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## Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974

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# LITIGATION STRATEGIES AND JUDICIAL REVIEW UNDER TITLE I OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

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Since the origin of the Slum Clearance and Urban Renewal Program of 1949,<sup>1</sup> federal community development programs have been plagued with red tape,<sup>2</sup> delay<sup>3</sup> and often ineffective results.<sup>4</sup> Another serious problem with prior community development schemes was their delivery in the form of categorical grants, each requiring separate applications, review, strictly defined purpose, and a requirement for local financial contribution.<sup>5</sup> The massive amount of planning and administrative duplication, together with the relatively narrow spectrum of eligible community development activities tended to impose a system of dominance by Washington over local land use planning. Communities planned and implemented programs, not so much upon the basis of locally perceived priorities as on what federal grants were currently available. This system represented a de facto encouragement of non-planning despite lofty Congressional rhetoric to the contrary.<sup>6</sup> Such

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1. Housing Act of 1949 tit. 1, 42 U.S.C. §§ 1450-69 (1970).

2. See generally NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 152-69 (1968) (known as the "Douglas Comm'n"); cf. *Hearings on Red Tape — Inquiring Into Delays and Excessive Paperwork in Administration of Public Works Programs Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works*, 92d Cong., 1st Sess. (1971).

3. *Hearings on Red Tape*, *supra* note 2.

4. BUILDING THE AMERICAN CITY, *supra* note 2, at 152-69. See also LeGates, *Can the Welfare Bureaucracies Control Their Programs: The Case of HUD and Urban Renewal*, 5 URBAN LAW. 228 (1973).

5. See Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 URBAN LAW. 189, 189-90 (1975) [hereinafter cited as Fishman].

6. E.g., 42 U.S.C. § 1451 (1970). See note 209 *infra* for materials relating to the Workable Program requirement.

concerns, combined with promises of the "New Federalism," resulted in passage of the Housing and Community Development Act of 1974.<sup>7</sup>

Although the administration favored carte blanche delegation of responsibility in the form of pure revenue sharing,<sup>8</sup> Congress, concerned with national goals and performance, held out for a far more sophisticated package. While offering simplicity, vastly increased efficiency and flexibility, the resulting program also retains standards comparable to its predecessors. It creates some new requirements and expectations, which if effectively and aggressively implemented could make a sizeable contribution toward remedying this nation's housing and community development crisis. This Article will explore the strengths and weaknesses of these program requirements, and will attempt to forecast the litigable issues that might be raised, and in doing so assess the potential for judicial intervention.

#### I. AN INTRODUCTION TO TITLE I OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

In combining virtually all of the United States Department of Housing and Urban Development's (HUD) prior grant-in-aid community development programs into a block grant entitlement concept, Title I of the Housing and Community Development Act of 1974<sup>9</sup> (HCDA) creates a deceptively simple package.<sup>10</sup> HCDA reorders responsibilities for compliance with community development standards both by delegating to recipients the tasks of environmental assessment and relocation planning, and by greatly increasing the number of recipients, thus precluding the previously existing opportunity of HUD to carry out detailed program review. These factors, together with the controversial nature of certain program requirements and lack of

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7. Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 5, 12, 15, 20, 31, 40, 42, 49 U.S.C. (Supp. IV, 1974)).

8. See generally Fishman, *supra* note 5.

9. 42 U.S.C. §§ 5301-17 (Supp. IV, 1974).

10. For a general discussion of the Act see H. FRANKLIN, D. FALK & A. LEVIN, *IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS* 59-78 (1975); R. Alexander & M. Nanno, NAHRO, *A Local Housing Assistance Plan* (1974); R. Maffin, E. Silverman & D. Sosson, NAHRO, *Chart Book: For Plotting a Local Community Development Course Under the Housing and Community Development Act of 1974* (1975); Fishman, *supra* note 5; Kushner, *Community Planning and Development Under the Housing and Community Development Act of 1974*, 8 CLEARINGHOUSE REV. 661 (1975); Salsich, *Community Development — Some Reflections on the Latest Federal Initiative*, 19 ST. LOUIS U.L.J. 293 (1975).

experience with the law, have already resulted in legal challenges. The consequence, therefore, could be excessive delay in achieving the intent of the new law, causing further postponement of the commitment to provide "a decent home and a suitable living environment for every American family."<sup>11</sup>

As has already been noted, the most striking change brought about by the HCDA is the switch from the traditional project oriented grant-in-aid application procedures for community development to a block grant "special revenue sharing" approach.<sup>12</sup> Another significant development is a recognition of the relationship between development policy, or perhaps more accurately redevelopment policy, and housing. In addition, Congress recognized the devastating effects of racial and economic isolation occurring in the central cities and has provided a mandate to achieve integration and deconcentration of housing opportunity.

While the language of the HCDA is, for the most part, broad and general, it is at times quite specific. As a result the HCDA requires some dissection in order to be better understood. After delineating eligible activities<sup>13</sup> and the fund allocation system,<sup>14</sup> the Act sets out application and review requirements.<sup>15</sup> There are also sections of the Act devoted to reporting,<sup>16</sup> Secretarial remedies for noncompliance<sup>17</sup> and authorizing regulations for performance standards.<sup>18</sup> For purposes of the discussion that follows, the application for Title I funds is divided into three parts: (1) a three-year summary plan, (2) designation of a program of specific projects to be undertaken, and (3) a housing assistance plan (HAP).<sup>19</sup>

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11. Preamble to the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476.

12. The block grants replace the following categorical grant programs: urban renewal, code enforcement, interim assistance, model cities, water and sewer facilities, neighborhood facilities, open space land, urban beautification, historic preservation and rehabilitation grants. See S. REP. No. 693, 93d Cong., 2d Sess. 48-49 (1974).

13. 42 U.S.C. § 5305 (Supp. IV, 1974).

14. *Id.* §§ 5303, 5306-07. See generally Hirshen & LeGates, *HUD's Bonanza for Suburbia*, 39 THE PROGRESSIVE 32 (1975); Kushner, *supra* note 10, at 663-64; Salsich, *supra* note 10, at 300-02.

15. 42 U.S.C. § 5304 (Supp. IV, 1974).

