



10-1-1972

# HUD's Project Selection Criteria - A Cure for Impermissible Color Blindness

David O. Maxwell

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

## Recommended Citation

David O. Maxwell, *HUD's Project Selection Criteria - A Cure for Impermissible Color Blindness*, 48 Notre Dame L. Rev. 92 (1972).  
Available at: <http://scholarship.law.nd.edu/ndlr/vol48/iss1/5>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## HUD'S PROJECT SELECTION CRITERIA—A CURE FOR “IMPERMISSIBLE COLOR BLINDNESS”?

*David O. Maxwell\**

The Department of Housing and Urban Development (HUD) does not plan, select sites for or build any housing. Public and private sponsors submit proposals for federal housing assistance to HUD based on their own plans for building on sites they select. HUD's function is to react to their initiatives in accordance with constitutional and statutory limitations. Decisions to approve or reject proposals for federally subsidized housing<sup>1</sup> frequently involve HUD's administrators in civil rights issues.

Federally subsidized housing is intended for occupancy by persons of low and moderate income. Much of it, especially public housing, has been built in central cities where there are high concentrations of low-income residents. The correlation in residential patterns between race and socioeconomic class is too well established to argue. A large portion of the center city populace are members of minority groups while the suburbs remain predominantly white. Every additional low-income project HUD approves for financial assistance in central cities inevitably reinforces segregated housing patterns. Conversely, projects outside central cities potentially break down segregation. Projects in both sectors are needed to provide decent housing for the poor. There are those who maintain that decent housing is more needed in our deteriorating central cities, since that is where low-income minorities live—and want to live. And, of course, there are those outside central cities who do not want federally subsidized projects in their neighborhoods irrespective of need.

On February 7, 1972, HUD initiated by far its most ambitious effort to deal with the social conflicts inherent in its responsibilities by establishing for the guidance of its local offices a set of standards for judging the desirability of subsidized housing proposals. These rules are known as “Project Selection Criteria.”<sup>2</sup> They govern the evaluation of applications for funding of housing projects under sections 235(i) and 236 of the National Housing Act<sup>3</sup> and rent supplement projects<sup>4</sup> and low-rent housing assistance applications under the

---

\* General Counsel, Department of Housing and Urban Development; B.A., 1952, Yale; J.D., 1955, Harvard. Opinions expressed in this article are those of the author and do not necessarily reflect the views of the Department.

1 In the field of housing, terms like “subsidized” and “assisted” are weighty with special meanings accumulated over the years and often understood only by the initiated. For the purposes of this article, I will use “federally subsidized housing” consistently to describe as a group those programs covered by the Project Selection Criteria.

2 37 Fed. Reg. 203-09 (1972).

3 12 U.S.C. §§ 1715z-1715z-1. Section 235 covers single-family housing and Section 236 multifamily housing. Under both sections, HUD makes interest reduction payments in the amount of the difference between the monthly payment for principal, if any, interest, fees and charges that the mortgagor is obligated to pay under the actual mortgage and the monthly payment for principal, if any, and interest that the mortgagor would be obligated to pay if the mortgage were to bear interest at 1%. This interest subsidy results in lower mortgage payments by the homeowner and lower rental payments by the renter. Basic eligibility for the programs is defined in terms of family income no greater than 135% of public housing initial occupancy income limits in the area.

4 12 U.S.C. § 1701s *et seq.* The Secretary may pay rent supplements up to an amount by which the fair market rental of a unit exceeds 25% of the income of a qualifying low-income family.

U.S. Housing Act of 1937.<sup>5</sup> There are seven criteria for both single and multi-family applications covering the following considerations: "Need for Low Income Housing," "Minority Housing Opportunities," "Improved Location for Low Income Families," "Relationship to Orderly Growth and Development," "Relationship of Proposed Project to Physical Environment," "Ability to Perform," and "Project Potential for Creating Minority Employment and Business Opportunities." The eighth criterion, "Provision for Sound Housing Management," applies solely to multifamily proposals. Each proposal is rated "superior," "adequate" or "poor" by the standards set forth in each criterion. HUD gives priority to funding of projects with the highest ratings. A "poor" rating on any criterion disqualifies a project.

