 program has been subject to numerous other problems. The record shows that the use of Section 8 in predominantly white areas is subject to many barriers and hurdles. Many of these problems are the ones which the Court was aware of when it approved of the 1987 consent decree.[212] These other barriers arise from the fact that the use of a Section 8 certificate or voucher requires a landlord who is willing to accept the Section 8 tenant and the Section 8 contract with the Housing Authority. These landlords, not under the control of the Housing Authority, may be either be motivated by racial discrimination, adequate occupancy rates achieved without the need to accept either the rent limitations or other requirements of the Section 8 program,[213] or by the desire to enforce tenant selection requirements such as minimum income, long term employment, or high credit rating.[214] Even landlords who want to participate in the Section 8 program may not have the three and four bedroom apartments which are needed by some participants.[215] Whatever the reasons, there is and has been a significant rate of persons with Section 8 certificates who have not been able to find any housing.[216]

The Court's approval of the City Consent Decree required consideration of various measures designed to improve the capability of Section 8 to provide desegregated housing. The City was required to monitor rent levels in predominantly white areas and request HUD for an increase in Section 8 FMRs if necessary to provide units in white areas.[217] The City is required to pay up to $50,000 a year in landlord bonuses in order to obtain 3 and 4 bedroom units in non-minority concentrated areas of Dallas County.[218] The City is required to perform timely code inspections on Section 8 units.[219]

***30** The Court's 1990 approval of the City Consent Decree required consideration of various measures designed to improve the capability of public housing to provide desegregated housing. The City is required to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units.[220] The City is required to take various actions to improve the conditions in and around DHA's existing projects.[221]

The effectiveness of both Section 8 and public housing in providing desegregated housing opportunities was evaluated by the Court in its decision to vacate the 1987 consent decree. Neither program had eradicated the vestiges of racial segregation under that remedial decree.[222]

The Court considered the relative success of both Section 8 and public housing when it ruled on plaintiffs' motion for summary judgment against HUD and DHA. The undisputed material facts showed that neither program had effectively eradicated the vestiges of racial segregation despite all the previous remedial efforts.[223]

After the liability determination, both HUD and DHA submitted desegregation plans. Plaintiffs objected to each plan. The Court held a hearing on the proposed remedial plans. The record submitted at the hearing included various proposals for the use of Section 8 and public housing in the remedy.

The evidence at the hearing showed that the lingering effects of past discrimination affected both public housing and Section 8:

> (1) 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[224] 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[225] The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance.[226] *Walker v. HUD,* 734 F.Supp. 1231, (N.D.Tex.1989).
>
> (2) At least 2,850 [59.2%] of the black households on DHA's Section 8 certificate and voucher program live in predominantly black or racially concentrated and low income areas. Only 21% of those households live in predominantly white areas. 45.6% of white DHA Section 8 households live in predominantly white areas. The neighborhood conditions are substantially inferior to the conditions in which low income whites receive HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside.[227]

Since September of 1994, the number of black Section 8 participants in white areas has increased only by 285, to 1,335.[228]

The Section 8 record at the hearing.

***31** In order to provide a desegregated housing

opportunity, a certificate or voucher must first provide an actual housing unit. A substantial number of DHA's Section 8 certificate or voucher holders do not successfully locate a unit. Most families who successfully use Section 8 find housing within 60 days of certificate or voucher issuance. The success rate for 3 bedroom families is 73% and 66% for 4 bedroom families.[229] This is lower than the national success rate of 84% for 3 bedroom families.[230] The families who cannot locate an acceptable unit are dropped from the Section 8 program.[231]

There are several reasons for the limited success of Section 8. Section 8 is dependent upon the willingness of landlords to enter into Section 8 contracts and leases. DHA has an ambitious and thorough program to search for and recruit willing landlords.[232] Many landlords will not accept Section 8, at least in white areas.[233] For example, the owner of the new apartment complex close to the Sites refuses to accept Section 8.[234]

Even if a landlord is generally willing to accept Section 8, there are still substantial barriers to the use of Section 8 in white areas. First, the unit must be available at a rent which can be paid under the Section 8 program. There are a very limited number of these units. DHA's July 1996 analysis showed 20 vacant 3 bedroom units, 181 vacant 2 bedroom units, and 253 vacant 1 bedroom units in white areas renting for Section 8 approved amounts.[235] Prof. Thibodeau's August 1996 occupancy data contained only between 52 and 23 three bedroom units in tracts he identified as white, and between 247 and 184 two bedroom units renting at or below Section 8 FMR rents.[236] Between 86 and 63 three bedroom units and 649 to 533 two bedroom units were vacant in white areas at rents equal to or below 120% of FMR on October 17, 1996.[237] This was characterized as a tight rental market even by Professor Thibodeau.[238]

Even assuming that a unit in a white area is vacant for Section 8 rent and that the landlord is willing to accept Section 8, there are still substantial barriers to the use of that unit by a Section 8 family. These barriers include high deposits which can be as much as the entire amount of a month's rent even though the family will be paying only a fraction of that amount.[239] Landlords also use tenant selection criteria which effectively bar many Section 8 families. These criteria include requirements that the head of the household have been employed continuously for the last 12 months and that the household income be at least three times the amount of the total monthly rent.[240]

At least 80% of DHA's Section 8 families are frustrated in their search for housing in white areas. Because the units are not available in white areas, the families end up using Section 8 in minority areas.[241] These discouraging results occur despite DHA's mobility counseling and landlord outreach efforts.[242]

***32** Section 8 can be as clustered as public housing.[243] Section 8 tenants moving into white areas can experience racial isolation, discrimination, and harassment just as can public housing tenants.[244]

Even small scattered site projects, 3 to 6 units, may not win the acceptance of adjoining white homeowners.[245] Despite this isolation, the tenants are well off and exhibit no more signs of anti-social behavior than any other group of people.[246] The size of the scattered site project is not as important as the characteristics of the neighborhood in which it is located. The Chicago scattered site units in the wealthier areas provide a better quality of life for the tenants than the projects in the poorer areas.[247] The only reported survey of tenant satisfaction in scattered site public housing projects in white areas found high satisfaction.[248]

National studies.

The housing allowance and Section 8 studies referred to by the Homeowners' own experts Thibodeau and Sa–Aadu confirm that these demand type housing assistance programs are not necessarily very efficient at providing desegregated housing opportunities.

The Weicher article, cited in opposition to public housing by Professor Thibodeau, actually concludes,

> "Minority households and other special groups can theoretically be better served in new construction programs. In practice, the record has been uneven. Section 8 Existing Housing has served minorities better than the new construction program, and had some modest success in reducing racial and ethnic residential segregation, but many blacks and Hispanics who wanted to participate have been unable to find satisfactory housing. More help for minority households is desirable.
> No program works well in tight markets, at least in the short run. New construction programs are notoriously slow; many families are unable to use vouchers or certificates when vacancy rates are low."[249]

Professor Thibodeau cited Raymond Struyk for the proposition that housing allowances are cheaper than new

construction.[250] The Struyk report is unambiguous in its conclusions on the racial issues .[251]

> "Racial discrimination, both perceived and actual, also reduced the mobility of minorities."[252]
> "Unfortunately, after controlling for race, income, and other factors, it was found that households in the worst housing (as measured by the EHAP program's own standards) also had the lowest rates of participation."[253]
> "The housing allowances appear to have had little if any impact on the extent of income and racial segregation, on the length of the journey to work, on neighborhood quality, or on movement between the central city and suburbs."[254]
> "We do know, however, that housing allowances enlist households with low housing preferences and the dwellings with the greatest deficiencies at lower rates than others. Hence, the very processes that provide for maximum freedom of choice for individual households may tend to discourage those households whose housing would improve the most by participating."[255]

***33** Prof. Thibodeau had done an earlier study summarizing and analyzing the experiences of minority families in using the housing allowances and Section 8. His report showed the significant barriers which minority families encounter in using allowance/voucher programs.[256]

> "Discrimination adds to the costs of search for minority households. "For certain types of minority households—particularly female-headed households and those wich (Sic) children—the effects of multiple forms of discrimination imply even greater costs."[257]
> "Given this conceptualization of move-related decisions, what is the role of discrimination? Discrimination increases search as well as moving costs, since a household facing discrimination must search more units than households that do not. Landlords practicing discrimination can increase moving costs by requiring higher security and utility deposits. It is also important to note that racial discrimination is only one type of discrimination prevalent in some housing markets. Households may face discrimination due to sex, presence and number of children, source of income, and possession of pets. The cumulative effect of discriminatory practices can drastically reduce the number of available units. For example, minority female heads of households raising several children may have difficulty locating alternate housing because of racial discrimination, discrimination against female-headed households, or discrimination against children. To the extent that discrimination is more prevalent outside concentrated areas, moves out of such areas are more costly to households."[258]
>
> "EHAP households encountered several types of discrimination. Table V lists the percentage of households reporting discrimination in four EHAP sites. Nearly one half of Pittsburgh households faced discrimination because of children while less than 30% of other households faced similar discrimination. Clearly then, some households are likely to face higher costs because of discrimination, and a large part of the explanation seems to lie in household composition. Given the costs involved, one would expect fewer moves to deconcentrated areas by larger households.
> > "A comparison of the Demand sites and the Supply sites indicates higher percentages of households report discrimination in tighter housing markets. Pittsburgh and Green Bay were tight markets, where landlords can screen tenants more carefully, while Phoenix and South Bend were loose markets. The percentages of households reporting discrimination in Pittsburgh and Green Bay are larger than similar Phoenix and South Bend households for each type of discrimination."[259]

The Homeowners also introduced into evidence a 1995 HUD Report to Congress on the use of Section 8 to provide housing choices for minorities outside ghetto areas.[260] The conclusions of the report paralleled the experience with Section 8 in this case. HUD found that a variety of market, social, and policy factors impede the movement of Section 8 families to better neighborhoods. Minority families were particularly subject to the limiting factors. The restrictions included community/political opposition to Section 8 reflecting underlying racial or class prejudice, tight rental markets, landlord preferences, racial discrimination, Section 8 discrimination, impediments of distance and information, program administration, HUD's Fair Market Rent levels, and the existence of Section 8 "submarkets" operated in low-income neighborhoods.[261]

Efficiency as a matter of economic principles.

***34** The abstract issue of economic efficiency is irrelevant to the issues in this case. Professor Thibodeau testified that so long as the housing cost less, Section 8 would be more efficient in economic terms if all of the housing was located in a predominantly minority area and perpetuated racial segregation.[262] The issue in this housing desegregation case is the efficiency of the means chosen in providing desegregated housing opportunities in white

areas for the black class members.[263] In addition to being irrelevant, neither the assertion of elementary economic proof nor that of unanimous consensus by the experts were true.

Professor Thibodeau cited the 1990 article Apgar, "Which Housing Policy is Best,"[264] in support of his assertion that the voucher/production debate had been unanimously settled in favor of vouchers. The Apgar article does not support the conclusion asserted by Professor Thibodeau. The Apgar article make it clear that the debate about demand (vouchers) versus supply (public housing) housing subsidy programs is still open.

Apgar, citing his own and other HUD research, reaches the following conclusions.

> "In metropolitan areas characterized by significant disinvestment in selected neighborhoods, a housing allowance program could further destabilize the housing market by further inducing households to move out of areas with high vacancy rates and low-quality housing and move into areas with low vacancies and strong upward pressure on rents. In this context, a housing allowance arguably could both add to abandonment pressures in some neighborhoods and stimulate excess demand pressures in other neighborhoods and still not evoke, at least in the short run, a positive supply response that would limit price increases."
>
> .....
> "While the demand-oriented approach has won the upper hand in recent funding decisions, recent policy studies raise doubts about the validity of earlier findings concerning the likely market effects of housing allowances or vouchers. In light of the deteriorating housing situation of the growing number of low-income renter households, these studies call into question the efficacy of the current reliance on demand-oriented housing assistance."[265]

After analysis, Apgar comes to the following conclusion:

> "In either case, the presumption that vouchers will not trigger rent inflation is called into question, as is the presumption that vouchers represent a more cost-effective method for increasing the well-being of low-income tenants.
>
> ....
> The recent increase in market rents challenges the proposition that demand subsidies are a cost-effective method of housing assistance. First, rent increases have raised the cost of subsidizing households through use of existing stock and have made new construction programs relatively more attractive. In addition, by expanding the supply of rental housing, subsidized new construction programs may limit future rent increases, benefitting not only recipients, but others in the form of reduced rent payments ."[266]

***35** Apgar notes that since the time period analyzed in the EHAP studies, gross rents have increased more than construction costs, reversing the trend that would make supply units more efficient. The rent increases have made the supply subsidies more expensive. Apgar emphasizes the point made by the original analysts of the EHAP data, the relative efficiency of supply versus demand is not a theory true for all time and every place but rather a factual matter that is conditional on program features, administration, and economic conditions.[267]

Apgar cites an example of where subsidized production will provide a needed expansion of the housing market for low income persons while limiting rent increases and without reducing maintenance and repair of existing units—the subsidized production of 3 and 4 bedrooms for low-income families with children in a market that has little private new construction of this type of housing.[268]

Apgar specifically pointed out that new construction of public housing, a supply program, can benefit the entire low-income housing market. "Just as the Voucher Program may impose costs on nonparticipants by raising prices, supply programs may confer benefits on nonparticipants by lowering or holding in check market price increases."[269]

Apgar also argues that the rent increase burdens of a voucher program may easily "overwhelm the direct effects of the subsidy for participants."[270]

Apgar's conclusion is that the "best" housing policy depends on a balanced approach. "Vouchers may be good in some contexts, but economic theory and recent empirical analysis suggest that they are 'not best at all times and under all situations,' especially when the concept of best is expanded to include both subsidized and nonsubsidized poor."[271]

Professor Thibodeau cites John Weicher for the proposition that production programs failed. The context of the quote gives a more balanced view.