16. *Id.* § 5313.

17. *Id.* § 5311.

18. See 24 C.F.R. pt. 570 (1975). For the most current status of the various parts of pt. 570 see the affected sections published in the *Federal Register* subsequent to April, 1975.

19. For a description of the HAP requirement see notes 114-182 and accompanying text

This Article will first examine the application requirements with regard to both community development activities and the housing assistance plan in an attempt to analyze the potential for judicial review. Under the community development section this Article will address the need to plan eligible activities, the problem of whether communities can use HCDA funds to replace local resources previously programmed for planned activities, citizen participation requirements and civil rights considerations. With regard to the housing assistance plans, problems of both the central city and the suburban community will be addressed with primary focus on civil rights considerations in the location of housing and problems of exclusionary suburban communities. This Article will then explore performance standards relating to execution of the recipient's plan. This section examines the recipient's plan with regard to problems of relocation, equal opportunity and civil rights, citizen participation, maintenance of local financial efforts to support community development activities and ineligible activities, as well as the housing assistance plans as they pertain to implementation, exclusionary land use restrictions and project site selection.

The Article will next address attempts to avoid program requirements. In doing so this work will examine performance standards and program requirements together with a summary of available judicial remedies, in the context of potential and pending litigation, so that issues and pitfalls of noncompliance can be recognized at the outset. Despite the ostensible revenue-sharing approach of the HCDA, the Act calls for relatively elaborate application and reporting requirements. These requirements, although at times giving rise to judicially enforceable standards, in certain instances represent, at best, hollow rhetoric. The purpose of this section of the Article is to help avoid time-consuming, expensive litigation, that too often proves pyrrhic, by isolating crucial application and reporting requirements, and thereby alerting HUD block grant recipients and other concerned parties to issues that should be addressed at the earliest possible stage. Lastly, this Article will discuss the applicability of the National Environmental Policy Act of 1969 (NEPA) to the HCDA.

In examining the various requirements of the HCDA and potential noncompliance problems, careful attention should be given to the symbiotic relationship that Congress intended for community develop-

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*infra.* For a general overview of the initial experience with the HCDA and activities begun under it see U.S. Dep't of Housing & Urban Dev., Community Development Block Grant Program, Provisional Report, May 1975.

ment (CD) activities and housing assistance plans. If conscientiously and aggressively adhered to, the requirements of the HCDA will provide a systematic approach toward the problems of housing and community development. While the implementation of the new law will no doubt lack a large measure of its planned effectiveness, due in part to the failure to legislate ambitious performance standards, one must appreciate the long-awaited congressional recognition that inner-city strategies must be linked to outer-city programs if any inroads are to be made toward providing a remedy to our urban pathology.

## II. THE COMMUNITY DEVELOPMENT ACTIVITIES APPLICATION

As previously indicated, the application must exhibit a three year summary plan of community development goals in addition to a program of specific projects to be undertaken within the year immediately following application approval. The essence of the application requirement, as described in HUD's regulations, is the identification of needs and a plan of activities to address those needs.<sup>20</sup> Regarding planned activities, the application must cover the program year and should indicate the estimated costs and general location of the activities on accompanying maps.<sup>21</sup>

### *A. Identification of Need for Community Development Activities*

The Act specifies that the application must set forth a "summary of a three-year community development plan which identifies community development needs."<sup>22</sup> The proper identification of need is a critical step in designing a community development program which will achieve the HCDA's broad congressional goals.<sup>23</sup> Communities may inaccurately assess their developmental needs in several ways. These could range in significance from the failure to recognize blighting influences to the underestimation of the number of existing substandard dwelling units. Underestimating may occur as part of a strategy to keep housing

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20. The plan shall be written in a manner to encompass the needs, strategy and objectives, and to describe a program, which is designed to eliminate or prevent slums, blight, and deterioration where such conditions or needs exist, and to provide improved community development facilities and public improvements, including the provision of supporting health, social and similar services where necessary and appropriate.

21 C.F.R. § 570.303(a) (1975).

21. *Id.* § 570.303(b).

22. 42 U.S.C. § 5304(a)(1) (Supp. IV, 1974); see 24 C.F.R. § 570.303(a) (1975).

23. See 42 U.S.C. §§ 5301(c), (d) (Supp. IV, 1974). See also 24 C.F.R. § 570.2 (1975).

assistance plan requirements to a minimum or to provide an overture to proposing activities such as downtown renewal, sports and convention complexes, and other proposals primarily benefiting business and industry, priorities often far removed from immediate strategies to eliminate blight and slums and to improve lower-income housing and living opportunities. In assessing needs recipients must also be acutely sensitive to the special needs of certain segments of the population, such as problems of housing and employment access often faced by minorities, and the existence of architectural barriers for the physically handicapped.<sup>24</sup>

Perceiving the possibility that recipients may fail to adequately address community development needs, Congress specifically provided for review of needs treatment in the application approval process:

The Secretary shall approve an application . . . unless (1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicant's description of such needs and objectives is plainly inconsistent with such facts or data . . .<sup>25</sup>

The legislative history provides an illustration of the inconsistency notion:

[I]f a community's application asserted that it had little or no need

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24. In identifying the needs, the applicant "shall take into consideration and summarize any special needs found to exist in any identifiable segment of the total group of lower-income households in the community." Final HUD Reg. § 570.303(c)(2), 41 Fed. Reg. 7504 (1976). An attack on the application on the grounds of inconsistency is strongly supported by *City of Hartford v. Hills*, 408 F. Supp. 889 (D. Conn. 1976). See notes 120-36 and accompanying text *infra*. A Dallas, Texas, application has been attacked on the grounds of inconsistency for failing to recognize the need for integrated housing given that 93% of the black families reside in certain census tracts. *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), reported in *Community Dev. Digest*, Aug. 19, 1975, at 1-2.