One would have expected HUD's implementation of these criteria in February, 1972, to come as no shock to housing experts and civil rights activists. The Department had put the first version of them out for comment on June 17, 1971.<sup>6</sup> The volume and detail of comments received led to changes significant enough to persuade the Department to publish them once again for comment on October 2, 1971.<sup>7</sup> They were published in their final form on January 7, 1972, a month before they became effective.

Despite this extraordinary solicitude for public opinion—really an unprecedented provision for citizen participation in the rule-making process by a federal agency—some people who should (and probably do) know better reacted as if HUD's management had produced the criteria like a rabbit from a hat. They appeared to view this as an act of nefarious prestidigitation, the outward manifestation of a clandestine plot to cripple HUD's housing programs with complications or to end them altogether in the inner city. Other critics spoke of the criteria as if they were as evanescent as a cloud, a bureaucrat's dream without legal justification, much less imperatives:<sup>8</sup>

On the assumption that the goal of housing policy should be racial integration, and given the theory of permanent income difference between the races, the conclusion drawn by the federal government was irresistible—government policy must seek to obliterate the significance of income to housing location. On this syllogistic base, mandating an attack on the class structure of American cities, the federal government founded the scattersite housing policy embodied in the new HUD guidelines.

That Criterion (2), "Minority Housing Opportunities," has been the lightning rod for most attacks on the criteria is hardly surprising.<sup>9</sup> In this Criterion, HUD has tried to resolve the conflict of residential segregation with housing need in consonance with applicable law and sound public policy. To

5 42 U.S.C. § 1401 *et seq.* Low-rent housing is often called public housing.

6 36 Fed. Reg. 12032-038 (1971).

7 36 Fed. Reg. 19316-320 (1971).

8 Roger Starr, *The Lesson of Forest Hills*, COMMENTARY, June, 1972, at 13.

9 Initial criticism of Criterion (3), "Improved Location for Low(er) Income Families," has largely abated since HUD made clear that proposals in Urban Renewal or Model Cities areas which are required to fulfill the official plan for those areas will receive at least an "adequate" rating on this Criterion. Such proposals will, of course, be separately rated on the other criteria, including Criterion (2).

review the essential elements of this law and policy is the purpose of this article. Criterion (2) reads:

## 2. *Minority Housing Opportunities*

( ) Superior ( ) Adequate ( ) Poor

Objectives:

To provide minority families with opportunities for housing in a wide range of locations.

To open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination.

(A) A *superior* rating shall be given if the proposed project will be located:

(1) So that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racially mixed; *or*, . . . .

(2) In an area of minority concentration, but the area is part of an official State or local agency development plan, and 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. . . .

(B) An *adequate* rating shall be given if the proposed project will be located:

(1) Outside an area of minority concentration, but the area is racially mixed, and the proposed project will not cause a significant increase in the proportion of minority to nonminority residents in the area; *or*, . . . .

(2) In an area of minority concentration and 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*, . . . .

(3) In an area of minority concentration, but is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. (An "overriding need" may not serve as the basis for an "adequate" rating if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color or national origin renders sites outside areas of minority concentration unavailable); *or*, . . . .

(4) In a housing market area with few or no minority group residents. . . .

All "superior" and "adequate" ratings shall be accompanied by documented findings based upon relevant racial, socioeconomic, and other data and information.

(C) A *poor* rating shall be given if the proposed project does not satisfy any of the above conditions, *e.g.*, will cause a significant increase in

the proportion of minority residents in an area which is not one of minority concentration, but which is racially mixed. . . .<sup>10</sup>

Like any private loan officer, HUD has to assess the economic feasibility of every project. For many years after the federal government first got into the housing business in the 1930's, that was all the Department and its predecessors did. In fact, prior to 1967, instructions regarding approval of low-rent housing sites did little more than pay vague lip service to racial considerations. In February, 1967, HUD issued site approval rules which did clearly cover the question of racial segregation in the low-rent housing programs.<sup>11</sup> Based on Title VI of the 1964 Civil Rights Act and the Department's regulations under that Act, these rules defined as *prima facie* unacceptable any application which would contribute to additional racial concentration—and thus perpetuate housing segregation—within the jurisdiction of the local housing authority. The authority could overcome the presumption against acceptability only by showing that there were an equivalent number of units of low-rent housing outside areas of minority concentration within its jurisdiction.