After stating that the voucher/production debate has been at a standstill, Weicher says:

> "The reason for the stalemate is that neither vouchers nor production programs are a panacea, and advocates

> of both approaches at least implicitly recognize this. Conversely, critics of both approaches have been able to make telling points.
>
> ...
>
> Vouchers seem to be less a housing program than an income transfer program for poor people who already live in decent housing. When EHAP began, most housing economists believed that existing housing subsidies would result in substantial housing improvement. Results have been much more modest.
>
> ...
>
> Minority households and other special groups can theoretically be better served in new construction programs. In practice, the record has been uneven. Section 8 Existing Housing has served minorities better than the new construction program, and had some modest success in reducing racial and ethnic residential segregation, but many blacks and Hispanics who wanted to participate have been unable to find satisfactory housing. More help for minority households is desirable.
> ***36** No program works well in tight markets, at least in the short run. New construction programs are notoriously slow; many families are unable to use vouchers or certificates when vacancy rates are low."[272]

Professor Thibodeau cited some of the cost conclusions from the Mayo study of the EHAP results. He does not give the limiting context in which those conclusions are stated. The Mayo study does not support the position that housing allowances/vouchers are always cheaper or better for those served. Rather, it found that the relative efficiency of the forms of housing assistance depended on the specific facts of given housing and financial markets. The following quotes and summaries from the Mayo study illustrate this point.[273]

"For construction program costs to fall below those of Housing Allowances would require a combination of steady or falling construction costs, interest rates, and operating costs, and a sustained increase in residential rents at a level well in excess of recent rates."[274]

In 1965 new construction only 27 percent more costly, in 1975 55%. Interest rates rose by 68%, construction costs by 104% and fuels and utilities by 71%. Rents rose only 42%.[275]

The new construction inefficiencies arise from the decision to build additional units in markets where units are available at much lower costs. "This suggests that the comparative efficiency of existing housing and construction programs is not fixed either over time or across locations. Thus, any comparative evaluation of housing programs should ultimately be conducted in the context of a more general understanding of how general economic conditions and local housing markets influence the availability and relative costs of both existing and newly built standard housing."[276]

Regarding study conclusions that existing housing has lower costs. "Such observations concerning relative costs should not be taken as conclusive; they are, at heart, empirical observations rather than the inevitable consequences of new construction and existing housing programs."[277]

"Thus what appears to a 'finding' in the comparative cost literature—that existing housing costs are less than new construction costs—may be more highly conditional on program features, administration, and economic conditions than some researchers have acknowledged."[278]

"Analyses based on the earlier data, for example, indicate that costs of construction programs are relatively closer to those of existing housing programs than is the case in analyses using more recent data." Life cycle analysis shows closer relative costs in terms of present discounted values.[279]

"Throughout this analysis, and especially in the discussion of the relative 'efficiency' of housing programs, it must be borne in mind that housing programs have many objective and many outcomes and that costs, equity, and efficiency as defined here are only a few of them."[280]

***37** "Cost comparisons for a particular unit size may not accurately portray the relative costs among programs for other unit sizes. Local housing market conditions may, for example, create a temporary excess or shortage of units of a particular size and quality...It could also be the case that price discrimination against households of particular sizes, especially large households, could drive up the cost of existing housing relative to the cost of newly constructed units of particular sizes. In such situations, the total cost of a newly constructed unit could be above that of existing units for some unit sizes and below that for other sizes."[281]

Some situations could be created where investing in new housing rather than leasing represents a desirable strategy. As of 1975, leasing represented a less costly strategy. "Generalizations from the results presented here must, however, be approached with an appreciation for their

sensitivity to the level and rate of change in both local factors (construction costs, rents, operating costs) and national factors (interest rates). As the analysis has indicated, relative costs of programs can change rapidly in response to such factors."[282]

"At this stage, therefore, it should not be automatically assumed that existing housing programs are both inexpensive and efficient for all groups and in all places.[283]

Another aspect of the analysis which affects the generality of the results is the time of the analysis. As indicated above, 1975 is not a favorable time for comparing costs and efficiency of construction programs vis-a-vis existing housing programs....."[284]

Prof. Sa–Aadu, an economist, also testified to the same conclusions as Prof. Thibodeau about relative economic efficiency of vouchers and public housing. His conclusions were based on the same EHAP reports and upon Prof. Thibodeau's exaggerated public housing construction costs.[285] Prof. Sa–Aadu did not know of any research or studies on the issue of whether minority voucher holders encountered racial discrimination and other barriers preventing the use of the vouchers to obtain housing in white areas.[286] Prof. Sa–Aadu knew nothing about the specifics of the Dallas housing rental market or local housing construction and financing costs.[287]

Professor Berry testified and reported on two corollary economic arguments. His first conclusion was unremarkable. Given the choice of an in-kind or a cash transfer, people find the cash transfer more useful. At best this conclusion supports the Court's previous finding that many of the class members prefer Section 8 vouchers or certificates over public housing.[288]

Prof. Berry's second major conclusion was that construction of public housing had adverse supply side effects and injured the welfare of the working poor who were not recipients of public housing.[289] This testimony was not supported by the authority cited.[290] As Prof. Berry acknowledged on cross examination, according to the O'Sullivan text, the construction of public housing would both increase the number of units available and lower rents for everyone in the short term and long run. Prof. Berry also acknowledged that, according to O'Sullivan, voucher programs would have the effect of raising rents for everyone.[291]

Thibodeau's analysis of local conditions.

***38** Professor Thibodeau argued that there is no need for public housing in white areas because there are many privately owned units available for Section 8 certificates and vouchers holders. He presented three elements of evidence on this subject: 1) an analysis of 1990 census data showing that there were a substantial number of persons living in parts of Dallas and paying rent in an amount less than or equal to Section 8 Fair Market Rents, 2) maps showing the location of existing Section 8 participants in 1994, 3) Prof. Thibodeau's analysis of vacancies currently available in Dallas for rents less than or equal to Section 8 Fair Market Rents, 120% of Section 8 Fair Market Rents, and 160% of Section 8 Fair Market Rents.

The 1990 census data and the maps showing Section participants were not useful. Neither the 1990 data nor the maps showed the extent to which black families were able to find housing in white areas.[292] The 1990 census data did not even include the large part of the City of Dallas that is in Collin or Denton County.[293] The sites are located in the portions of the City of Dallas excluded from the PUMS analysis.[294]

Prof. Thibodeau's analysis of vacancy data purported to find numerous units for rent in primarily white and non-poverty census tracts at various rent levels.[295] His analysis was unreliable and his conclusions exaggerated.

Prof. Thibodeau did not analyze the vacant units by bedroom size. This prevented any analysis to determine if the units available were the size of units needed by actual Section 8 families.[296] Plaintiffs did this analysis and it showed a substantial mismatch between vacancies and need. 32% of the Section 8 waiting list (3,365 families) is eligible for one bedroom apartments. 61.55% of the FMR vacancies in the white areas (671 X .6155 = 379.8) were one bedroom units. 38.24% of the waiting list needs a two bedroom unit. 29.41% of the FMR vacancies in the white areas (671 X .2941 = 197) were two bedroom units. 21.64% of the Section 8 waiting list families need three bedroom units. 3.33% of the FMR vacancies in white areas (671 X .0333 = 22.3) were three bedroom units. 4.38% of the Section 8 families need four bedroom apartments.[297] Prof. Thibodeau's analysis found no four bedroom units.[298]

Many of Prof. Thibodeau's available units were not really there. Because Prof. Thibodeau built in an extra .5 into his rounding formula, his total vacancy estimate of 8,990 units contained 1,248 units added only as a result of the rounding formula, a difference of 14%.[299] The difference was not uniform across all bedroom categories. Prof.

Thibodeau's rounding formula produced 66 three bedroom units in white areas. The normal rounding formula, without the additional 0.5, added up to 43 three bedroom units in white areas, a 34% difference from the Thibodeau total.[300]

DHA did its own vacancy analysis using the same source of vacancy data as was used by Prof. Thibodeau. DHA's analysis showed 20 vacant three bedroom units, 181 vacant two bedroom units, and 253 vacant bedroom units available at 110% of the Section 8 Fair Market Rent level and in predominantly white areas.[301]

***39** Prof. Thibodeau's analysis and testimony did not include any estimate of how many of the vacant units were actually available to Section 8 families. Prof. Thibodeau was unable to estimate how many of the landlords were willing to accept Section 8. Prof Thibodeau was unable to estimate how many of the landlords had application criteria such as employment requirements, minimum incomes, etc. which would prevent Section 8 families from using those vacant units .[302]

DHA has the obligation to create 3,200 units of assisted housing in predominantly white areas. Any plan for the use of Section 8 instead of public housing for these units will have to show that the units are actually available in white areas for use by black Section 8 families. Professor Thibodeau's analysis did not accomplish this result.

Section 8/public housing cost comparison.

Prof. Thibodeau also presented an analysis of the costs of constructing new public housing on the Sites compared to the cost of either purchasing existing units or using Section 8 vouchers/certificates to provide the housing.[303] He used this analysis to support his opinion that new construction was grossly economically inefficient by a factor or more than 2. The analysis does not support the argument.

Prof. Thibodeau based his analysis on estimated total development costs per unit ranging from $76,118.94 for a one bedroom unit to $204,611.03 for a four bedroom unit. His average cost per unit was $136,347.19.[304] These amounts are far in excess of both the maximum amounts which HUD will allow for the development of public housing units and the costs per unit of similar developments by DHA. HUD sets the maximum which may be spent for each unit of new public housing. The maximum cost for the Dallas area range from $61,900 for a one bedroom unit to a $114,150 for a four bedroom unit.[305]

DHA has and will develop units in white areas within the HUD cost limitations. The total development cost for Barbara Jordan Homes was $49,115 per unit. The total development cost for the units in development at the Frankford and Marsh site will be $84,000 per unit .[306] These costs are for housing that is consistent in design with the other housing in the area.[307]

Prof. Thibodeau then proceeded to capitalize the development cost, add other costs which he believed DHA would incur in operating the new units and calculate a per month per unit cost which he compared to the Section 8 Fair Market Rent.[308] This monthly cost estimate was artificially inflated by the exaggerated construction costs and the inclusion of a security cost of $5,391.97 per year, $449.33 per month, per unit. While DHA and the City will have to provide adequate security and policing for these units, there is nothing in the record upon which this estimate can be based.[309] The Court has not ordered, HUD has not agreed to pay, and DHA has not planned to incur such security costs.

The recalculation of Prof. Thibodeau's monthly cost analysis using the HUD Cost Caps and omitting the security costs is a matter of substituting different amortization amounts and expenses to the same formula.[310] As shown below, the resulting comparison of public housing costs to the average FMR is lowered from 2.37 to 1.23. The ratio of public housing costs to the 120% average FMR drops from 1.97 to 1.02. The cost ratio for 3 bedroom units drops to 1.12 of the 3 bedroom FMR and to 0.93 of the 3 bedroom 120% FMR.

***40** The use of the HUD cost caps also changes Prof. Thibodeau's calculation of the cost of new construction versus the cost of acquisition. The 1, 2, and 3 bedroom discounts for acquisition drop from 54%, 37.6%, and 27.25% to 35%, 6%, and –15.76%. The –15.76% discount for three bedroom units means that it would be cheaper to build new three bedroom units than to acquire existing units.