25. 42 U.S.C. § 5304(c) (Supp. IV, 1974); see 24 C.F.R. § 570.306(b)(2)(i) (1975). Challenges based on the Secretarial review provisions would be made under the Administrative Procedures Act, 5 U.S.C. § 701 (1970). See, e.g., *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *North City Area-Wide Council, Inc. v. Romney*, 428 F.2d 754 (3d Cir. 1970); *City of Hartford v. Hills*, 408 F. Supp. 889 (D Conn. 1976). As HUD has made no provision in its regulations to allow administrative complaints by the public or even recipients, exhaustion of remedies posed no hurdle to HCDA litigation. Nevertheless, where practicable, an administrative complaint made to HUD can establish quite early the sincerity of the claimant, provide notice to all parties of the nature and seriousness of the dispute, and open the possibility for settlement as well as eliminate any claim of failure to exhaust administrative remedies. See *English v. Town of Huntington*, 335 F. Supp. 1369 (E.D.N.Y. 1971), *aff'd*, 448 F.2d 319 (2d Cir. 1971).

for housing for lower income families despite census figures showing large numbers of substandard dwellings and housing overcrowding, the community's assertion would be 'plainly inconsistent' with facts and data available to the community and HUD. On the other hand, if a community proposes to improve housing in census tract 'X' in a particular year, but census figures show that the problem is somewhat worse in census tract 'Y', the Committee does not expect HUD to second guess that decision.<sup>26</sup>

A litigation challenge for "inconsistency" between real needs and stated needs is limited because real needs must be evidenced by facts and data that are "generally available." This would appear to preclude the preparation of studies for the purpose of contesting the needs analysis. While the legislative history cites census data as representative, HUD regulations define "generally available" as "published data accessible to both the applicant and the Secretary, such as census data, . . . recent local, areawide or State comprehensive planning data."<sup>27</sup> Thus, census data,<sup>28</sup> governmental agency studies, General Neighborhood Renewal Plans (GNRP),<sup>29</sup> Community Renewal Program Studies (CRP),<sup>30</sup> prior Workable Program applications or private consultant studies might be used. If prior studies also lack the precision of the CD application, however, there may not be any studies available that could contradict the application.

#### *B. The Relationship of Planned Activities to Community Development Needs*

Perhaps the most common problem to be anticipated under the community development program will be a community's designation of

26. H.R. REP. NO. 1114, 93d Cong., 2d Sess. 8-9 (1974) [hereinafter cited as H.R. REP. NO. 1114]. The House provisions were adopted by the Conference Committee. CONFERENCE COMMITTEE, JOINT EXPLANATORY STATEMENT OF THE MANAGERS OF THE COMMITTEE OF CONFERENCE, IN SUBCOMM. ON HOUSING OF HOUSE COMM. ON BANKING AND CURRENCY, 93d CONG., 2d Sess., COMPILATION OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974, 297, 302 (Comm. Print 1974) [hereinafter cited as CONFERENCE REPORT].

27. 24 C.F.R. § 570.306(b)(2)(i) (1975).

28. Census data may be of limited value as "substandard housing" was eliminated as a census data requirement in 1970. It was replaced by a category indicating lack of plumbing facilities that may grossly underestimate housing need. Further, 1970 census figures may be obsolete.

29. The GNRP consisted of renewal planning in areas larger than those specifically proposed for urban renewal project treatment. 42 U.S.C. § 1452(d) (Supp. IV, 1974).

30. The CRP was designed to perform preliminary planning for future renewal needs. *Id.* § 1453(d) (1970).



activities that fail to significantly address the community development needs described in the application. This issue will often take the form of criticism of perceived priorities and will thus often be a most difficult issue to litigate due to the significant range of discretion which decisionmakers are permitted by reviewing courts. There may be situations, however, that present such glaring deviations from obvious needs that courts will find a *prima facie* failure to correlate planned expenditures with needs.<sup>31</sup> A similar problem will arise when an application describes planned activities in such a vague and general

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31. The application for Honolulu, Hawaii, proposes to spend nearly \$9 million of its almost \$12 million grant in its first program year for planning what appears to be a new town outside the city. An additional \$1.2 million will be used for recreation programs, principally tennis courts, a skating rink, and recreation buildings. These priority expenditures are being made in the absence of any funds programmed for housing preservation despite a HAP indicating over 19,000 substandard dwelling units, 17,000 of which are considered suitable for rehabilitation. HUD, Application for Federal Assistance, Community Development Block Grant Program, City and County of Honolulu, Hawaii, Apr., 1975. Kingston, New York, has programmed only \$10,000 for code enforcement despite a high degree of housing suitable for rehabilitation and a large housing need unmet by proposed housing starts. Of the \$1.3 million entitlement, no funds are programmed for housing rehabilitation while \$375,000 is allocated to remodel the existing municipal auditorium. HUD, Application for Federal Assistance, Community Development Block Grant Program, City of Kingston, New York, Feb., 1975. This application has nevertheless survived its first attack. See *Ulster County Community Action Comm., Inc. v. Koenig*, 402 F. Supp. 986 (S.D.N.Y. 1975). The first extensive review of an application attack was made in *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975). Plaintiffs there challenged the inclusion of allegedly ineligible activities (including acquisition and renovation of a theater and railroad depot, and a feasibility study for a 1980 World's Fair) and further, that the proposed activities involved no blight. The court, finding HUD's application approval to be reasonable, stated that the Act envisioned a minimum of second guessing on HUD's initial application review. The court based its ruling for defendants on the ground of ripeness, but indicated that if HUD failed to assure compliance, the court might then intervene. *Id.* at 788-90. It appears that plaintiffs misconstrued the Act, as neither of their claims follow from the Act itself. Additionally they should have considered the "inconsistency" and "inappropriateness" standards of the HCDA. See notes 22-43 and accompanying text *supra* and *infra*. See *Ulster County Community Action Comm., Inc. v. Koenig*, 402 F. Supp. 986 (S.D.N.Y. 1975). See also *NAACP v. Hills*, Civil No. C-75-2257-WHO (N.D. Cal., Mar. 19, 1976) (expenditures for commercial renewal reasonable in light of some attention given to housing needs and activities devoted to blight elimination). Corning, New York, has proposed the use of nearly half of its first year allocation for construction of a heated skating rink, half to construct a new water reservoir, with \$9,000 remaining for code enforcement in the face of a tight housing supply, proposed displacement, an anticipated increase in migrating lower-income families, and a substantial number of dwelling units suitable for rehabilitation. HUD, Application for Federal Assistance, Community Development Block Grant Program, Corning, N.Y. Feb. 19, 1975.