After George Romney became Secretary of HUD in 1969, he directed its lawyers and housing administrators to begin work on regulations which would require departmental officials to consider, as part of the processing of an application for subsidy under the sections 235 and 236 private housing programs, a proposal's impact on patterns of residential segregation in the community. Several drafts of such regulations circulated within the Department—and elsewhere in the federal establishment—during 1970, but the fine tuners were still at work on December 30 of that year when the Third Circuit Court of Appeals announced its landmark decision in *Shannon v. United States Dept. of Housing & Urban Dev.*<sup>12</sup> Here is a case which commands detailed attention because of the impact of its legal reasoning and conclusions on not only other federal courts subsequently confronted with similar issues but also upon the drafters of the Project Selection Criteria.

Maurice Shannon was one of several individual and institutional plaintiffs that sued in their own right and as class representatives of others similarly situated to enjoin the Department and its officials from insuring and paying rent supplements on Fairmount Manor, a multifamily project sponsored in their neighborhood in the East Poplar Urban Renewal Area of Philadelphia by a nonprofit corporation. The court in its opinion succinctly stated their complaints:<sup>13</sup>

The essential substantive complaint is that the location of this type of project on the site chosen will have the effect of increasing the already high concentration of low income black residents in the East Poplar Urban Renewal Area. The essential procedural complaint preserved on appeal is that in reviewing and approving this type of project for the site chosen, HUD had no procedures for consideration of and in fact did not consider

10 37 Fed. Reg. 206 (1972).

11 HUD *Low-Rent Housing Manual*, ¶ 4(g) (1967).

12 436 F.2d 809 (3d Cir. 1970).

13 *Id.* at 811-12.

its effect on racial concentration in that neighborhood or in the City of Philadelphia as a whole.

The urban renewal plan for the East Poplar Urban Renewal Area, as amended five times between 1958 and 1964, provided for redevelopment of the Fairmount Manor area primarily with single-family owner-occupied homes. For a variety of reasons not uncommon in the urban renewal program, progress in carrying out the plan had been minimal when in 1967 and 1968 HUD approved a change from single-family homes to the 221(d)(3)<sup>14</sup> rent supplement<sup>15</sup> project known as Fairmount Manor. Regarding the change as minor, HUD's Philadelphia office required no public hearing or other procedures to determine its social impact prior to approving it. The court held that HUD's action failed to meet the requirements of the 1949 Housing Act<sup>16</sup> and the 1964<sup>17</sup> and 1968<sup>18</sup> Civil Rights Acts.

The court reasoned from two propositions in reaching the result in *Shannon*. The first is that the change in the urban renewal plan was major, not minor. While single-family homeownership "would tend to create a more stable and racially balanced environment," a 221(d)(3) rent supplement project like Fairmount Manor is the "functional equivalent of a low rent public housing project." As such, it would serve the "same socioeconomic group" resident in the many proximate low-rent housing projects and thus inevitably contribute to racial concentration in Philadelphia.

The second proposition supporting the result was the court's reading of congressional intent. In authorizing federal financial assistance for urban renewal in the Housing Act of 1949, Congress expressed its intention to eliminate slums and urban blight by requiring localities receiving funds to develop a "workable program" for this purpose.<sup>19</sup> In the 1964 Civil Rights Act, Congress outlawed discrimination on grounds of race, color or national origin in programs or activities—including urban renewal—receiving federal assistance.<sup>20</sup> In the 1968 Civil Rights Act, Congress mandated the Secretary of Housing and Urban Development to administer the programs under his jurisdiction "affirmatively" to further the declared policy of the United States in favor of fair housing.<sup>21</sup>

The key to the court's reasoning on this point is that these Acts must be "read together" as national housing policy. Together, they "show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight."<sup>22</sup> Racial concentration is one such factor. Therefore, the court concludes:

---

14 12 U.S.C. § 1715l.  
 15 12 U.S.C. 1701s.  
 16 42 U.S.C. §§ 1450 *et seq.*  
 17 42 U.S.C. § 2000a *et seq.*  
 18 42 U.S.C. 3601 *et seq.*  
 19 42 U.S.C. §§ 1450 *et seq.*  
 20 42 U.S.C. § 2000a *et seq.*  
 21 42 U.S.C. § 3601 *et seq.*  
 22 436 F.2d at 816.