The more realistic analysis shows that even in simple economic terms the Section 8 advantage over new public housing in white areas of Dallas is narrow. In terms of desegregation efficiency, the advantage disappears. As of June 10, 1996 HUD records showed 6 DHA Section 8 certificate holders in the tract.[311] There were no other HUD assisted housing units in the tract.[312] MSJ 295.

If all 80 public housing units are developed on the Sites, that census tract will have 86 assisted units out of 11,885 total housing units, 0.72%. MSJ 296. The cost of new public housing will provide units which can be used by class members in census tract 317.98 where there are currently no vacant units renting for Section 8 FMRs[313] and few renting for 120% FMR.[314]

Adverse impact of public housing on class member choice.

The Homeowners claim that their major concern is not protecting property values but protecting the class members' right to choose where to live. The claim is made in public statements.[315] The claim is made in testimony.[316] The claim is made in argument.[317] The Homeowners claim that it is now plaintiffs' counsel who is telling black people where to live.[318]

The concern is misplaced. The Remedial Order Affecting DHA already protects every class members' right to choose where to live.[319] Because there is a preference for Section 8, every person accepting a unit in any public housing project is automatically placed on the waiting list for Section 8. If the applicant has already applied for Section 8, then the applicant remains on the Section 8 waiting list even though she has moved into public housing.[320] This procedure has worked in the past to allow many families to first use public housing and then move to Section 8. *Walker I,* 734 F.Supp. 1246 (N.D.Tex.1989). Whatever adverse effects will flow from residence in public housing, the participant will be able to end her exposure to those effects by choosing to move to Section 8.

Violation of their equal protection rights.

In order to be unconstitutional as to the Homeowners, the remedy must not only be race-conscious but it also must violate their equal protection rights. The illicit race conscious purpose must be the intent to treat minorities better than whites by giving minorities preferential treatment and allowing minorities to be judged by lower standards than are applied to whites. *Hopwood v. Texas,* 78 F.3rd 932, 936–938, 947, 957 (5th Cir.1996) *cert. denied.* Assuming an equal protection violation is shown, the Homeowners are still not entitled to relief if the same result would occur under a race-blind remedy. *Id.* at 932.

***41** The Homeowners are not being denied a job, placed lower on a promotion list, denied admission to a school or denied admission to a publicly assisted housing program. Their asserted injury, a loss of property value, is being caused by otherwise normal and lawful governmental action. Absent the allegation of race discrimination, they would have no claim for compensation. *Florida East Coast Properties Inc., v. Metropolitan Dade County,* 572 F.2d 1108, 1111 (5th Cir.1978) (since construction of a prison did not infringe property rights, an allegation of diminution in value alone was not sufficient to present a constitutional claim).

The U.S. Supreme Court and the Fifth Circuit have given the framework for determining when local government action with an indirect effect on property values and the quality of urban life violates the equal protection guarantee against racial discrimination. In *Memphis v. Greene,* 451 U.S. 100, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981) black property owners challenged the City for closing streets which went from black to white neighborhoods. The black homeowners asserted that the closings adversely affected their ability to hold and enjoy their property because of race. *Id.* at 102. In its analysis to determine whether the equal protection principle had been violated by conferring a benefit on whites because of their race, the Court noted that there was no showing that the benefit, street closings, was not equally available to black property owners. *Id.* at 119, 123.

The Fifth Circuit applied the same reasoning in its evaluation of a claim by black property owners that a grand prix automobile race in their black neighborhood had impaired the use and enjoyment of their homes and inflicted various physical and psychological injuries. The Circuit noted that the equal protection principle mandates similar treatment for those similarly situated. Because the black plaintiffs failed to allege the existence of a similarly situated but differently treated non-minority neighborhood, there could be no equal protection violation. *Samaad v. City of Dallas,* 940 F.2d 925, 941–942 (5th Cir.1991). The Fifth Circuit held that the essence of an equal protection claim is that other persons similarly situated as the claimant unfairly enjoy benefits that he does not or escape burdens to which he is subjected. The complaint must specifically allege the actual existence of these similarly situated group of persons. *Id.* at 941, 941 n. 31. The Fifth Circuit held that even if there was some discriminatory intent, the Equal Protection Clause would not reach the conduct in the

absence of a similarly situated group of whites. *Id.* at 942 n. 32.

The Homeowners have not identified any such set of black persons who are similarly situated and have been treated better. The Homeowners must show that there is an intent to treat minorities better than whites by giving minorities preferential treatment. *Hopwood v. Texas,* 78 F.3rd 932, 936–938, 947, 957 (5th Cir.1996) *cert. denied* (allowing minorities to be judged by lower standards than are applied to whites).

Equal protection and site selection.

***42** The Homeowners assert that the choice of the Sites violate the Homeowners' right to equal protection under the law because the Sites were chosen, in part, based on the race of the occupants of the area, white. The Homeowners assert that the choice will injure them by causing a diminution in the values of their homes and real property. Accepting this injury for argument purposes, it is important to place the interest affected in its legal context.

DHA is not exercising any form of control over the Homeowners' property. The Homeowners do not allege that DHA is limiting the use of or physically invading the Homeowners' property. The Homeowners do not allege that DHA's development of public housing projects is in itself an unlawful or nuisance use of DHA's own property.

The Homeowners do not claim any abridgement of contract rights. The property purchased by DHA is not within the boundaries of their associations and is not subject to the deed restrictions of the associations. The Homeowners do not claim that DHA's use of the property will violate the zoning or building codes of the City.

The Homeowners do not claim any type of general right to be free from public housing close to their neighborhood. One of the neighborhood homeowners' association representatives admitted that there were sites in the area which could be chosen under a "race blind" process and that the Homeowners would not have any legal basis to stop the housing.[321] The only basis upon which they rely is that the race based site selection violates their rights not to be discriminated against because of race and not to suffer a loss in property values because of that discrimination.

While any type of financial loss is a serious matter, the constitutional protections afforded to property values for consequential damages arising out of lawful government use is limited. Such a diminution in value alone is simply not sufficient to present a cognizable claim for compensation under the due process provisions of the Fifth or Fourteenth Amendments. *FLORIDA EAST COAST PROPERTIES, INC., a Florida Corporation v. METROPOLITAN DADE COUNTY,* 572 F.2d 1108, 1111, (5th Cir.1978) (diminution of property values because of construction of a prison facility near neighborhood did not give rise to a "taking" claim).

In order to analyze the Homeowners' equal protection claim, it is necessary to first find the unequal treatment based on race. The relevant comparison in this case would be a showing that black homeowners are not subjected to the presence of public housing in their neighborhoods, that black homeowners are somehow treated better when public housing is placed in their neighborhoods, or that white homeowners are being subjected to racial residential segregation. None of these comparisons can be made in this case.

Almost all of DHA's public housing projects are already located in predominantly black neighborhoods and will continue to be located there for the foreseeable future. Even if all of the 674 units were to be constructed in predominantly white areas, there would be less than 1,000 units in those areas. As of the date of the entry of the Remedial Order Affecting DHA, 6,133 of the 6,411 units in DHA's non-elderly public housing projects were in these predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[322] There will still be over 3,000 units of family public housing in minority areas even after the demolition of the West Dallas units. There can be 950 units in the West Dallas project alone if the revitalization plan is approved by the Court. The Remedial Order Affecting DHA allows for up to 200 of the allocated new public housing units to be developed in West Dallas, a predominantly minority location.[323]

***43** The impact, if any, on the Homeowners will be considerably less than that impact of the existing DHA public housing projects on the property owners in the black neighborhoods with existing projects. DHA is implementing the race conscious site selection in a manner that minimizes any impacts on the surrounding property owners.[324] This is in contrast to the implementation of the previous race conscious site selection in black areas. DHA is constructing new units in small complexes of less than 100 units. The Frankford and Marsh site will have 75 units. The sites now at issue will have no more than 40 units on each site. The projects in the minority areas ranged in size from 3,500 units to 102 units.

DHA is giving adjoining and nearby property owners the opportunity to provide guidance and input into the design and management of the new projects. There was no and is no such process for property owners in the minority areas.

DHA is imposing higher qualifications on the tenants who will reside in the new public housing units than on those in the other projects. Each tenant in the new units will be required to participate in the Family Self Sufficiency program. There is no such requirement in the minority area projects.

DHA is attempting to design and build the units to blend structurally and aesthetically into the surrounding neighborhoods. The barracks style and design used in the historical black projects will not be used.

The development of public housing on these sites will little demographic effect on the area.

The census tract within which the Sites are located is Collin County census tract 317.98. MSJ 292.

Census tract 317.98 is 87.91% non-Hispanic white [17,678], 3.59% non-Hispanic black [721], and 3.96% Hispanic origin [796].[325] Of the total population of 20,109, only 655 or 3.26% are below poverty level.[326] 96.74% of the total population is above poverty level.[327] There are no black families below poverty level in this census tract.[328] MSJ 293.

Of the 11,885 total housing units in census tract 317.98, 30.65% [3,643] are single family units.[329] 68.73% [8,168] of the total housing units are multifamily units in this census tract.[330] In this census tract, there are 2,104 units in structures with 50 or more units. There are 1,170 units in structures with 20 to 49 units. There are 2,499 units in structures with 10 to 19 units. There are 1,839 units in structures with 5 to 9 units.[331]

As of June 10, 1996 HUD records showed 6 DHA Section 8 certificate holders in the tract.[332] There were no other HUD assisted housing units in the tract.[333] MSJ 295.

If all 80 public housing units are developed on the Sites, that census tract will have 86 assisted units out of 11,885 total housing units, 0.72%. MSJ 296.

The City average ratio of assisted to total units is 7.5%.[334] MSJ 297.

The 1990 median value of owner occupied housing units in tract 317.98 was $208,400.[335] MSJ 298.

***44** There were 10,869 households with no public assistance income and 84 (0.77%) households with public assistance in tract 317.98.[336] MSJ 299.

The median family income was $70,893 and the median household income was $37,994.[337] MSJ 300.

There were 3,386 owner occupied units (31.06% of occupied units) in tract 317.98 and 7,516 renter occupied units (68.94%).[338] MSJ 301.

Of the 7,516 occupied rental units in the tract, 100 were three bedroom units (1.33%) and 121 were four bedroom units (1.61%).[339] MSJ 302.

Only 2.19% of the labor force in census tract 317.98 is unemployed.[340] MSJ 306. In census tract 317.98 only 2.32% of the total households are headed by single moms with children under 18 years old [254 out of 10,953 total households]. 196 of the 254 households that are headed by single moms with children under 18 years old are white [1.79% of the total households] and 58 are black [.53% of the total households].[341] MSJ 305.

There are no unemployed high-school drop-outs in census tract 317 .98.[342] MSJ 307.

There are no vacant and boarded up structures in this census tract where the two challenged Sites are located.[343] Only 8.27% total housing units in this census tract are vacant units.[344] MSJ 308.

The age of the housing is indicated by the median year structures of housing units were built which is 1986 for census tract 317.98.[345] MSJ 309.

There is no equal protection violation because there is no intent to treat whites worse than similarly situated blacks, no effect of subjecting whites to unequal conditions, and no residential segregation of whites.

The municipal services discrimination cases provide a better analogy for this case than do the individual employment or student admission cases. The cases involved claims similar to the Homeowners' claims that a specific neighborhood or part of town were being subjected to purposeful discrimination because of race. In order to succeed, the black plaintiffs in those cases had to show that white neighborhoods were treated better than black neighborhoods by the city. *Hawkins v. Town of Shaw,* 437 F.2d 1286 (5th Cir.1971), *affd. en banc,* 461 F.2d 1171 (5th Cir.1971); *Dowdell v. City of Apopka,* 698 F.2d 1181, 1186 (11th Cir.1981). If no disparity, then no

violation was found. *City of Memphis v. Greene,* 451 U.S. 100, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981); *Beal v. Lindsay,* 468 F.2d 287 (2d Cir.1972); *Burner v. Washington,* 399 F.Supp. 44 (D.D.C.1975).

The race conscious provision of the remedial order does not give blacks a preference or allow them to benefit from lower standards than similarly situated whites. Whites are not subjected to racial segregation under the order. White neighborhoods are not subjected to heavier burdens or fewer benefits than black neighborhoods. The remedial order uses race to achieve equality of treatment, not inequality.

Equal protection and tenant selection and assignment.