A more difficult problem is presented when a community is receiving funds based solely upon the "hold-harmless" provisions of the Act permitting communities to receive HUD funds due to prior categorical on-going programs that were approved prior to HCDA. 42

manner that it is impossible to determine what the nature and extent of activities would be in any section of the city.<sup>32</sup>

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U.S.C. § 5306(g) (Supp. IV, 1974). *See also* 24 C.F.R. § 570.103 (1975). For example, the city of Corona, California, has programmed its entire first year's funds for a closeout of its central business district renewal program, with a small portion directed toward planning activities for its housing element and HAP in the face of a significant lower-income housing problem. HUD, Application for Federal Assistance, Community Development Block Grant Program, Corona, Cal., Apr. 15, 1975. Receiving funds solely by virtue of the recently approved urban renewal project appears to ignore the clear substantive requirements of the Act as hold-harmless provisions are located only in the allocations sections and no exemption for using the funds in this way has been provided in the remainder of the Act.

32. For example, the Philadelphia application simply listed 239 census tracts that would receive rehabilitation loans and grants, 94 where acquisition for clearance would occur, 150 where demolition would take place, and 129 where rehabilitation of recreation facilities would occur. HUD, Application for Federal Assistance, Community Development Block Grant Program, Philadelphia, Pa., Apr., 1975. The Act calls for the "general location" for planned activities. 42 U.S.C. § 5304(a)(2)(A) (Supp. IV, 1974). *See also* Final HUD Reg. § 570.303(b)(1)(i), 40 Fed. Reg. 24,701 (1975). In addition, HUD's regulations require maps indicating the "general location" of activities. *Id.* § 570.303(b)(2). The Philadelphia application simply included a map showing census tracts with accompanying lists of tracts under the various planned activities. This use of census tracts alone without describing the extent of activity would seem to comply with the "general location" requirement, but it no doubt resulted from a misreading of the HUD regulations. The regulations, in requiring maps, also require the submission of census tract maps disclosing "concentrations of minority groups and lower-income persons." *Id.* This issue is also raised in *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), *reported in* Community Dev. Digest, Aug. 19, 1975, at 1-2.

It is interesting to note that the statute calls not only for the "general location" but also for the "estimated costs." 42 U.S.C. § 5304(a)(2)(A) (Supp. IV, 1974). It could be argued that these terms read together would require, at a minimum, a breakdown of estimated costs by census tract. This would provide an indication of the extent, if not the nature, of proposed activities, allowing residents of the tract to meet and influence how the funds will be expended. This argument is bolstered by the legislative history. The Conference Committee adopted the House language of the section rejecting the Senate version that simply required that "the application should be brief rather than elaborate and should focus on describing the elements of a program rather than the details of a project." S. REP. NO. 693, 93d Cong., 2d Sess. 55 (1974); H.R. REP. NO. 1114, *supra* note 26, at 6.

The Secretarial review provisions of the Act provide a tool to deal with vagueness problems: "The Secretary shall approve an application . . . unless . . . (3) the Secretary determines that the application does not comply with the requirements of this chapter . . ." 42 U.S.C. § 5304(c)(3) (Supp. IV, 1974); *see* 24 C.F.R. § 570.306(b)(2)(iii) (1975); *note* 25 *supra*. Thus, HUD could request additional information, but once it approved the application judicial relief probably would be limited to denying all funds or denying funds designated for the vaguely defined activities. In addition, HUD approval of an application lacking sufficient activity description would arguably be arbitrary in light of the requirement that proposed activities be appropriate to needs and objectives. 42 U.S.C. § 5304(c)(2) (Supp. IV, 1974); *see* 24 C.F.R. § 570.306(b)(2)(ii) (1975); *notes* 33-35 and accompanying text *infra*. A third approach to the vagueness problem would be the overall NEPA environmental impact statement requirement. *See generally* *notes* 233-69 and accompanying text *infra*. Remedies in this area could call for either an application rewrite with specificity, the denial of partial or total funds due to the inability to determine

The Act covers the potential failure of planned activities to address community development needs in a section providing for HUD review: "The Secretary shall approve an application . . . unless — . . . (2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant . . . ." <sup>33</sup> Where inappropriate activities are programmed, HUD could request a revised application during the seventy-five day review period. <sup>34</sup> If the amendment is not timely, however, the Secretary may disapprove all or part of the application. <sup>35</sup>

An additional base to question a community's funding priorities is in the Act's requirement that the applicant certify:

[T]o the satisfaction of the Secretary that its Community Development Program has been developed so as to give maximum feasible priority to activities which will benefit low- or moderate-income families or aid in the prevention or elimination of slums or blight. The Secretary may also approve an application describing activities which the applicant certifies and the Secretary determines are designed to meet other community development needs having a particular urgency as specifically described in the application. <sup>36</sup>

While this provision, on its face, would not appear to be very meaningful where a community pursued programs that, while not

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appropriateness, or the preparation and review of an environmental impact statement.

33. 42 U.S.C. § 5304(c)(2) (Supp. IV, 1974); see 24 C.F.R. § 570.306(b)(2)(ii) (1975). The legislative history provides an illustration of the section's applicability: "HUD would be expected to look beyond an application which, for example, proposed only minimal activities to improve housing despite the application's identification of substantial housing needs." H.R. REP. NO. 1114, *supra* note 26, at 9. The "inappropriateness" strategy is greatly strengthened by the decision in *City of Hartford v. Hills*, 408 F. Supp. 889 (D. Conn. 1976). See notes 120-25 and accompanying text *infra*.

34. H.R. REP. NO. 1114, *supra* note 26, at 8-9. HUD reports that the average application review and approval process takes 49 days. U.S. DEP'T OF HOUSING AND URBAN DEV., COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM, FIRST ANNUAL REPORT EXECUTIVE SUMMARY 1, (Dec. 1975).