Possibly before 1964 the administrators of the federal housing programs could . . . remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible. Increase or maintenance of racial concentration is *prima facie* likely to lead to urban blight and is thus *prima facie* at variance with the national policy. Approval of Fairmount Manor under [HUD's abbreviated] procedure produced a decision which failed to consider that policy.<sup>23</sup>

The court then directly hits the target of its reasoning—not Fairmount Manor *per se*, but, rather, HUD's failure to exercise its expertise to determine the socioeconomic desirability of this type of housing proposal before approving it:

We hold . . . that the Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.<sup>24</sup>

Observing that desegregation is not the only goal of the national housing policy, the court leaves room for HUD to approve proposals which iterate or add to racial concentration in "instances where a pressing case may be made for the rebuilding of a racial ghetto."<sup>25</sup> But HUD may not do so without weighing the socioeconomic implications:

We hold only that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.<sup>26</sup>

The court of appeals remanded *Shannon* to the district court for the entry of an injunction against further federal financial assistance to the project, except payment of rent supplements to tenants, until HUD could determine whether the location would "enhance or impede a workable program for community improvement in conformity with the Civil Rights Acts of 1964 and 1968."<sup>27</sup> Several months later, in the summer of 1971, HUD informed the district court that Fairmount Manor failed this test.<sup>28</sup>

Criterion (2) is based not only on the law of *Shannon*<sup>29</sup> but also on the

23 *Id.* at 820-21. See *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969).

24 436 F.2d at 821.

25 *Id.* at 822.

26 *Id.* at 822.

27 *Id.* at 822-23.

28 After the district court had dismissed the plaintiffs' complaint on October 7, 1969, the project was built; it was fully occupied, although HUD had not insured a permanent mortgage, by the time the court of appeals decided the case. At this writing, the question of appropriate relief remains unsettled.

29 It should be noticed that *Shannon* speaks in terms of *racial* concentration, while Criterion (2) regulates *minority* concentration. HUD considered minorities other than racial groups to be subject to housing discrimination. Support for this view can be found in the opinion of the Fifth Circuit Court of Appeals in *Cisneros v. Corpus Christi Independent School Dist.*, 324 F. Supp. 599 and 330 F. Supp. 1377, *aff'd in part, modified in part and remanded*, — F.2d —, *appeal docketed* No. 71-2397 5th Cir., August 2, 1972, holding *inter alia* that segregation of Mexican-Americans is constitutionally impermissible.

policy of the President's statement on equal opportunity in housing, issued June 11, 1971.<sup>30</sup> Many months in preparation and the subject of widespread speculation before its issuance, this statement is a forthright articulation of the Administration's views on the proper federal role in the effort to achieve equal housing opportunity. It is regrettable that its strictures against so-called forced integration ("we will not seek to impose economic integration upon an existing local jurisdiction")<sup>31</sup> have been so widely publicized as to overshadow its passages on the costs of racial separation.

On the question of approval of sites for federally subsidized housing, the statement provides the following policy guidance:

Based on a careful review of the legislative history of the 1964 and 1968 Civil Rights Acts, and also of the program context within which the law has developed, I interpret the "affirmative action" mandate of the 1968 act to mean that the administrator of a housing program should include, among the various criteria by which applications for assistance are judged, the extent to which a proposed project, or the overall development plan of which it is a part, will in fact open up new, nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination. This does not mean that no federally assisted low- and moderate-income housing may be built within areas of minority concentration. It does not mean that housing officials in Federal agencies should dictate local land use policies. It does mean that in choosing among the various applications for Federal aid, consideration should be given to their impact on patterns of racial concentration.