The Homeowners' complaint alleges that the use of a race conscious tenant selection method for the public housing on the sites violates the Homeowners' equal protection rights.[346]

***45** The race conscious tenant selection and assignment procedure does not operate to deprive anyone of housing because of race. The existing system uses race in a very limited fashion. It does not use race to move persons up or down the waiting list. Race is used only if there are units available in both white and minority areas or locations. Then the person at the head of the list will be offered a unit in the location where her race does not predominate.[347] No one is skipped over because of race. No one is denied housing because of race. The purpose and effect of the assignment plan is to desegregate the projects.

Each applicant is also given the right to refuse a unit in the remaining 950 units in the West Dallas project without losing her place on the waiting list.[348] Each black applicant is given the right to refuse a unit in West Dallas without losing her place on the waiting list. Each white applicant is given the right to refuse a unit in a predominantly white location without losing her place on the waiting list.[349]

The race consciousness of this plan is race neutral; it prefers neither whites nor blacks. Since it does not use willingness to move into project where the applicant's race does not predominate as preference to move up on the list, this plan has less impact than the race conscious plan approved by the Sixth Circuit. *Jaimes v. LMHA,* 833 F.2d 1203, 1207 (6th Cir.1987). There are no quotas or other limits on the availability of all of DHA's programs to persons of all races. *Burney v. Housing Authority,* 551 F.Supp. 746, 764 (W.D.Pa.1982) (striking down integration maintenance quotas); *U.S. v. Starrett City Associates,* 840 F.2d 1096 (2d Cir.1988), *cert. denied,* 488 U.S. 946, 109 S.Ct. 376, 102 L.Ed.2d 365 (1988) (striking down integration maintenance quotas). The plan does not violate the equal protection rights of DHA's applicants.

The Homeowners have not explained how these policies adversely affect their equal protection rights. One Homeowner representative testifying on behalf of the association stated that the tenant selection and assignment plan did not affect them. The Homeowners were only challenging it as evidence in their case.[350] The Homeowners' should have to explain how a predominantly black occupied project in their neighborhood violates the Homeowners' equal protection rights simply because the occupants are black before they can prevail on this claim.

The tenant selection policy and the predominantly black DHA waiting list will produce predominantly black occupied projects on these sites. The effect will flow primarily from the 90% plus black waiting list rather than the tenant assignment policy [Lori Moon deposition]. The sites in the black neighborhoods are also predominantly black occupied. There is no disparity in treatment. There is no segregative purpose against or effect on the Homeowners. There is no violation of the Homeowners' equal protection rights.

Equal protection and race conscious Section 8 mobility.

***46** The Homeowners' complaint does not ask for any relief against the operation of the race conscious Section 8 mobility program or include those provisions in the stated causes of action or requests for relief. The attack on the race conscious Section 8 mobility is also described as part of the Homeowners' evidence rather than an infringement of their rights.[351]

The only effect which the mobility program could have on the Homeowners would be to increase the number of black Section 8 participants in the multifamily complexes or other rental housing in the area. This effect would not subject the Homeowners to any form of racial discrimination. The Homeowners are not seeking to occupy the rental housing. The Homeowners are not

being subjected to racial segregation by the mobility effort. These provisions do not violate the Homeowners' equal protection rights.

Color blind result.

Even if there was an equal protection violation, the Homeowners are not entitled to relief. The sites at issue could be chosen even if the race conscious site selection language was not in the Remedial Order Affecting DHA. The Order also requires the sites to be selected in areas with less than a 13% poverty population.[352] The Homeowners do not challenge the choice of the specific sites.[353] The Homeowners do not challenge the use of the poverty concentration rate. The Sites are located in census tract 317.98. Of the total population of 20,109, only 655 or 3.26% are below poverty level.[354] 96.74% of the total population is above poverty level.[355]

Jacob Cherner, the designated representative for the Preston Highlands Homeowner Association, testified that such a race blind choice of the site would not violate their rights or afford them a remedy.

> "Q. Would the sites that are at issue in this lawsuit meet your criteria for use under a color-blind public housing site selection remedy?
>
> A. They could.
>
> Q. You're saying they could as opposed to they would. Why are you saying they could as opposed to they would?
>
> A. They could as opposed to they would because in our definition that we used for our purposes today, we've said that the environmental issues would also be met, and although those are not before us right now, I do believe that there are concerns with the two particular tracts, but there is other vacant land near Preston Highlands Homeowners' Association that would certainly fall within the guidelines and be available for purchase.
>
> Q. So if DHA was to pick these sites or the other sites you referred to on a color-blind basis, would these same injuries we talked about earlier also impact the adjoining homeowners?
> A. If they picked one of the sites that was in my Homeowners' Association, the injury could be the same, yes, sir."[356]
>
> Q. So, if the site that's across the way from Preston Highlands was selected because it was a good site for public housing and it didn't have anything to do with the fact that it's a predominantly white area, that wouldn't be a problem then?
>
> ***47** A. I don't think there would be a remedy—
>
> Q. Or a violation of your constitutional rights?
> A. Yes, ma'am. No ma'am. I don't think it would be a violation of our constitutional rights for them to have selected that site at random."[357]

J. *Expert qualifications, usefulness, and credibility*

The purpose of expert testimony is to present the Court with scientific, technical or other specialized knowledge which will be useful to the Court in understanding the evidence or determining facts in issue. The person presenting the knowledge must be qualified. Since the expert is presented as an objective, scientific observer, that expert must be objective and truthful.[358] Three of the four Homeowners' experts failed to meet one or more of these standards. The testimony of the fourth expert, Mr. Couch, was entitled to little weight.

Professor Berry.

Professor Berry was retained to conduct an independent analysis of "whether the portion of Judge Buchmeyer's order requiring the construction of 674 public housing units in predominantly white areas is not narrowly tailored to serve the purpose of eradicating the vestiges of past discrimination because less intrusive means would suffice to achieve that same purpose."[359]

Professor Berry did little to qualify himself as an expert on public housing desegregation remedies. He has not written or published any articles examining the possible means of remedying de jure racial segregation in public housing programs.[360] He has never consulted on the evaluation of or formulation of a specific remedy for racial segregation in public housing programs.[361]

His only knowledge of the remedy in the East Texas public housing case against HUD came from the newspapers and what he learned at cocktail parties.[362]

Even though he had been defendants' expert in the public housing desegregation cases in Omaha and Allegheny County, he never even read the remedial orders in those cases and had no knowledge of the role of public housing construction.[363]

The only step he took to determine what had been done in this case to use Section 8 as a means of providing desegregated housing opportunities was to read the Remedial Order Affecting DHA.[364] He was unaware of the basic demographics of the proposed location for the public housing.[365] In his deposition, Prof. Berry claimed that he did not know the racial composition of the proposed location and did not think the information was relevant.[366] He did not know the racial composition of the areas around DHA's existing projects or the racial distribution of the Section 8 program[367]

Professor Berry claimed that the only economists who would disagree with his conclusions would be Marxists.[368] Yet few of Professor Berry's opinions were supported by any of the authorities he cited. None of the articles supported his conclusions about social isolation, the market effects of vouchers and public housing, or the negative spillover effects of anti-social behavior caused by social isolation.[369]

***48** His claims for the benefits of scattered site projects with 6 or fewer units based on the Chicago experience were not supported by Sue Brady, the person in charge of the Chicago scattered site projects.

The size of the project makes little difference in neighborhood acceptance.[370] Whether a project is new construction or rehabilitation makes little difference in neighborhood acceptance.[371] The children of the project's neighbors are not the ones who discriminate against project children.[372] A fifty unit project is not more likely to cause prejudice against its residents than a project that fits into the neighborhood.[373] The more stable and middle class the neighborhood, the less problems at a project. The neighborhood stability is a factor, size of the project is not.[374]

The site residents who come from the neighborhood are more likely to engage in gang behavior than those who move from another neighborhood because the neighborhood residents are just moving around the block and they bring the problems with them. The outsiders are taken out of their historic setting and put in a new environment.[375] The gang activity that does exist does not come from the scattered site projects, the gangs form at the schools. The more stable the neighborhood, the less likely the presence of gang behavior.[376]

The clustering effect does not occur.[377]

Scattered site projects are preferential to Section 8 because of the ability to place the unit so it is truly integrated, it is more permanent than Section 8, and you do not need landlord acquiescence.[378]

The Homeowners' attorneys argued that Professor Berry's citation of articles that did not support his opinion was a sign of intellectual honesty.[379] Unfortunately Professor Berry claimed that the cited articles and other sources did support his opinion.[380] That claim was not credible.

Professor Berry's demeanor while testifying did not convey credibility. For example, he was asked why he did not use or cite academic articles on the issue of the effect of public housing on property values which articles contradicted his position and were cited in the Puryear study.[381] Professor Berry then claimed that he had decided not to cite articles which were published in the 1960s and 1970s.[382] The articles omitted included articles which were published in 1980s.[383]

Professor Berry criticized a survey report finding a high degree of tenant satisfaction with and little social isolation in scattered site projects in white areas of Charlotte, N.C.[384] One criticism was the lack of a random sample survey.[385] Professor Berry cited another survey report as supporting his conclusions.[386] When asked whether or not the second survey used random sampling, he answered yes, but he just could not remember the exact response rate .[387] There is no mention of either random sampling or response rates anywhere in the study.[388]

Professor Berry was neither credible, qualified, nor useful.

Professor Sa–Aadu.

***49** Professor Sa–Aadu's opinions were limited solely to the relative economic efficiency of Section 8 and public housing.[389] He had never written on or studied this specific question.[390] His articles involved a comparison between Section 8 new construction and the Section 8 certificate program.[391] He had never studied whether the Section 8 program could be used to help desegregate a public housing program.[392]

Professor Sa–Aadu knew nothing about the cost of public

housing development in the Dallas area.[393] He could not accept the notion that landlords would not rent to Section 8 tenants.[394] He knew nothing about any problems which black families might encounter in attempting to use Section 8 to find housing in white areas.[395] He knew of no studies based on the EHAP experiment which found that racial discrimination reduced the mobility of minorities.[396] He believed that minority EHAP families encountered only minimal and insignificant instances of discrimination.[397] He thought that the percent of minorities in DHA's Section 8 program who had been able to use vouchers to move into white areas had increased from 5% to 65%.[398]

Professor Sa–Aadu saw no reason why DHA could not just take the HUD money provided for public housing and distribute it to tenants in the form of vouchers or cash grants.[399]

Professor Sa–Aadu's testimony was neither credible nor useful.

Professor Thibodeau.

Professor Thibodeau lied under oath at his deposition and on the stand.

Professor Thibodeau testified as follows at his deposition:[400]

> "A. The question I understand is: have I ever studied the effect of discrimination—housing discrimination on low-income households? The answer to that question is: I have not, but I'm familiar with some literature that has."[401]
>
> Q. Have you ever studied the effect of public or private housing discrimination on the housing available to any race or income level?
> A. No, I haven't."[402]

Referring to the experimental housing allowance program,

> "Q. Okay, do you know of any of the studies or reports or data that was collected from that experiment that considered race in any manner?
> A. No, I do not.[403]
>
> Q. In your career as an economist with significant involvement in public housing, has nobody ever suggested to you that it's more difficult for black families to participate effectively in the Section 8 program than it is for white families?
>
> A. I have not spent much time looking at the racial issue.
>
> Q. Did you understand me to ask you how much time you had spent?
> A. The answer to your question is no."[404]
>
> "Q. Has anybody ever suggested to you that it is more difficult for black families to use the Section 8 program than for white families?
> A. I'm just thinking about the things that I've read. The things that I've read have more to do with discrimination in the housing market not discrimination vis-a-vis Section 8, so I'd have to answer no."[405]

***50** Professor Thibodeau testified as follows on the stand:

> "Q. Have you ever calculated the effect of public or private housing discrimination on housing available to any race or income level.
> A. No, I have not."[406]

Of course this testimony was false. Professor Thibodeau himself had authored a study calculating the effect of housing discrimination on housing available to minority housing allowance and Section 8 participants.[407] Other reports cited by Professor Thibodeau explicitly considered the effect of racial discrimination on Section 8 and housing allowance participants.[408]

This was a deliberate misrepresentation on a matter directly before the Court—the efficiency of Section 8 vouchers in providing desegregated housing opportunities to black families in white areas.

Professor Thibodeau also testified that all the articles cited in his report agreed with his conclusions.[409] The articles either did not support his conclusions or contained cautionary limitations that would severely limit the authority for and the scope of his conclusions.[410] This was not helpful to the Court nor was it proper behavior for an expert witness who has the obligation to be objective and forthright.[411]

Mr. Couch.