35. See 42 U.S.C. § 5304(c)(3) (Supp. IV, 1974); 24 C.F.R. §§ 570.306(b)(2)(iii), (c), (d); H.R. REP. NO. 1114, *supra* note 26, at 8-10, 49-50. While the House Report would seem to indicate the existence of discretion to deny all or part of the funds, it is believed that the partial withholding relates to certain inappropriate activities, and that it would be arbitrary to place a dollar value on the misrepresentation of need. The real relief necessary would be a rewrite of the program of activities to be carried out — a remedy unavailable under the Act.

36. 42 U.S.C. § 5304(b)(2) (Supp. IV, 1974); see 24 C.F.R. § 570.303(e)(7) (1975).

addressing lower-income needs, were designed to eliminate blight or address urgent community development needs, the legislative history discloses that the provision contains a mandate to address the needs of low- and moderate-income families. While a plain reading of the provision would appear to permit a reading of the word "or" in the disjunctive, Congress clearly intended that the provisions be read in the conjunctive. Both the House<sup>37</sup> and Senate<sup>38</sup> versions of the Act called for emphasis on addressing the needs of the poor. The final conference report made it clear that activities proposed by recipients must address such needs.<sup>39</sup> In addition, the certification provision clearly would provide a vehicle to question the overall scheme of planned activities that, while related to community development needs and thus perhaps susceptible to being labeled "appropriate," were not directed at the needs of lower-income persons or the elimination or prevention of blight.<sup>40</sup>

The term "maximum feasible priority" lends further vagueness to the provision. The obvious interpretation would be that not all proposed activities need comply with the limitation but that some substantial amount must benefit the poor or help eliminate blight. The legislative history sheds no light on this issue, as the phrase was born in Conference Committee without comment.<sup>41</sup> If the certification is recognized as a

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37. The House Bill required that an application describe a program designed to: "(i) eliminate or prevent slums, blight, and deterioration where such conditions or needs exist; and (ii) provide improved community facilities and public improvements, including the provision of supporting health, social, and similar services where necessary and appropriate." H.R. 15361, 93d Cong., 2d Sess. § 104(a)(6)(3) (1974) (emphasis added). See also H.R. REP. NO. 1114, *supra* note 26, at 6, 49.

38. The Senate Bill required an application to include programs: "(B) to prevent and eliminate slums and blight, and upgrade deteriorated neighborhoods through renewal, code enforcement, and other community improvement programs; and (C) to improve and upgrade community services and facilities and to provide increased economic opportunities for residents in areas affected by community development activities, particularly those residents with low or moderate incomes." S. 3066, 93d Cong., 2d Sess. § 308(a)(1) (1974) (emphasis added). See also S. REP. NO. 693, *supra* note 32, at 134.

39. "[A]ll applicants must propose activities to eliminate slums and blight where such conditions or needs exist, provide housing for low and moderate income persons, and improve and upgrade community facilities and services where necessary." CONFERENCE REPORT, *supra* note 26, at 300.

40. An obvious illustration might be a need for recreation facilities and planned expenditures for a network of tennis courts that might not even be accessible to the poor. For example see the discussion of the Honolulu and Corning, New York, applications discussed at note 31 *supra*.

41. CONFERENCE REPORT, *supra* note 26, at 301. An analogue to the Conference Committee's language is the promise of "maximum feasible participation" found in the

substantive performance standard, remedies for violation could conceivably result in the denial of all application funds or the denial of at least a portion of funds directed to activities that do not fall within the bounds of the certification.<sup>42</sup>

A third strategy for potential litigation would be to seek the preparation of an environmental impact statement under NEPA on the overall program application.<sup>43</sup>

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1964 Economic Opportunity Act provisions creating the Community Action Agencies. Economic Opportunity Act of 1964 § 201, 78 Stat. 516. See generally D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969). The phrase was subsequently picked up in the 1970 amendments to the United States Housing Act that called for "maximum feasible participation" by tenants in the development and operation of tenant programs and services. 42 U.S.C. § 1402(6) (1970). This language was repeated in the assisted housing provisions of the Housing and Community Development Act of 1974 § 3(4), 42 U.S.C. § 1437(a)(4) (Supp. IV, 1974). One should also consider the requirement that to the "greatest extent feasible," employment and training opportunities should be provided to lower-income housing and community development project area residents. 12 U.S.C. § 1701(u) (1970), as amended, (Supp. IV, 1974). Daniel P. Moynihan observed in his work on the O.E.O. legislation that the provision was virtually ignored in hearings and in the legislative history, and is still undefined. MOYNIHAN, *supra*, at 87-91, 179. It remains to be seen whether the certification provision rises above pure language, or, like the promises of the "war on poverty" results in "soaring rhetoric" and "minimum performance." *Id.* at 203. One indication that the "maximum feasible participation" requirement connotes a substantive standard is the experience under HUD's modernization program. The regulations called for only "involvement" of the tenants in the plans and programs for modernization, changes in management and policies, and expanded services and facilities. U.S. Dep't of Housing and Urban Dev., Low-Rent Housing, The Modernization Program Handbook, RHA 7485.1(a)(3) (June, 1969). Utilizing this "involvement" standard, the sending out of questionnaires to tenants regarding desired changes and personally contacting most tenants was held to satisfy the regulation. *Drake v. Crouch*, 377 F. Supp. 722 (M.D. Tenn. 1971), *aff'd mem.*, 471 F.2d 653 (6th Cir. 1972). One might suspect that "maximum feasible participation" would entail a more significant amount of involvement.

42. Interpretation of the provision was sought in *NAACP v. Hills*, Civil No. 75-1461 (D.N.J., filed Aug. 22, 1975), reported in 9 CLEARINGHOUSE REV. 422 (1975), but a settlement was reached. 3 HOUSING & DEV. REP. CURRENT DEV. 865 (1976); see note 273 *infra*. An interpretation was also sought in *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), reported in *Community Dev. Digest*, Aug. 19, 1975, at 1-2. Defendant's motions to dismiss and for summary judgment were denied without comment on the specific issue. *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex. Dec. 24, 1975). In another case an attempt to interpret the provision was summarily rejected on the basis that "approval of the plan of HUD is prima facie an indication of the fact that defendant City has complied with these basic requirements." *Ulster County Community Action Comm., Inc. v. Koenig*, 402 F. Supp. 986, 990 (S.D.N.Y. 1975).