In furtherance of this policy, not only the Department of Housing and Urban Development but also the other departments and agencies administering housing programs—the Veterans Administration, the Farmers Home Administration and the Department of Defense—will administer their programs in a way which will advance equal housing opportunity for people of all income levels on a metropolitan areawide basis.<sup>32</sup>

The publication of the first version of the Project Selection Criteria followed by three days the President's policy statement. While that version was still pending, another significant event occurred. On September 10, 1971, the U.S. Court of Appeals for the Seventh Circuit announced its decision in *Gautreaux v. Romney*.<sup>33</sup>

This is one of a long—indeed lengthening—series of *Gautreaux* decisions. Dorothy Gautreaux and her co-plaintiffs, all black tenants of or applicants for public housing in the City of Chicago, brought companion cases in the U.S. District Court for the Northern District of Illinois against the Chicago Housing Authority (CHA) and the Secretary of HUD seeking relief from alleged racially discriminatory housing policies of the Authority assisted by HUD. The lower court deferred the case against the Secretary pending a determination of the action against the Authority.

---

30 7 *Weekly Compilation of Presidential Documents* 892 (1971).

31 *Id.* at 900.

32 *Id.* at 901.

33 448 F.2d 731 (7th Cir. 1971).



The district court did find the Authority's role in the construction of public housing to have been racially discriminatory<sup>34</sup> and enjoined further construction on a segregated basis.<sup>35</sup> These decisions were upheld on appeal.<sup>36</sup> Thereafter, the lower court decided that the Secretary was not liable for assisting the Authority's discriminatory conduct. The Seventh Circuit disagreed.

The court in its opinion acknowledged that HUD's heart was in the right place. The agency had funded Chicago's segregated public housing program only after having made numerous and consistent efforts to persuade the Authority to locate low-rent housing projects in white neighborhoods. "Moreover, given the acknowledged desperate need for public housing in Chicago, HUD's decision was that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy Negro families of that city."<sup>37</sup>

Thus, HUD had funded urgently needed housing only after failing to persuade the Authority to change its segregationist policies. Not enough, said the court. The fact that HUD continued to fund CHA's housing program knowing it was discriminatory constituted a violation of "either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964."<sup>38</sup> Neither the harshness of HUD's alternative course of action (no housing at all) nor the source of CHA's discriminatory conduct (community resistance to public housing in white areas) excused the violation:

[I]t is apparent that the "dilemma" with which the Secretary no doubt was faced and with which we are fully sympathetic, nevertheless cannot bear upon the question before us. For example, we have been advised that any further HUD pressure on CHA would have meant cutting off funds and thus stopping the flow of new housing altogether. Taking this assertion as true, still the basis of the "dilemma" boils down to community and local governmental resistance to the only constitutionally permissible state policy . . . a factor which, as discussed above, has not yet been accepted as a viable excuse for a segregated result. So, even though we fully understand the Secretary's position and do not, in any way, wish to limit the exercise of his discretion in housing related matters, still we do not feel free to carve out a wholly new exception to a firmly established general rule which, for at least the last sixteen years, has governed the standards of assessing liability for discrimination on the basis of race.<sup>39</sup>

The court of appeals carefully and clearly repeated that its holding was limited to liability and remanded the case to the district court where the determination of appropriate relief remains a lively issue.<sup>40</sup>

34 *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill., 1969).

35 *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736 (1969).

36 *Gautreaux v. Chicago Housing Authority*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922, 91 S. Ct. 1378, 28 L. Ed. 2d 661 (1971).

37 448 F.2d at 737.

38 *Id.* at 737. Note that the *Shannon* court did not find it necessary to reach constitutional issues raised by plaintiffs in that case.

39 *Id.* at 738-39.