Mr. Couch was allowed to testify as an expert even though the Homeowners' attorneys did not provide the adverse parties with a written report and did not disclose the underlying data until the day before Mr. Couch's testimony. The Court specifically noted that this would be taken into account when deciding the weight to be given his testimony.[412] The Court further directed the Homeowners to furnish plaintiffs' counsel with the underlying information so that Ms. Rhodes, plaintiffs' paralegal/investigator, could prepare Court exhibit # 2.[413] While verifying that data and preparing Court # 2, Ms. Rhodes discovered additional sales for the period covered by Mr. Couch's testimony.[414]

The lack of a report, the late disclosure, and the missing sales as well as Mr. Couch's inability to testify to a causal relationship between the announcement of the Sites and the drop in prices mitigate against giving Mr. Couch's testimony any weight.

K. *Consistency of Homeowners' claims*

As the Court has noted in a similar context, consistency is not a requirement for opposing a public housing desegregation remedy. *Walker III,* 734 F.Supp. 1311. These current opponents are no more consistent than others.

The individual Homeowners assert that the problem with the public housing for their neighborhoods is not the people who will reside there but the structures and DHA's maintenance of those structures. Yet the Homeowners hired an expert to present a report and testimony which asserted, without support, that the people in the projects would engage in anti-social conduct which would spillover into the Homeowners' neighborhood and cause property values to drop. The expert testified that the fact that the public housing residents would be black would contribute to the problem and white public housing residents would not be as likely to engage in the anti-social conduct such as forming gangs.[415]

***51** The individual Homeowners assert that the public housing residents would be welcomed with open arms into the single family residential area if they would only use Section 8.[416] The Homeowners know that the rent for those homes is not within the Fair Market Rent or 120% of Fair Market Rent which can be paid by Section 8.[417] The Homeowners know that the owner of the new multifamily complex immediately south of the Preston Highland Homeowner Association refuses to participate in the Section 8 program.[418]

The individual Homeowners assert that they have no desire to perpetuate the conditions of racial segregation which the Court found to be unconstitutional. The individual Homeowners assert that their primary interest is the well being of the class members and that the least intrusive remedy, Section 8, is better for the class and the Homeowners. The Homeowners hired an expert who testified that the least intrusive remedy should, if necessary, develop any new public housing only in South Dallas where there are few expensive homes, the people are used to public housing, and property values are already low.[419]

L. *Additional conclusions of law*

The U.S. Supreme Court has expressly approved the use of race to locate publicly assisted housing units in predominantly white areas. *Hills v. Gautreaux,* 425 U.S. 284, 301, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976).[420] *Gautreaux* also set out the general remedial principles for public housing desegregation cases. Once a constitutional violation is found, the court must tailor the scope of the remedy to fit the nature and extent of the constitutional violation. All reasonable methods must be available to formulate an effective remedy. The court should make every effort to employ those methods to achieve the greatest possible degree of relief, taking into account the practicalities of the situation. *Gautreaux,* 425 U.S. at 293–294, 297.

The remedy must match the violation. For example, the lower courts found that the exclusion of women from the Virginia Military Institute violated the constitution. Those courts went on to approve a remedy which set up a separate system at another college. The U.S. Supreme Court reversed the remedy because it did not fit or match the violation.

The Supreme Court cited the general principle that the remedial measures must closely fit the constitutional violation. It must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of the discrimination. The state's remedy of a separate program did not match the violation which was the refusal to admit women into VMI. The state chose not to eliminate the discriminatory barrier but to leave it in place and offer the women a separate program. The Supreme Court held that approval of the remedy was constitutional error. *U.S. v. Virginia,* 518U.S. 515, 1996 U.S. LEXIS 4259, 64 U.S.L.W. 4638.

This Court may constitutionally employ racial classifications if those classifications are essential to remedy unlawful treatment of groups because of race. The need to remedy prior illegal race discrimination is a compelling government interest. A specific race conscious remedy must also be narrowly tailored. The factors which have been used to test for narrow tailoring include: efficacy of alternative remedies, the flexibility and duration of the relief including the availability of waivers, the relationship of any numerical goals to the relevant objective standard, and the impact of the relief on the rights of third parties. *U.S. v. Paradise,* 480 U.S. 149, 166, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987).

***52** The U.S. Supreme Court has refused to adopt a least restrictive means of implementation standard as part of its narrow tailoring test. The choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court. It is the district judge that has the first hand experience with the parties and the "flinty, intractable realities of day-to-day implementation of constitutional commands." There is no universal answer to the complex problems of desegregation. There is no one plan that will do the job in every case. *Id.* at 184.

There are no Fifth Circuit cases applying these principles to public housing desegregation cases.

The final remedy in *Gautreaux* was through a consent decree. The 7th Circuit upheld that decree which required the use of race in selection of sites for additional low-income assisted units. *Gautreaux v. Pierce,* 690 F.2d 616, 622–623, 634 n. 21 (7th Cir.1982). The underlying violations included racially segregative project site selection decisions. *Id.* at 619. The opinion does not discuss the issues before this Court.

The Philadelphia Housing Authority was ordered to construct a public housing project in a white neighborhood after neighborhood opposition had convinced the City, HUD and the Authority to stop the project. The Third Circuit found that the order to build the housing was an appropriate remedy for the violation, the refusal to build the housing. *Resident Advisory Board v. Rizzo,* 564 F.2d 126, 150 (3rd Cir.1977).

Although not directly on point, there is a line of cases which holds that HUD has the obligation under 42 U.S.C. 3608 to consider the effect of its site approval decisions on the racial composition of the area and whether the decision will increase or maintain racial concentrations. *Shannon v. U.S.,* 436 F.2d 809, 820–821 (3rd Cir.1970). Congress imposed a duty on HUD not to approve a housing project in an area of undue minority concentration and which would have the effect of perpetuating racial segregation. *Alschuler v. HUD,* 686 F.2d 472, 482 (7th cir.1982). In order to avoid liability under 42 U.S.C. 3608, HUD must take into account the racial composition of the neighborhood within which a proposed project is located and decide whether use of the location will perpetuate housing segregation. *Anderson v. City of Alpharetta, Ga. .,* 737 F.2d 1530, 1537 (11th Cir.1984).

HUD's site selection regulations require the consideration of race in its approval decisions. 24 CFR 941.202 "(c) The site for new construction projects must not be located in: (1) An area of minority concentration unless (i) sufficient comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot feasibly be met in that housing market ... (2) a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area."[421]

***53** HUD, the City of Dallas, and DHA violated the U.S. Constitution by starting, perpetuating and maintaining racial segregation in DHA's low-income housing programs. The violation included the use of race to choose black or minority neighborhood locations for the public housing projects. This choice was made in order to keep black people out of white neighborhoods. The implementation of the choice caused black families residing in public housing to live in racially segregated and unequal conditions.

The challenged remedy is directly related to the violation. The governmental defendants did not allow black occupied public housing to be located in predominantly white areas. The remedy is precisely tailored to this violation. Black occupied public housing shall be built in predominantly white areas. The construction of the public housing in minority or racially mixed areas would not fit the violation. *U.S. v. Virginia,* 518U.S. 515, 1996 U.S. LEXIS 4259, 64 U.S.L.W. 4638.

There are possible alternatives to the general use of public housing to provide the desegregative housing opportunities. The Section 8 program may be a potential way to create a comparable number of desegregative housing opportunities in predominantly white areas. In the first seven years of this case, it has not done so. The Section 8 program as administered under the previous remedial orders has been able to place less than 24%

[1,255] of the total Section 8 units in 60% to 100% white census tracts [plaintiffs' 9/27/94 exhibit # 59]. There are substantial barriers to the successful use of Section 8 in a desegregation program. The appropriate sized units must exist in predominantly white areas. The landlords managing those units must accept the program. HUD must provide a subsidy which allows rents sufficient to afford the units. DHA must competently operate the program. All of these barriers have existed during the remedial stage of this case. Nevertheless, the Court has urged the parties to come up with a plan that, allowing for the effects of these obstacles, will implement Section 8 as a general alternative to public housing.

Section 8 is not an alternative to the development of the 674 public housing units already allocated to DHA. The money for these units is here. The units must be placed somewhere. To forfeit the units rather than build them in white areas would continue the constitutional violation, not remedy the wrong. To build the units in minority concentrated or racially mixed areas would perpetuate the violation, not eradicate the vestiges of segregation.[422]

The relief is limited. The Remedial Order Affecting DHA requires a specific and limited number, 3,205, of units to be developed in predominantly white areas.[423] The actual relief provided may be even more limited. HUD has provided funding for only 647 additional public housing units.[424] HUD has indicated that it wants to exercise its option under the Remedial Order Affecting HUD and propose a plan to use Section 8 to substitute for at least part of the future allocation of new public housing in predominantly white areas.[425]

***54** The Remedial Order sets a goal of an additional 3,205 units in predominantly white areas. This goal, plus the few units already in predominantly white areas, is equal to the number of non-elderly public housing units in predominantly minority areas.[426] The population of the City of Dallas is now approximately 50% minority and 50% white. The equal number standard reflects this population mix. If race had not been a factor in the original placement of the public housing units, it would have been as likely to place a unit in a white area as in a black area.

The equal number is also consistent with the HUD policy which prohibits approval of units in minority areas unless there is a comparable number of units in white areas.[427] HUD's policy does not require equal numbers in every locality but rather describes a reasonable distribution of units which will approach an appropriate balance. While proportions other than 50–50 might be consistent with policy, 50–50 is within the range of a reasonable distribution which will approach an appropriate balance given the uncontested findings of discrimination in this case.

The development of the new units in minority and low-income concentrated areas would violate national policy and City of Dallas policies favoring the deconcentration of assisted units.[428]—Correspondingly, placing the units in predominantly white areas will further the national and local policies. Placing the next set of public housing units in predominantly white areas also avoids a conflict with the national and local policies favoring deconcentration of low-income assisted units.

There are several sets of third parties potentially affected by the issue of the race conscious site selection requirement. If there are disadvantages to homeowners, then any site selection standard will result in some homeowners being impacted by those units and some homeowners avoiding the impacts. There will also be impacts on non-class members who are on or who might be on DHA's waiting lists. The choices of these white and Hispanic public housing eligible households will also be affected by the site selection standards.

As set out above, any impact on the homeowners near the Sites will be comparatively minimal and diffuse. Eighty units in the census tract will not noticeably affect any demographic characteristic of the area. The use of race to locate public housing units in predominantly black areas has significantly affected the demographic characteristics of those census tracts.

The general use of the predominantly white criteria will avoid further disadvantages to the homeowners in the existing public housing neighborhoods. The homeowner input and small project policies being followed by DHA in the development of the units in white areas were not used when the existing projects were built in black areas. These homeowners got 3,500, 600, or 500 units of public housing in their neighborhoods. There is no record of any input from these homeowners in the design, operation, or maintenance of those large projects.

***55** The present locations of DHA's public housing projects may also deter low-income whites and Hispanics from even applying for public housing. Low-income whites have always had more choices for low-income housing than have blacks. *Walker v. HUD,* 734 F.Supp. 1289, 1293 n. 16, 1296, 1302. Public housing located in predominantly white areas at least has the potential of attracting white and Hispanic tenants.[429] Without these tenants, the projects will remain predominantly black.

Conclusion

This Court has been dealing with the flinty, intractable realities of remedy in this case for almost 10 years. The remedial requirement that the existing allocation of new public housing be developed in predominantly white areas serves the compelling governmental purpose of remedying past racial discrimination. The remedy is an exact fit to the violation, the refusal to develop public housing in white areas. Unless the housing is developed in white areas, the violation and its effects will continue.

This Court, probably more than any other court in the country, is aware of the promises and problems of the Section 8 program in a desegregation remedy. The Court has requested a plan that will allow Section 8 to furnish most of the desegregated housing opportunities instead of public housing. Even with such a Section 8 plan, the Court must take the existing allocation of funding for new units into account in its remedial ruling. If the units are not developed or are developed in non-white areas, the constitutional violation will continue. The only choice, consistent with constitutional principles, is to develop the units in white areas.

All Citations

1997 WL 33177466

Footnotes

1 *Walker v. U.S. Department of Housing & Urban Development,* et al., 734 F.Supp. 1289 (N.D.Tex.1989) ("*Joinder of the City of Dallas as a Defendant Subject to the Consent Decree* "). See also *Walker I: DHA Violations of the Consent Decree and Appointment of a Special Master,* 734 F.Supp. 1231 (N.D.Tex.1989).

2 See Class Plaintiffs' Post Trial Proposed Findings of Fact and Conclusion of Law, p. 10.

3 A transcript of these oral findings of fact and conclusions of law has been filed as an exhibit to the August 25, 1997 hearing.