43. For a discussion of NEPA's applicability see notes 233-69 and accompanying text *infra*.

### C. *Need to Plan Eligible Activities*

The Act and regulations specify eligible activities,<sup>44</sup> with the regulations also identifying certain ineligible activities.<sup>45</sup> The inclusion of one or more ineligible activities in an application is a distinct possibility under the Act. For example, the Honolulu proposal to spend nearly \$9,000,000 of its almost \$12,000,000 grant on planning, engineering and site preparation for a new town "out-of-town" housing development appears to be an activity of questionable eligibility.<sup>46</sup> A preliminary survey of community development applications conducted by HUD disclosed that twenty-three percent of all applications contained proposed activities which were "clearly ineligible or illegal."<sup>47</sup> There is a fear within HUD that actual expenditures on ineligible activities will be even more significant.<sup>48</sup> Given this premonition, it is probable that such ineligible activities will be inappropriate for community development needs, thus leaving the application susceptible to HUD review and litigation.<sup>49</sup> HUD could request an application amendment pending review, but relief thereafter would be limited to withholding funds intended for such ineligible activities.

### D. *Maintenance of Local Efforts*

In the findings and purpose section of Title I, Congress clearly evidenced its intent that HCDA funds not be used to replace any previous locally provided resources: "It is the intent of Congress that the Federal assistance made available under this title not be utilized to reduce substantially the amount of local financial support for community development activities below the level of such support prior to the availability of such assistance."<sup>50</sup>

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11. 42 U.S.C. § 5305(a) (Supp. IV, 1974).

15. 24 C.F.R. § 570.201 (1975); Final HUD Reg. § 570.201, 41 Fed. Reg. 2767-68 (1976).

16. HUD, Application for Federal Assistance, Community Development Block Grant Program, City and County of Honolulu, Hawaii, Apr., 1975.

17. 2 HOUSING & DEV. REP. CURRENT DEV. 1047 (1975) (statement of Donald G. Dodge, Director, Office of Evaluation for Community Planning, HUD).

18. 3 HOUSING & DEV. REP. CURRENT DEV. 401-04 (1975). HUD has announced that it will make no attempt to recapture funds spent during the first year for ineligible activities. Housing Affairs Letter No. 75-43, at 6, Oct. 31, 1975.

19. See *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975); *Ulster County Community Action Comm. v. Koenig*, 402 F. Supp. 986 (S.D.N.Y. 1975). See generally notes 31-35 and accompanying text *supra*.

50. 42 U.S.C. § 5301(c) (Supp. IV, 1974). HUD's regulations implementing the Act specifically employed that mandate in the substantive section of their rules. The

Issues could easily arise if a community planned to use HCDA funds for activities previously funded from local resources. The phrase “reduce substantially” weakens the efficacy of this provision because of the openendedness of the language, but where an entire activity is taken over with CD funds it would, nevertheless, appear to meet the “substantial” requirement. Although this provision is located in the purpose and finding section, HUD’s implementing regulation gives it force, especially in light of the long-standing doctrine of judicial deference to an agency’s interpretation of its own statute.<sup>51</sup> To interpret this provision differently might result in the conclusion that the HCDA could be used for local tax relief, a conclusion not supported by the eligible activities provisions of the Act.<sup>52</sup> HUD’s interest in enforcing the maintenance of effort provisions, however, must be skeptically viewed, as CD application forms do not require information relating to prior effort levels.

A strict and not unreasonable interpretation of the law would require continued local funding for community development in an amount equal to the prior matching share,<sup>53</sup> or to local noncash credits<sup>54</sup> provided for urban renewal, water and sewer, or other community development programs. On the other hand, reduction of only the local matching share may fail to constitute a “substantial” reduction. In any event, a significant reduction in local share funding may present litigation problems.<sup>55</sup> The litigation approach to violations of this

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maintenance of effort requirement was derived from the Senate bill, but the legislative history is silent as to its breadth or limitations. S. REP. NO. 693, *supra* note 32, at 48.

51. *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 372 (1973); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

52. 42 U.S.C. § 5305 (Supp. IV, 1974); 24 C.F.R. §§ 570.200-01 (1975); Final HUD Reg. §§ 570.200-01, 41 Fed. Reg. 2766-68 (1976). This position is also suggested in *Fishman*, *supra* note 5, at 189, 205 n.4.

53. See 42 U.S.C. §§ 1453, 1454, 1460 (1970). The Open Space Program required a local share of one-half, *id.* § 1500a(a)(2), Neighborhood Facilities one-third, *id.* § 3103(b), and Water and Sewer one-half, *id.* § 3102(b). Twenty percent of local project planning and administrative funds were required under Model Cities. *Id.* §§ 3304(a), 3305(b), (c). This position was taken by HUD with regard to previously committed urban renewal projects in a memorandum of Oct. 10, 1975, reversing an earlier and weaker provision. See 3 HOUSING & DEV. REP. CURRENT DEV. 491 (1975); *id.* at 279 (1975).

54. See, e.g., 42 U.S.C. §§ 1460(d), 1463 (1970); U.S. Dep’t of Housing & Urban Dev., Urban Renewal Handbook RHA 7216.1.

55. The issue has been raised in a suit in Dallas, Texas, where it is charged that the city is using CD funds to replace current city spending on an on-going flood relocation project. *Bois D’Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), reported in *Community Dev. Digest*, Aug. 19, 1975, at 1-2. See *NAACP v. Hills*, Civil No. C-75-2257-WHO (N.D. Cal., Mar. 19, 1976).

provision would be through the requirements section of the Secretarial review provisions.<sup>56</sup> Remedies would be limited to either requiring a repayment of funds equal to the previous local commitment or conditioning any funds on continued local commitment.