40 The district court entered an order prohibiting HUD from paying Model Cities funds to the City of Chicago until the CHA complied with that court's orders regarding low-rent housing. 332 F. Supp. 366 (1971). The court of appeals held this order to be inappropriate relief for the Secretary's discriminatory conduct. 457 F.2d 124 (1972). Until a final order is entered and upheld on appeal (or accepted), the Government has reserved decision on whether

From *Shannon, Gautreaux*, and the Presidential policy statement, one can distill certain fundamental principles governing HUD's site approval decisions:

1. HUD must have an institutionalized method to weigh socioeconomic factors in considering housing proposals.
2. HUD should include, among the various criteria by which applications for housing assistance are judged, the extent to which a proposed project, or the overall development plan of which it is a part, will in fact open up new, nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination. This means that HUD should consider the impact of proposals on patterns of racial concentration.
3. Involuntary racial concentration leads to urban blight; it is therefore contrary to national housing policy for HUD to reinforce racial concentration in making its housing site decisions.
4. HUD may approve housing proposals in areas of racial concentration when its informed judgment is that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.
5. HUD may not knowingly acquiesce in a racially discriminatory housing program or proposal.
6. Community opposition to sites outside areas of minority concentration does not justify HUD's funding of a racially discriminatory housing program or proposal.

HUD believes that the Project Selection Criteria meet the *Shannon* requirement of an institutionalized<sup>41</sup> method for weighing socioeconomic factors in considering subsidized housing proposals. In Criterion (2), the Department has tried to formulate a rule which will as simply as possible conform to the principles relating to racial concentration set forth above.

Under Criterion (2), proposals which will provide housing opportunities for minorities outside areas of minority concentration are entitled to a "superior" rating.<sup>42</sup> In connection with this provision, one must take into account HUD's far-reaching Affirmative Marketing Regulations which became effective on February 25, 1972, and which apply to both unsubsidized and subsidized single

---

to appeal the seventh circuit's decision holding the Secretary liable. 448 F.2d 731 (1971). Even if the Government does eventually appeal on the question of liability, the election to do so will undoubtedly relate strongly to the form of relief. The decision will remain in any event a good one for showing the *expectations* courts have of HUD's administration of federal housing programs.

41 For discussion of the meaning of "institutionalized" in this context, see *Coffey v. Romney*, C-44-G-71 (U.S.D.C., M.D. N.C., filed May 11, 1972).

42 Project Selection Criteria 2(A)(1). Text accompanying note 10 *supra*.

and multifamily housing proposals.<sup>43</sup> Clearly, the availability of low- and moderate-income housing outside an area of minority concentration means nothing to residents of that area who never learn of it. These Regulations mandate various techniques to insure adequate communication to the center city residents.

Proposals within areas of minority concentration rate "superior" if the area is subject to an official state or local development plan and "adequate" if it is not, provided that 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.<sup>44</sup> The basis for this formulation is apparent, although execution requires care and sound judgment. If in fact minorities do have a choice of housing they can afford outside segregated areas, there is no reason for declining to approve additional housing within such areas. While this will not be of much practical effect as to low-rent or rent supplement housing for some time to come, it does permit construction of 235 and 236 housing in those central cities where, as is frequently the case, a significant amount of such housing is being built in the suburbs.

Proposals within areas of minority concentration can also receive an "adequate" rating if they are necessary to meet housing needs which cannot otherwise feasibly be met in that housing market area.<sup>45</sup> This tracks the *Shannon* dictum. The exception, emphasized in *Gautreux*, arises when discrimination is the only reason why the need cannot be met outside areas of minority concentration.

The President in his policy statement made the point that to "impact or tip the balance of an established community with a flood of low-income families [does a] disservice to all concerned."<sup>46</sup> This language provided guidance to the drafters of the Project Selection Criteria in dealing with the difficult question of how to handle proposals for subsidized housing in areas which are already substantially racially mixed. It made no sense to ignore the fact that a large subsidized project could well destroy one of those all too rare integrated communities that are functioning well in this country today. The solution was cautious. A proposal can receive an "adequate" rating in a racially mixed area if it will not cause a significant increase in the proportion of minority to nonminority residents in the area.<sup>47</sup> It will not be easy to determine in all cases what constitutes a "significant increase." Indeed, all the provisions of Criterion (2), and the other criteria as well, require a high order of judgment and discretion on the part of program administrators in HUD's local offices, who are charged with the responsibility of making final decisions on housing proposals.

From the moment the criteria became effective, a chorus of Cassandras has repeatedly charged that the new rules would bar approval of subsidized housing in central cities. Secretary Romney addressed himself to this question in his testimony before the House Banking and Currency Committee on February 22, 1972:

---

43 37 Fed. Reg. 75 (1972).