4 HUD's approval is subject to DHA's remedial actions to mitigate excessive noise concerns.

5 The Homeowners argue that they are innocent of any complicity in causing the egregious segregation discussed in *Walker I and Walker III.* Although this is true, these Homeowners—as well as the property owners in the other white areas of Dallas—clearly have received the benefits (in their view) of having no public housing in their neighborhoods as a result of the wrongdoing. The tragic racial discrimination of the past effectively built a fence behind which all public housing had to remain in minority neighborhoods; the remedial orders in this case merely attempt to remove that shameful fence. Plaintiffs' 12/12/88 exhibit # 5 racial residence lines.

6 Indeed, one of the Homeowners' representatives admitted that there were sites in the neighborhoods which could be chosen under a "race blind" process and that, if this were done, the Homeowners would not have any legal basis to oppose the public housing. Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition, pages 56–57, 166.

7 Plaintiffs' 1/13/92 exhibit # 22—census tract location and occupancy table.

8 Plaintiffs' 1/13/92 exhibit # 20.

9 The citations to "MSJ _____" in this opinion are to the statements of fact in plaintiffs' motion for summary judgment against the Homeowners. The Homeowners have either admitted or stipulated to many of these facts [plaintiffs' 10/28/96 exhibit88, 89]. Plaintiffs' "CLASS PLAINTIFFS' STATEMENT OF MATERIAL, UNDISPUTED FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE NORTH DALLAS HOMEOWNERS" combines the plaintiffs' MSJ cites and the Homeowner responses. In addition, those fact statements for which there is no stipulation or admission are established by the evidence cited in support of each of the plaintiffs' statements of fact. The August 13, 1996 MSJ exhibits against the Homeowners are also in the record as plaintiffs' 10/28/96 exhibit # 38.

10 Plaintiffs' 12/12/88 exhibit # 7—Dallas City Charter, 1952, Section 321.

11 Plaintiffs' 12/12/88 exhibit # 1, pages 11, 13.

12 Plaintiffs' 12/12/88 exhibit # 5—1950s documents, pages 6–7.

13 Plaintiffs' 12/12/88 exhibit # 8—1950–1951 newspaper stories; plaintiffs' 12/12/88 exhibit # 8—1950 Joint Report.

14 Plaintiffs' 12/12/88 exhibit # 44—DHA Facts in Brief, page 24.

15 Plaintiffs' 12/12/88 exhibit # 5—1950s documents, pages 4–5, 13; plaintiffs' 12/12/88 exhibit # 10—1962–1966 documents, page 1.

16 Plaintiffs' 12/12/88 exhibit # 10—1962–1966 documents, page 1.

17 Plaintiffs' 12/12/88 exhibit # 8—1950–1951 newspaper articles.

18 Plaintiffs' 12/12/88 exhibit # 8—supra.

19 Plaintiffs' 12/12/88 exhibit # 8—supra.

20 Plaintiffs' 12/12/88 exhibit # 9—Joint 1950 Report.

21 Plaintiffs' 12/12/88 exhibit # 9—Joint 1950 Report, page 4.

22 Plaintiffs' 12/12/88 exhibit # 8—supra; plaintiffs' 12/12/88 exhibit # 9—supra.

23 Plaintiffs' 12/12/88 exhibit # 5—1950s documents, pages 4–5, 10.

24 Plaintiffs' 12/12/88 exhibit # 10—1962–1966 documents, page 1.

25 Plaintiffs' 12/12/88 exhibit # 5—1950s documents, page 10.

26 Plaintiffs' 12/12/88 exhibit # 45—1948 Survey of West Dallas conducted by the Council of Social Agencies and the October 1950 report of the Special Committee of the Dallas Chamber of Commerce and the Council of Social Agencies, plaintiffs' 12/12/88 exhibit # 5—supra, at pages 8–11.

27 Plaintiffs' 12/12/88 exhibit # 5—supra at page 21.

28 Plaintiffs' 12/12/88 exhibit # 11—1962 referendum ads.

29 The Statman deposition has been filed with the District Clerk.

30 Statman deposition pages 13–14, 34.

31 Statman deposition pages 34–37.

32 Plaintiffs' 12/12/88 exhibit # 38—224 units documents, page 1.

33 Plaintiffs' 12/12/88 exhibit # 38—224 units documents.

34 Plaintiffs' 12/12/88 exhibit # 38—224 units documents, page 38.

35 Plaintiffs' 12/12/88 exhibit # 40—Robin Square Apartments documents, page 20.

36 Plaintiffs' 12/12/88 exhibit # 37, supra.

37 Plaintiffs' 12/12/88 exhibit # 22—1981 documents, page 2.

38 Plaintiffs' 12/12/88 exhibit # 31—supra.

39 Plaintiffs' 12/12/88 exhibit # 5, pages 7, 9, 14, 20, 21, 23; plaintiffs' 12/12/88 exhibit # 18—1975 documents, page 86.

40 Plaintiffs' 12/12/88 exhibit # 31—Summary of DHA project occupancy characteristics; plaintiffs' 12/12/88 exhibit # 32—Summary of Section 8 occupancy characteristics by census tract.

41 Plaintiffs' 12/12/88 exhibit # 18—1975 documents page 89–90; plaintiffs' 12/12/88 exhibit # 31—supra.

42 Plaintiffs' 12/12/88 exhibit # 33—Elderly registration documents; plaintiffs' 12/12/88 exhibit # 34—analysis of applicant offers, 1982–1986.

43 Plaintiffs' 12/12/88 exhibit # 14—1969 documents 4–9, 14.

44 Plaintiffs' 12/12/88 exhibit # 21—1980 documents, pages 7–8, 14–19.

45 Plaintiffs' 12/12/88 exhibit # 31—supra.

46 Plaintiffs' 12/12/88 exhibit # 21—1980 documents, pages 7–8, 14–19.

47 Plaintiffs' 12/12/88 exhibit # 31—supra.

48 Plaintiffs' 12/12/88 exhibit # 33—elderly registration documents.

49 Plaintiffs' 12/12/88 exhibit # 31—supra.

50 Plaintiffs' 12/12/88 exhibit # 31—supra.

51 Plaintiffs' 12/12/88 exhibit # 34—analysis of applicant offers, 1982–1986.

52 Plaintiffs' 12/12/88 exhibit # 31—supra.

53 Plaintiffs' 12/12/88 exhibit # 18—1975 documents page 138.

54 Plaintiffs' 12/12/88 exhibit # 35—Sylvia M. Demarest 3/7/78 letter, to Gordon Lewis, page 1, 8.

55 Plaintiffs' 12/12/88 exhibit # 36—DHA Section 8 suburb documents.

56 Plaintiffs' 12/12/88 exhibit # 32—Summary of Section 8 occupancy characteristics by census tract, Feb. 1987.

57 Plaintiffs' 12/12/88 exhibit # 24—supra, 3–4.

58 Plaintiffs' 12/12/88 exhibit # 41—DHA HQS inspection reports, Q1 and Q2 inspection results.

59 These figures exclude the approximately 46 single family homes for which DHA does not separately report racial occupancy data [plaintiffs' 9/27/94 exhibit # 68—excerpt from DHA monthly report].

60 Plaintiffs' 9/27/94 exhibit # 79.

61 Plaintiffs' 9/27/94 exhibit # 79.

62 Plaintiffs' 9/27/94 exhibits62–66, 68–80.

63 Plaintiffs' 9/27/94 exhibits70–73, 76, 78.

64 Plaintiffs' 1/13/92 exhibit # 37; HUD 9/27/94 exhibit # 2—Declaration of Henry G. Cisneros pages 3, 5.

65 Remedial Order Affecting DHA ¶ A.3.

66 Remedial Order Affecting DHA ¶ 8.7.

67 Remedial Order Affecting DHA ¶ A.7.

68 Remedial Order Affecting DHA ¶ B.1.

69 Hearing Record of Public Housing Steering Committee motion to enjoin construction at Frankford and Marsh site.

70 Remedial Order Affecting DHA ¶ A.10.

71 Remedial Order Affecting DHA ¶ B.7.h.

72 Remedial Order Affecting DHA ¶ A.10.

73 Remedial Order Affecting DHA ¶ A.11.

74 Remedial Order Affecting DHA ¶ C.2.

75 Plaintiffs' 12/12/88 exhibit # 26—"SUBSIDIZED HOUSING AND RACE", Office of General Counsel, U.S. Department of Housing and Urban Development, November, 1985, pages 31, 34.

76 Plaintiffs' 12/12/88 exhibit # 27—Appendix 2, PUBLIC HOUSING TENANT ASSIGNMENT.

77 2–11.

78 11.

79 25.

80 35; plaintiffs' 12/12/88 exhibit # 26—supra pages 28–29; plaintiffs' 12/12/88 exhibit # 28—HUD Assessment Report, 1981, pages 2, 3, 7–9, 13.

81 Plaintiffs' 12/12/88 exhibit # 10—1962–1966 documents, pages 20–21, 32, 38–41.

82 Plaintiffs' 12/12/88 exhibit # 31—supra.

83 Plaintiffs' 12/12/88 exhibit # 27—supra, pages 7–11.

84 Plaintiffs' 12/12/88 exhibit # 12—1967 documents, page 1.

85 Plaintiffs' 12/12/88 exhibit # 12—1967 documents, pages 15–37; plaintiffs' 12/12/88 exhibit # 13—1968 documents, pages 1–24.

86 Plaintiffs' 12/12/88 exhibit # 13—1968 documents, pages 15, 23–24, 27, 34.

87 Plaintiffs' 12/12/88 exhibit # 13—1968 documents, pages 27, 34.

88 Plaintiffs' 12/12/88 exhibit # 13—1968 documents, supra; plaintiffs' 12/12/88 exhibit # 14—1969 documents, page 1.

89 Plaintiffs' 12/12/88 exhibit # 13—1968 documents, page 66.

90 Plaintiffs' 12/12/88 exhibit # 16—1970 documents, pages 27–33.

91 Plaintiffs' 12/12/88 exhibit # 14—1969 documents 29–34.

92 Plaintiffs' 12/12/88 exhibit # 14—1969 documents, pages 47–50.

93 Plaintiffs' 12/12/88 exhibit # 14—1969 documents, page 51.

94 Plaintiffs' 12/12/88 exhibit # 16—1970 documents, pages 1–3.

95 Plaintiffs' 12/12/88 exhibit # 16—1970 documents, pages 4–14.

96 Plaintiffs' 12/12/88 exhibit # 16—1970 documents, pagees 17–19, 20, 23, 38.

97 Plaintiffs' 12/12/88 exhibit # 16—1970 documents, page 43.

98 Plaintiffs' 12/12/88 exhibit # 17—1974 documents, page 1.

99 Plaintiffs' 12/12/88 exhibit # 17—1974 documents, pages 3–10, 11.

100 Plaintiffs' 12/12/88 exhibit # 57—City CDBG documents.

101 Plaintiffs' 12/12/88 exhibit # 18—1975 documents, page 2.

102 Plaintiffs' 12/12/88 exhibit # 18—1975 documents, pages 1, 2, 7, 9–15, 18–22, 25–32, 36–37, 42–46, 70; plaintiffs' 12/12/88 exhibit # 19—1976 documents, pages 1, 11, 34.

103 Plaintiffs' 12/12/88 exhibit # 19—1976 documents, pages 44, 71, 73, 80.

104 Plaintiffs' 12/12/88 exhibit # 20—1979 documents, pages 4–7. See also MSJ 221–224, 227–224 for efforts to desegregate DHA using a color blind tenant selection method.

105 1987 Consent Decree Exhibit B Plan 12.

106 Testimony of Brenda Campbell 4/8/94 hearing transcript page 42.

107 Plaintiffs' 9/27/94 exhibit # 58.

108 Plaintiffs' 9/27/94 exhibit # 78.

109 Plaintiffs' 9/27/94 exhibits62–66, 68–80, 70–73, 76, 78.

110 Vol III pages 40–41—1335 families now in white areas compared to 1050 as of September 1994.

111 Plaintiffs' 9/27/94 exhibits84–87.

112 HUD plan I.A.

113 DHA plan page 25, ¶ 36.

114 DHA plan pages 25–26, ¶ 37.

115 DHA plan page 14, ¶ 64.

116 Plaintiffs' 9/27/94 exhibit # 84.

117 Hornig and Brewer Declarations filed in support of HUD's responses to DHA's motions for approval of the Hillcrest and McCallum sites. [The regulation does not directly require public housing construction in white areas. It only presents a barrier to housing in minority areas. If the developer does not attempt to build in a white area and the minority sites are rejected, there is no violation of the regulation. This can result and has resulted in no new public housing.]