*E. Civil Rights Considerations in the Planning  
of Community Development Activities*

Many issues concerning housing assistance plans and the availability of lower-income housing opportunities will be addressed in later sections. Although overlapping with the issue of housing availability, civil rights issues which could conceivably be disclosed on the face of the application will now be addressed. The potential fact situations are of two types: affirmative, where discriminatory activities are planned; and negative, where a discriminatory effect will result from the nonaction of the applicant. This dichotomy is of limited value as affirmative action is generally accompanied by the failure to mitigate incidental effects of a program. An example of an affirmative action would be the proposed clearance of an identifiable minority community to make way for an industrial complex, convention or sports center, or even housing.<sup>57</sup> The negative aspect of that proposal will most often be the absence of a meaningful plan for the minority community's relocation, either as a group or individually.

Negative discrimination can occur if a community's application systematically ignores development needs of identifiable minority-dominated neighborhoods. An example of negative discrimination would be a CD application addressing only the need for downtown commercial renewal and ignoring residential needs of minorities and the poor. This negative discrimination is made more dramatic if a community has never sought federal funds for rehabilitation, renewal or code enforcement activities in spite of a great need for housing improvement, but has used urban renewal funds for commercial needs. Such a program would eventually result in a high degree of deterioration in those affected neighborhoods, the eventual "solution" being abandonment or strict code enforcement, and orders to vacate,

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56. See note 32 *supra*.

57. See, e.g., *English v. Town of Huntington*, 448 F.2d 319 (2d Cir. 1971); *Arrington v. City of Fairfield*, 414 F.2d 687 (5th Cir. 1969); *Garrett v. City of Hamtramck*, 335 F. Supp. 16 (E.D. Mich. 1971), *plan approved*, 357 F. Supp. 925 (E.D. Mich. 1973), *aff'd in part*, 503 F.2d 1236 (6th Cir. 1974), *further relief ordered to locate prior residents and plan replacement housing*, 394 F. Supp. 1151 (E.D. Mich. 1975).



possibly forcing an exodus of poor and minorities<sup>58</sup> from the community.

There are various litigation strategies available to deal with these problems. First, there is the constitutional attack under the fifth and fourteenth amendments that the affected persons are being denied equal protection of the law.<sup>59</sup> The equal protection clause would provide a tool to avoid the most blatant examples of discrimination visited upon racial minorities such as displacement into a deteriorated or nonexistent housing supply.<sup>60</sup> Secondly, relief would also be available under Title VI of the Civil Rights Act of 1964.<sup>61</sup> Litigation under Title VI essentially applies traditional equal protection tests and standards.<sup>62</sup> More importantly, Title VI requires that the funding agency police its funded program to assure the absence of discriminatory effects.<sup>63</sup>

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58. The National Committee Against Discrimination in Housing has charged that Bonner Springs, Kansas, has proposed construction and maintenance of a city-wide sewer system serving the white areas of the community when only outdoor facilities are provided in black areas. Similarly, it has charged Fort Smith, Kansas, of limiting code enforcement activities to white areas of the community. *Community Dev. Digest*, Apr. 22, 1975, at 8. Alternatively, under these alleged facts the equal protection clause could be utilized to mandate an equalization of municipal services. *Hawkins v. Town of Shaw*, 437 F. 2d 1286 (5th Cir. 1971), *aff'd on motion for rehearing*, 461 F.2d 1171 (5th Cir. 1972). HUD has characterized its own civil rights monitoring performance under the HCDA as "lax" and "wholly inadequate." 3 HOUSING & DEV. REF. CURRENT DEV. 538 (1975) (remarks of James H. Blair, Assistant Secretary for Equal Opportunity, HUD).

59. The fifth amendment would be invoked due to the presence of federal approval and financial assistance. The equal protection standards of the fourteenth amendment would be applied under the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). As against the state or local defendants, litigation under the fourteenth amendment could be raised pursuant to 42 U.S.C. § 1983 (1970). Jurisdiction would be provided by 28 U.S.C. §§ 1343(3), (4) (1970). *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969). Fifth amendment claims may be raised by 28 U.S.C. § 1331 (1970), relating to federal questions. *Where Zahn v. International Paper*, 414 U.S. 291 (1973) (precluding aggregation of claims to meet the \$10,000 jurisdiction minimum of § 1331) portends problems, 28 U.S.C. § 1361 (1970) (relating to mandamus actions), will provide a jurisdictional base to raise the constitutional issue. In addition, 28 U.S.C. § 1337 (1970), provides a jurisdictional base to cases arising under the 1964 Civil Rights Act due to its commerce power constitutional base. *See, e.g., Mandina v. Lynn*, 357 F. Supp. 269 (W.D. Mo. 1973).

60. *See Kushner & Werner, Metropolitan Desegregation After Milliken v. Bradley: The Case for Land Use Litigation Strategies*, 24 CATHOLIC U.L. REV. 187 (1975) (discussion of some litigation approaches and an examination of fault as a factor).

61. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d) (1970). *See Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

62. *See, e.g., Ward v. Winstead*, 314 F. Supp. 1225 (N.D. Miss. 1970).

63. *See, e.g., Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970). A potentially significant facet of the HCDA is its expanded coverage of Title VI to include sex discrimination. 42 U.S.C. §

Thirdly, Title VIII of the Civil Rights Act of 1968<sup>64</sup> provides an additional base for attacking communities which hamper the availability of housing.<sup>65</sup> The Act requires federal programs to be administered affirmatively to further increase housing opportunity.<sup>66</sup> In addition, it should be noted that Title VIII was expanded by the HCDA to cover sex discrimination.<sup>67</sup>

Fourthly, section 111 of the HCDA establishes remedies or procedures to be used where there is legal noncompliance.<sup>68</sup> This section permits reduction and termination of benefits following a hearing from which the recipient may appeal to the United States Court of Appeals for the circuit where the community is located. In addition to this statutory provision HUD has promulgated regulations implementing the nondiscrimination provisions describing certain prohibited discriminatory actions.<sup>69</sup> Where prior discrimination has occurred or where such effects have existed, the regulations call for affirmative action to overcome the effects of such prior discrimination or practice.<sup>70</sup>

Fifthly, the Secretarial review portions of the Act provide additional bases to question the application with regard to civil rights considerations in planned activities. Where the community misrepresented the nature and extent of need (*e.g.*, failure to disclose the need for residential treatment), the application may be "inconsistent" with need.<sup>71</sup> Likewise, where needs indicate residential priority and the application fails to so provide, or where the application discloses a

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5309 (Supp. IV, 1974) (administrative relief must follow a 60-day offer of an opportunity for compliance to the Governor or chief administrative officer). *See also* 24 C.F.R. §§ 570.601, 912 (1975). The Act gives the Secretary discretion to refer the matter to the Attorney General for suit, exercise Title VI powers, exercise noncompliance remedies under the Act, or take other action authorized by law.