44 Project Selection Criteria 2(A)(2), 2(B)(2). Text accompanying note 10, *supra*.

45 Project Selection Criteria 2(B)(3). Text accompanying note 10, *supra*.

46 7 *Weekly Compilation of Presidential Documents* 892, at 901.

47 Project Selection Criteria 2(B)(1). Text accompanying note 10, *supra*.

Let me put to rest right here and now an unfortunate misunderstanding of the criteria. There are those who say that this project selection system will halt construction of HUD-assisted housing in the inner city.

There are two reasons for this misunderstanding. First, people say that Criterion No. 2 does not permit approval of projects in areas of minority concentration. That this is not correct ought to be clear from the text of Criterion No. 2, which specifically permits approval of projects in areas of minority concentration under certain circumstances; for example, an overriding need which cannot otherwise feasibly be met in that housing market area.

Second, many people who have criticized the criteria have focused their attention solely on Criterion No. 2 and overlooked the fact that inner-city projects will likely rate "superior" on several of the remaining six or seven criteria.

Projects proposed for the inner city will usually rate "superior" on Criterion No. 1, because the need for housing there is generally great. Inner-city areas often are part of land-use or Urban Renewal plans, with housing elements, so that proposals there can receive a "superior" on Criterion No. 4. Projects proposed for inner-city areas will often rate "superior" on Criterion No. 7, because minority businesses and employees may more easily participate in building inner-city projects.

Preliminary reports from our Area Offices confirm that applications for projects to be located in the central city are receiving a sufficient number of "superior" ratings to be funded. At the same time, we will continue to comply with court decisions which do not permit confinement of our assisted housing to areas of minority concentration.<sup>48</sup>

Nevertheless, despite the Secretary's specific assurances and in the face of actual approvals of central-city projects under the criteria, some critics have persisted in this line of attack. Among them have been some of the very Community Legal Services lawyers who worked on or at least abetted the *Shannon* litigation.<sup>49</sup>

Some seem to believe the Department should approve all central-city, low-income proposals, regardless of racial concentration, because the people there need housing which the suburbs will not accept. This HUD clearly may not do, as we have seen. Conversely, Congress has given HUD no authority to force any community to accept low-income housing. This has led to an unfortunate stalemate in housing development in some metropolitan areas. *Item*: the Chicago Housing Authority has built no new public housing since the first *Gautreaux* decision in 1969. *Item*: the white community's and the city government's resistance to federally subsidized low- and even moderate-income housing outside areas

---

<sup>48</sup> *Hearings on H. R. 13337 Before the Subcommittee on Housing of the House Banking and Currency Committee*, 92d Cong., 2nd Sess., pt. 1, at 39 (1972).

<sup>49</sup> Indeed, there are rumors, as this is written, that there may soon be a suit against HUD for refusal to approve a central-city project under the Project Selection Criteria. This prospect tends to induce a weary, "you-can't-win" frame of mind in HUD's management, but actually it might not be a bad idea to test HUD's policy in court from the opposite viewpoint of the *Shannon* plaintiffs.

of minority concentration in Philadelphia is fast closing down federally subsidized housing programs in that city.

There is no question in the minds of many knowledgeable students of this sad dilemma that one solution lies in housing plans which would provide a "fair share" distribution of low- and moderate-income housing among the communities making up a metropolitan area. Secretary Romney has frequently spoken favorably of this approach. Congressman Patman and some of his colleagues proposed legislation in the 1971-72 session which would have required allocation of federal housing funds on this basis.<sup>50</sup> The Housing Subcommittee of the House Banking and Currency Committee rejected this proposal by a narrow margin. It is bound to appear again in the next Congress.

Meanwhile, HUD must work with the tools at hand, including the Project Selection Criteria. Three recent court decisions have buttressed confidence in the criteria, and specifically Criterion (2). In *Banks v. Perk*,<sup>51</sup> a case which bears a strong resemblance to *Gautreaux*, the U.S. District Court for the Northern District of Ohio held *inter alia* that "the failure of the housing authority to include any racial criteria in determining site selection constitutes a violation of the Fourteenth Amendment"<sup>52</sup> and ordered the authority not to approve any additional sites in areas of racial concentration in the City of Cleveland.