118 Vol I, pages 6–7.

119 Vol III pages 203–204.

120 Complaint; plaintiffs' 10/28/96 exhibit # 1—Cherner deposition, pages 21–22, 52, 54–56; construction in minority areas, Vol II, pages 166–174 Thibodeau testimony.

121 Complaint.

122 Vol II pages 172–173, 167–168.

123 Vol II pages 166–167, 171–172.

124 Vol II pages 171–174.

125 Vol II, pages 167–168.

126 Vol II pages 183–189; plaintiffs' 10/28/96 exhibit # 16.

127 Vol II page 220.

128 Remedial Order Affecting DHA ¶ A.3. ["The units may not be located in areas where the poverty rate exceeds 13%, the county average."]

129 Plaintiffs' August 13, 1996 MSJ exhibit # 2—1990 U.S. Census CD–ROM STF–3A, Poverty Status in 1989 by Age. [The August 13, 1996 MSJ exhibits against the Homeowners are also in the record as plaintiffs' 10/28/96 exhibit # 38.]

130 Plaintiffs' August 13, 1996 MSJ exhibit # 2—1990 U.S. Census CD–ROM STF–3A, Poverty Status in 1989 by Age.

131 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition pages 56–57.

132 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition page 16. [The Homeowners cited this deposition as relevant summary judgment evidence [Response pages 14–15]].

133 106 STAT 1571, 1580 (emphasis added).

134 Remedial Order Affecting DHA ¶ A.9.

135 Remedial Order Affecting DHA ¶ A.8.

136 Remedial Order Affecting DHA ¶ A.10.

137 Remedial Order Affecting DHA ¶ B.7.h.

138 Remedial Order Affecting DHA ¶ A.10.

139 Remedial Order Affecting DHA ¶ C.2.

140 Paragraph F.2. and ¶ F.3. set the standard.

141 Remedial Order Affecting DHA ¶ B.7.

142 Remedial Order Affecting DHA ¶ A.7.; Remedial Order Affecting HUD ¶ A.6.

143 Remedial Order Affecting DHA ¶¶ A.8.—A.10.

144 Remedial Order Affecting DHA ¶ A.13.

145 Remedial Order Affecting DHA ¶ A.3.—3,025 units in wite areas.

146 The number in predominantly minority areas after the demolition of the West Dallas units and assuming a West Dallas project with 950 units.

147 Plaintiffs' 9/27/94 exhibit # 6. 24 CFR 941.202.

148 Remedial Order Affecting DHA ¶ C.2.

149 Remedial Order Affecting DHA ¶¶ B.4.—B.6.

150 Remedial Order Affecting DHA ¶ B.1.

151 City Consent Decree ¶ 3.10.

152 The specific injury allegations of the Homeowners are discussed below.

153 ¶ C.5.

154 ¶ D.1.

155 ¶ D.2.

156 Vol I pages 50, 55–65.

157 Vol I pages 60–63.

158 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition pages 82–83.

159 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition pages 68–69, 136–137.

160 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition pages 64–66.

161 Vol III pages 94–95 Tim Lott.

162 Plaintiffs' 10/28/96 exhibit # 90.

163 Remedial Order Affecting DHA ¶ B.1.

164 City Consent Decree ¶ 3.10.

165 Vol I pages 91–93.

166 Vol I page 77 Cherner testimony.

167 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition page 67.

168 Vol I pages 230–231, Vol II pages 7–8.

169 Vol II page 40 Couch testimony.

170 Plaintiffs' 10/28/96 exhibit # 27 page 151.

171 i.e., Nourse (1963), Schafer (1972), Saunders and Woodford (1979), Sedway (1983), and Babo, et al. (1984).

172 Plaintiffs' 10/28/96 exhibit # 27 page 155.

173 Vol I pages 187–188.

174 Vol I pages 188–189.

175 Journal of the American Planning Association 48: (1982): 432–440.

176 Vol I pages 176, 177.

177 Land Economics 60 (1984): 174–179.

178 Plaintiffs' exhibit # 25 page 179; Berry testimony Vol I page 178.

179 Journal of the American Planning Association 59 (1993): 172–181.

180 Vol I page 179.

181 Plaintiffs' exhibits # 11, # 97 page 92. [Prof. Berry's report criticized the Puryear study for failing to take into account the national economic framework at the time. The report clearly did allow for the effect of national economic trends [plaintiffs' 10/28/96 exhibit # 97 pages 55–56, 73].]

182 Vol I pages 74–75 Cherner testimony.

183 Plaintiffs' 10/28/96 exhibits10, 11.

184 HO # 44.

185 Court exhibit # 2.

186 Plaintiffs' 10/28/96 exhibit # 107.

187 There were seven post DHA announcement sales [plaintiffs 10/28/96 exhibit # 7; Vol III page 125].

188 Plaintiffs' 10/28/96 exhibit # 4.

189 Page 3.

190 Page 5.

191 Plaintiffs' 10/28/96 exhibit # 8.

192 Plaintiffs' 10/28/96 exhibit # 27.

193 Plaintiffs' 10/28/96 exhibit # 8.

194 Prof. Thibodeau made the estimate without "a clue" of the specific type, size and design of the units DHA will actually build on the sites [Vol II page 106]. He didn't know because neither he nor the Homeowners asked for nor made use of the information that was available [Vol II pages 206–210, 212–213, 225–226, 234–235]. It is incredible that someone would claim to know what its going to cost to build something without knowing what it is you're going to build [Vol II page 124 line 25 to page 125 line 3 Thibodeau testimony].

195 There are no vacant units renting for FMR in the Sites census tract. There are a few renting at 120% of FMR. The issue is relative cost at providing housing in the area of the Sites, not the cost of Section 8 in low-income minority areas and the cost of public housing in middle class white areas.

196 1987 Consent Decree ¶¶ 6.B., 7.

197 Written objections filed with the Court.

198 December 4, 1986 Committee to Save Public Housing written objection.

199 Tr. 12/12/86 Hearing.

200 Tr. 12/12/86 Hearing, pages 101–102, 146–150. [One of the other objections to the consent decree was that it was not fair to the taxpayers. The cost of the demolition and replacement of the West Dallas units was compared to the lower cost of fixing up the units and leaving them segregated [Tr. 12/12/86 Hearing, pages 112–113].]

201 Tr. 12/12/86 Hearing, pages 139–140, 152.

202 Tr. 12/12/86 Hearing, pages 202–203.

203 Tr. 12/12/86 Hearing, pages 207–213.

204 Tr. 1/9/87 Hearing.

205 Tr. 1/9/87 Hearing pages 12–13.

206 Tr. 1/9/87 Hearing pages 14–15.

207 Tr. 1/9/87 Hearing pages 15–17.

208 Tr. 1/9/87 Hearing pages 21–22.

209 *Id.* At 1233–1245.

210 *Id.* At 1241.

211 *Id.* at 1311 (100 unit DHA complex simply too large) Tr. 9/15/95–9/19/95 hearing—opposition to approval of the Frankford and Marsh public housing site.

212 Tr. 9/27/94 hearing pages 116, 128.

213 3/28/88 hearing Tr. Pages 174–175.

214 5/28/91 hearing Tr. Pages 74, 101–102.

215 5/28/91 Tr. Pages 102–104.

216 3/25/88 hearing Tr. Pages 114–115.

217 ¶ 3.8.

218 ¶ 3.9.

219 ¶ 3.10.

220 ¶ 3.10.

221 §§ IV., V.

222 4/16/96 Findings and Conclusions: Vacation of the 1987 Consent Decree, pages 8–9.

223 5/26/94 Order Regarding Facts Established by Class Plaintiffs' Motion for Partial Summary Judgment Against DHA and HUD, material undisputed fact Nos. 1, 2.

224 Plaintiffs' 9/27/94 exhibit # 79.

225 Plaintiffs' 9/27/94 exhibit # 79.

226 Plaintiffs' 9/27/94 exhibits62–66, 68–80.

227 Plaintiffs' 9/27/94 exhibits70–73, 76, 78.

228 Vol III page 40.

229 Vol II page 60.

230 Plaintiffs' 10/28/96 exhibit # 84 page 2.

231 Vol II pages 71–72 Lori Moon testimony.

232 Vol III pages 20–26, 34–36 Ann Lott testimony,.

233 Vol III pages 36–37, 69 Ann Lott testimony; Vol III page 153 Craig Garder testimony.

234 Plaintiffs' 10/28/96 exhibit # 1 Cherner deposition pages 156–158.

235 HO # 12.

236 Plaintiffs' 10/28/96 exhibit # 19G. [The number of units varies according to the rounding formula used [Vol III pages 134–139, 149–150 Rhodes testimony].]

237 Plaintiffs' 10/28/96 exhibit # 105. [The use of the 120% FMR level overstates the number of units available. HUD has never approved the use of 120% FMRs [Vol II page 59 Lori Moon testimony]. The vouchers cannot use even the 110% exception rents

which have been granted. *Walker I,* 743 F.Supp. 1240. This difference continues today [HO # 1 Fair Market and Exception Rent Rates compared to HO # 2 Payment Standard Section 8 Voucher Program].]

238 Vol II page 157.

239 Vol II page 65 Lori Moon testimony.

240 Vol III pages 36–37; plaintiff's 10/28/96 exhibit # 83 Wellington Place rental criteria and policies.

241 Vol III pages 38 Ann Lott testimony.

242 Vol III pages 18–36, 47–48.

243 Plaintiffs' 10/28/96 exhibit # 6—spreadsheet.

244 Plaintiffs' 10/28/96 exhibit # 26 pages 244–249—Rosenbaum study of Chicago Section 8.

245 Plaintiffs' 10/28/96 exhibit # 28—Sue Brady deposition.

246 Plaintiff s' 10/28/96 exhibit # 28—Sue Brady deposition.

247 Plaintiffs' 10/28/96 exhibit # 28—Sue Brady deposition.

248 Plaintiffs' 10/28/96 exhibit # 29—Lord & Rent study of Charlotte, page 299.

249 Plaintiffs' exhibit # 14—Weicher, pages 287–288.

250 Plaintiffs' 10/28/96 exhibit # 20—Struyk, "Policy Questions and Experimental Responses," in Housing Vouchers for the Poor: Lessons from a National Experiment," 1981.

251 The EHAP documented the effect of racial segregation on mobility of voucher tenants early in the experiment. A number of suburban jurisdictions refused to participate in the program because EHAP staff could not guarantee that black households would not relocate into their areas [plaintiffs' 10/28/96 exhibit # 20 page 232].

252 Plaintiffs' 10/28/96 exhibit # 20, page 12.

253 Plaintiffs' 10/28/96 exhibit # 20, page 12.

254 Plaintiffs' 10/28/96 exhibit # 20, page 14.

255 Plaintiffs' 10/28/96 exhibit # 20, page 19.

256 Plaintiffs' 10/28/96 exhibit # 16.

257 Plaintiffs' 10/28/96 exhibit # 16, page 14.

258 Plaintiffs' 10/28/96 exhibit # 16, page 25.

259 Plaintiffs' 10/28/96 exhibit # 16, page 32.

260 HO # 16.

261 HO # 16 pages "FOREWORD", 29–42.

262 Vol III pages 216–217.

263 According to Prof. Berry, economic efficiency is completely compatible with thorough, deep seated, oppressive racial segregation. Prof. Berry pointed out that South Africa was on of the only three societies in the world that practiced effective urban development planning [Vol I pages 164–165, Berry testimony; plaintiffs' exhibit # 33, page 223]. This efficient planning was used to create and maintain wide ranging, thorough, unequal, and oppressive racial segregation in South Africa [Berry testimony]. The most efficient or effective means is not necessarily the just means [plaintiffs' 10/28/96 exhibit # 33, page 223].

264 Housing Policy Debate Vol. 1, No. 1 (1990): 1–32, plaintiffs' 10/28/96 exhibit # 13.

265 Plaintiffs' 10/18/96 exhibit # 13—Apgar, page 10.

266 Plaintiffs' 10/28/96 exhibit # 13—Apgar, page 17.

267 Plaintiffs' 10/28/96 exhibit # 13—Apgar, pages 18–19.

268 Plaintiffs' 10/28/96 exhibit # 13—Apgar, page 20.

269 Plaintiffs' 10/18/96 exhibit # 13—Apgar, page 21.

270 Plaintiffs' 10/28/96 exhibit # 13—Apgar, page 25.

271 Plaintiffs' 10/28/96 exhibit # 13—Apgar, page 28.

272 Plaintiffs' 10/28/96 exhibit # 14—Weicher, pages 287–288.

273 Plaintiffs 10/28/96 exhibit # 21.

274 Page S–3.

275 Page S–4.

276 Page S–9.

277 Page 5.

278 Page 6.

279 Page 7.

280 Page 16.

281 Page 51.

282 Page 96.

283 Page 187.

284 Plaintiffs' 10/28/96 exhibit # 21.

285 HO # 35B Sa–Aadu report; Vol I pages 99–131.

286 Vol I pages 115–117.

287 Vol I pages 111, 128–130.

288 HO # 36B pages 1, 4.

289 HO # 36B pages 1, 4–6.

290 Berry testimony; plaintiffs' 10/28/96 exhibit # 24—O'Sullivan economic text.

291 Vol I pages 173–176 Berry testimony.

292 HO # 34B pages 19–21; HO22, 23, 24.

293 Vol II pages 132–133 Thibodeau testimony; HO # 34C map.

294 Vol II pages 132–133 Thibodeau testimony.

295 HO # 34B Thibodeau report page 23.

296 HO # 34B Thibodeau report page 23; Vol II pages 218–219.

297 Plaintiffs' 10/28/94 exhibit # 94.

298 HO # 34B page 23.

299 Rhodes testimony; plaintiffs' exhibit # 100; arithmetic.

300 Plaintiffs' 10/28/96 exhibit # 106; arithmetic.

301 HO # 12, page 1.

302 Vol II pages 217–218, 221–222.

303 HO # 34B pages 10–17.

304 HO # 34B, pages 15–16.

305 Plaintiffs' 10/28/96 exhibit # 82.

306 Vol III pages 76–78 Tim Lott testimony.

307 Vol III pages 94–95 Tim Lott testimony.

308 HO # 34B, pages 15–16.

309 Vol II pages 217–218 Thibodeau testimony.

310 Vol II page 215 Thibodeau testimony.

311 Plaintiffs' August 13, 1996 MSJ exhibit # 16—HUD tabulation.

312 Plaintiffs' 9/27/94 exhibit # 18—Housing Assistance Plan for the City of Dallas, page 34.

313 HO # 34G.

314 HO # 34H.

315 Plaintiffs' 10/28/96 exhibits77, 78 KERA transcripts.

316 Vol I page 66 Cherner.

317 Vol I pages 18–19 Lynn argument.

318 Vol III pages 204–205 Lynn argument. ["It should not be built because it is time for white people such as Mr. Daniel and Mr. Werner and the others to stop telling African–Americans where they should live...Now, where do they get off telling an African–American or anyone else that they should move to North Dallas, or that they should move to East Dallas?" [Vol III pages 204–205 Lynn argument].]

319 Vol II pages 69–70 Lori Moon.

320 Remedial Order Affecting DHA ¶ A.11.

321 Plaintiffs' 10/28/96 exhibit # 1 Cherner 30(b)(6) deposition pages 56–57, 166.

322 Plaintiffs' 9/27/94 exhibit # 79; Remedial Order Affecting DHA Vestige A.

323 Remedial Order Affecting DHA ¶ B. 7.

324 Record of the Public Housing Steering Committee motion to enjoin development on the Frankford Marsh site.

325 Plaintiffs' August 13, 1996 MSJ exhibit # 1—1990 U.S. Census CD–ROM STF–3A, Hispanic Origin by Race.

326 Plaintiffs' August 13, 1996 MSJ exhibit # 2—1990 U.S. Census CD–ROM STF–3A, Poverty Status in 1989 by Age.

327 Plaintiffs' August 13, 1996 MSJ exhibit # 2—1990 U.S. Census CD–ROM STF–3A, Poverty Status in 1989 by Age.

328 Plaintiffs' August 13, 1996 MSJ exhibit # 3—1990 U.S. Census CD–ROM STF–3A, Poverty Status in 1989 by Race of Householder by Family Type and Presence and Age of Children.

329 Plaintiffs' August 13, 1996 MSJ exhibit # 4—1990 U.S. Census CD–ROM STF–3A, Units in Structure, 1 unit detached and 1 unit attached.

330 Plaintiffs' August 13, 1996 MSJ exhibit # 4—1990 U.S. Census CD–ROM STF–3A, Units in Structure, 2 through 50 or more units.

331 Plaintiffs' August 13, 1996 MSJ exhibit # 4—1990 U.S. Census CD–ROM STF–3A, Units in Structure. MSJ 294.

332 Plaintiffs' August 13, 1996 MSJ exhibit # 16—HUD tabulation.

333 Plaintiffs' 9/27/94 exhibit # 18—Housing Assistance Plan for the City of Dallas, page 34.

334 Plaintiffs' 9/27/94 exhibit # 18—Housing Assistance Plan for the City of Dallas page 28.

335 Plaintiffs' August 13, 1996 MSJ exhibit # 5—1990 U.S. Census CD–ROM STF–3A Median Value.

336 Plaintiffs' August 13, 1996 MSJ exhibit # 6—1990 U.S. Census CD–ROM STF–3A Public Assistance Income in 1989.

337 Plaintiffs' August 13, 1996 MSJ exhibit7, 8—1990 U.S. Census CD–ROM STF–3A Median Family Income in 1989 and Median Household Income in 1989. MSJ 300.

338 Plaintiffs' August 13, 1996 MSJ exhibit # 9—1990 U.S. Census CD–ROM STF–3A Tenure by Bedroom.

339 Plaintiffs' August 13, 1996 MSJ exhibit # 9—1990 U.S. Census CD–ROM STF–3A Tenure by Bedrooms.

340 Plaintiffs' August 13, 1996 MSJ exhibit # 10—1990 U.S. Census CD–ROM STF–3A Sex by Employment Status.

341 Plaintiffs' August 13, 1996 MSJ exhibit # 11—1990 U.S. Census CD–ROM STF–3A Race of Householder by Household Type and Presence and Age of Children, Households.

342 Plaintiffs' August 13, 1996 MSJ exhibit # 12—1990 U.S. Census CD–ROM STF–3A School Enrollment, Educational Attainment, and Employment Status.

343 Plaintiffs' August 13, 1996 MSJ exhibit # 13—1990 U.S. Census CD–ROM STF–1A Vacant Housing Units.

344 Plaintiffs' August 13, 1996 MSJ exhibit # 14—1990 U.S. Census CD–ROM STF–1A Occupancy Status.

345 Plaintiffs' August 13, 1996 MSJ exhibit # 15—1990 U.S. Census CD–ROM STF–3A Median Year Structure Built.

346 Homeowners' Original Complaint ¶ 31, page 12.

347 Remedial Order Affecting DHA ¶ A.10.

348 Remedial Order Affecting DHA ¶ B.7.h.

349 Remedial Order Affecting DHA ¶ A.10.

350 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition, page 91.

351 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition, pages 90–94.

352 Remedial Order Affecting DHA ¶ A.3. ["The units may not be located in areas where the poverty rate exceeds 13%, the county average."]

353 July 15, 1996 letter from Michael P. Lynn to Joseph Werner.

354 Plaintiffs' August 13, 1996 MSJ exhibit # 2—1990 U.S. Census CD–ROM STF–3A, Poverty Status in 1989 by Age.

355 Plaintiffs' August 13, 1996 MSJ exhibit # 2—1990 U.S. Cednsus CD–ROM STF–3A, Poverty Status in 1989 by Age.

356 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition pages 56–57.

357 Plaintiffs' 10/28/96 exhibit # 1—Cherner deposition page 166.

358 Fed.R.Evid. 702.

359 Melsheimer to Berry June 26, 1996, page 2 attached to plaintiffs' 10/28/96 exhibit 34 Berry deposition.

360 Plaintiffs' 10/28/96 exhibit # 34—Berry deposition, page 14,

361 Plaintiffs' 10/28/96 exhibit # 34 pages 13, 15–16, 18.

362 Plaintiffs' 10/28/96 exhibit # 34 page 83.

363 Plaintiffs' 10/28/96 exhibit # 34 page 47–50, 69–70.

364 Plaintiffs' 10/28/96 exhibit # 34 pages 57–58.

365 Vol I pages 187–188.

366 Plaintiffs' 10/28/96 exhibit 34 page 45. [Elsewhere in the deposition Prof Berry testified that the isolation of the tenants would be exacerbated because of the racial difference between the tenants and the neighbors [plaintiffs' 10/28/96 exhibit 34 pages 34–37, 40, 45–46].]

367 Plaintiffs' 10/28/96 exhibit 34 pages 56–57.

368 Plaintiffs' 10/28/96 exhibit # 34 page 75–76.

369 Vol I pages 172–179, 181–186, 194–196; plaintiffs' 10/28/96 exhibit 29—Lord & Rent study, page 299.

370 Plaintiffs' 10/28/96 exhibit 28 page 25.

371 Plaintiffs' 10/28/96 exhibit 28 page 33.

372 Plaintiffs' 10/28/96 exhibit 28 page 35.

373 Plaintiffs' 10/28/96 exhibit 28 page 36.

374 Plaintiffs' 10/28/96 exhibit 28 pages 40, 98–100.

375 Plaintiffs' 10/28/96 exhibit 28 page 80.

376 Plaintiffs' 10/28/96 exhibit 28 pages 84–86.

377 Plaintiffs' 10/28/96 exhibit 28 pages 81–82.

378 Plaintiffs' 10/28/96 exhibit 28 pages 96–97.

379 Vol I page 210.

380 HO # 36B, HO # 36C.

381 Plaintiffs' 10/28/96 exhibit 97.

382 Vol I page 201.

383 Plaintiffs' 10/28/96 exhibit # 97 pages 26, 28, 92.

384 HO # 36C.

385 Vol I page 196.

386 Vol I page 196.

387 Vol I page 196–197.

388 Plaintiffs' 10/28/96 exhibit # 96.

389 Vol I page 99.

390 Vol I page 111.

391 Vol I pages 109–110. [Section 8 new construction is not an element of the remedial plan.]

392 Vol i pages 115–117.

393 Vol I page 111.

394 Vol I page 108.

395 Vol I page 117.

396 Vol I page 120.

397 Vol I page 118.

398 Vol I page 117.

399 Vol I page 121, 123–124.

400 Plaintiffs' 10/28/96 exhibit # 19.

401 Page 22.

402 Page 22.

403 Page 64.

404 Page 136.

405 Pages 136–137.

406 Vol II page 182.

407 Plaintiffs' 10/28/96 exhibit # 16; Vol I pages 183–189.

408 Vol I pages 190–191, 199.

409 Vol I pages 192–193.

410 Vol I pages 192–201.

411 Professor Thibodeau also fudged the numbers on his analysis of vacant units [Vol II pages 176–182 Thibodeau testimony; Vol III pages 134–150; plaintiffs' 10/28/96 exhibits 100–104, 106].

412 Vol II pages 28–30.

413 Vol III pages 127–130.

414 Plaintiffs' exhibit # 107 transmitted 11/15/96 with Rhodes' declaration.

415 Plaintiffs' 10/28/96 exhibit # 34 pages 29–37, 40–41, 45–46.

416 Vol I pages 51, 67 Jacob Cherner testimony.

417 Vol I pages 79–80 Jacob Cherner testimony.

418 Plaintiffs' 10/28/96 exhibit # 1 pages 156–158.

419 Vol II pages 166–175.

420 "An order directing HUD to use its discretion under the various federal housing programs to foster projects located in white areas of the Chicago housing market would be consistent with and supportive of well-established federal housing policy." *Gautreaux,* 284 U.S. at 301.

421 The regulation does not directly require public housing construction in white areas. It only presents a barrier to housing in minority areas. If the developer does not attempt to build in a white area and the minority sites are rejected, there is no violation of the regulation. This can result and has resulted in no new public housing.

422 HUD might also engage in the rare exercise of its constitutional and statutory obligations and veto the minority or mixed sites. This would result in the units going unused.

423 A. 3.

424 Remedial Order Affecting DHA A. 2.

425 Memorandum In Support of Motion to Modify Remedial Order Affecting HUD, page 5.

426 The number in predominantly minority areas after the demolition of the West Dallas units and assuming a West Dallas project with 950 units.

427 Plaintiffs' 9/27/94 exhibit # 6. 24 CFR 941.202.

428 Plaintiffs' 9/27/94 exhibits6–9 HUD documents on deconcentration; 18–19 City of Dallas Housing Assistance Plan and modifications providing that public housing replacement units should be developed only in non-concentrated areas and setting City policy requiring deconcentration of assisted housing.

429 Plaintiffs' 12/12/88 exhibit # 30—Desegregation study pages 4–3 to 4–4.