In *Croskey Street Concerned Citizens v. Romney*,<sup>53</sup> the Third Circuit Court of Appeals upheld the refusal of the district court to enjoin construction of a low-income housing project for the elderly in an area of racial concentration in Philadelphia. The court's language shows that *Croskey* is not intended to give HUD *carte blanche* to approve central-city sites:

Admittedly low rent housing for the elderly is badly needed in the areas involved and in Philadelphia generally. The theory advanced in the contention offered against this new construction is that it will increase the already heavy black population of the Croskey Street neighborhood. Actually in the H.U.D. plan the first four buildings comprise a total of 313 units which will be occupied largely by low income elderly persons and located in an area predominated by blacks. The fifth structure "Washington Square West" will have 360 units in what is predominately a white or racially mixed area. The approval by H.U.D. of all this related housing is based upon what H.U.D. contends is a carefully balanced program fair to all of the Philadelphia citizens concerned, with H.U.D. recognizing the importance of the whole project to those people. H.U.D. argues and represents that it has been and is a fundamental H.U.D. policy to make sure that this practice is fully performed by the Philadelphia Housing Authority and that through meticulous checking and rechecking, H.U.D. is satisfied that Philadelphia will live up to its commitment in this instance. Were it otherwise H.U.D.'s policy would be to cut off all further funds until an acceptable balancing project is built.

It should be noted here that H.U.D. says plainly that it accepts and is in

50 H.R. 9688, 92d Cong. (*Housing and Urban Development Act of 1971, Title V*).

51 Civil No. C-72-115 (U.S.D.C., N.D. Ohio, May 2, 1972).

52 *Id.* at 14.

53 459 F.2d 109 (3d Cir. 1972).

full accord as far as it is relevant with the decision of this court in *Shannon v. H.U.D.*, 436 F. 2d 809 (1970). H.U.D. submits that its judgment in this litigation shows itself to be an informed one and that it thoroughly understands the area needs of low cost housing for the elderly. It realizes that the prime necessity for that might ordinarily outweigh the disadvantage of increasing racial concentration. But even so, it has lived up to its own regulations in insisting that the housing before us provides a balanced racial distribution.<sup>54</sup>

Clearly, the court felt that HUD's insistence on a "carefully balanced program fair to all of the Philadelphia citizens concerned" provided the basis for approval of the project at issue in *Croskey*. This is the very kind of program the criteria are designed to achieve.

*Coffey v. Romney*<sup>55</sup> involved a 236 project in Greensboro, North Carolina. Plaintiffs, residents in the neighborhood of the proposed project, sought to enjoin its approval by HUD primarily on the ground that HUD "did not use 'adequate institutionalized means' for finding the facts necessary to a determination of whether the [project site] could be selected for federally financed housing in compliance with the Department's duties under the Constitution and Civil Rights Acts of 1964 and 1968."<sup>56</sup> The court decided that HUD had properly weighed socio-economic factors, particularly race, in approving the site. The aspect of this case most worth noting is the unquestioning acceptance by all concerned of the *Shannon* doctrine.

HUD's Project Selection Criteria provide a rational method for allocating federally subsidized housing on a sound legal basis. As we gain experience with these criteria,<sup>57</sup> we should also continue to seek an even fairer way to accommodate the housing needs and civil rights of our citizens.

---

<sup>54</sup> *Id.* at 110.

<sup>55</sup> Civil No. C-44-G-71 (U.S.D.C., M.D. N.C., May 11, 1972).

<sup>56</sup> *Id.* at 2.

<sup>57</sup> HUD is in fact conducting an extensive study, the results of which the Department will make public, of the effect of the criteria from February 7 to June 30, 1972. In one early report, the Director of HUD's Hartford Area Office announced on June 6, 1972, that the criteria are working well in Connecticut. Individuals and groups outside HUD, *e.g.*, The Center for National Policy Review at the School of Law of the Catholic University of America, are also planning to monitor the operation of the criteria.