64. 42 U.S.C. §§ 3601-31 (1970).

65. *See, e.g.*, *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *United States v. City of Black Jack*, 372 F. Supp. 319 (E.D. Mo. 1974), *rev'd*, 508 F.2d 1179 (8th Cir. 1975), *cert. denied*, 422 U.S. 1042 (1975) (discriminatory land use regulation).

66. 42 U.S.C. §§ 3608(c), (d) (1970).

67. 42 U.S.C. § 5309 (Supp. IV, 1974). *See note 63 supra*.

68. 42 U.S.C. § 5311 (Supp. IV, 1974); 24 C.F.R. § 570.913 (1975). In *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783, 789 n.4 (E.D. Tenn. 1975), the notion that this provision precluded citizen suits was rejected. *See Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., Dec. 24, 1975).

69. 24 C.F.R. § 570.601 (1975).

70. *Id.* § 570.601(b)(4) (1975).

71. *See generally* notes 25-30 and accompanying text *supra*.

critical housing shortage and a high degree of deterioration with the community proposing a large amount for demolition and displacement, the application may constitute "inappropriate" activities.<sup>72</sup> Additionally, where the nondiscrimination provisions are violated, the Secretarial review section prohibits application approval in the absence of compliance with requirements of the Act.<sup>73</sup>

Sixthly, it is also conceivable that the certification for "maximum feasible priority to activities which will benefit low- or moderate-income families or aid in the prevention or elimination of slums or blight" would be applicable under the present genre of programmatic difficulties.<sup>74</sup> Besides not giving maximum feasible priority to such needs, the problems represent a maximum feasible effort not to address the needs of lower-income families. Seventhly, the strategy of requiring an environmental impact statement under NEPA on the overall application may provide a mechanism to examine and review a program's discriminatory effects.<sup>75</sup>

Finally, where extensive displacement is programmed and the available and planned housing resources will not adequately address the needs of displacees, the needs generated by concurrent displacement programs, and the dynamics of the local housing market,<sup>76</sup> the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA)<sup>77</sup> should provide an additional and perhaps more desirable remedy. In the face of a long and well-documented history of abuses visited upon persons subjected to the relocation process,<sup>78</sup> Congress

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72. See generally notes 31-35 and accompanying text *supra*.

73. See generally note 32 *supra*.

74. See generally notes 36-41 and accompanying text *supra*.

75. See generally notes 233-69 and accompanying text *infra*.

76. Much of this will be explored further under the sections relating to the application's Housing Assistance Plan. See notes 114-182 and accompanying text *infra*.

77. 42 U.S.C. §§ 4601, 4602, 4621-38, 4651-55 (1970).

78. E.g., SELECT COMM. ON REAL PROPERTY ACQUISITION, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 106 (Comm. Print 1964); *Hearings on H.R. 14898, H.R. 14899, S. 1 and Related Bills Before the House Comm. on Public Works*, 91st Cong., 1st & 2d Sess. (1969-70); Eichenberg, *From Capital Hill: A Uniform Relocation Act: The Price of Uniformity*, 3 URBAN LAW. 480 (1971); Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745 (1971); LeGates, *supra* note 4; Mandelker, *Model State Relocation Law*, 1971 URBAN L. ANN. 117; Note, *The Interest of Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STAN. L. REV. 801, 803-04 (1969).

passed the URA to assure "fair and equitable treatment" for those destined to suffer the burden of displacement. It is no surprise to learn that the politically handicapped — the poor and minorities — constitute the bulk of relocatees and, therefore, are the principal beneficiaries of the URA.<sup>79</sup>

Those familiar with the urban landscape know that the sites of civic "improvements," highways and other public works projects were once the homes of the poor and minorities. To safeguard against the wholesale removal of persons into even more deteriorated or nonexistent urban housing markets the URA prohibits a federal or federally assisted agency from relocating any person without first ensuring that suitable replacement housing is available.<sup>80</sup> The Act defines what constitutes "suitable" replacement housing,<sup>81</sup> grants the displacing agency authority to build replacement housing itself in its so-called "Houser of Last Resort" provision,<sup>82</sup> grants certain financial benefits such as

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79. In fiscal year 1973, HUD and the Federal Highway Administration displaced 162,078 persons, of whom 52,213 were black or Spanish surnamed. General Serv. Administration, Executive Departments and Agencies Report on Implementation of the Uniform Relocation Assistance and Real Property Acquisition Act of 1970, at 000122, 332 (Feb. 7, 1974).

80. 42 U.S.C. § 4626(b) (1970), provides: "No person shall be required to move from his dwelling on or after January 2, 1971, on account of any Federal project, unless the Federal agency head is satisfied that replacement housing, in accordance with section 4625(c) (3) of this title, is available to such person." For a general discussion of the requirements of relocation planning see NATIONAL HOUSING AND ECONOMIC DEVELOPMENT LAW PROJECT, HANDBOOK ON HOUSING LAW, ch. 10 Supp. (1973). See also 24 C.F.R. pt. 42 (1975) (HUD's implementing regulations); U.S. Dep't of Housing & Urban Dev., HUD Handbook, Relocation Policies and Procedures 1371.1, Rev. Feb. 20, 1975; U.S. Dep't of Housing & Urban Dev., Community Planning and Development Transmittal 1371.1 Rev. Chg. Aug. 26, 1975; U.S. Dep't of Housing & Urban Dev., Handbook, Evaluation of Relocation Plan Housing Resources 4035.4, July, 1974.

81. 42 U.S.C. § 4625(c)(3) (1970), provides that the displacing agency shall assure that . . . there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by such Federal agency head, equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment, except that the head of that Federal agency may prescribe by regulation situations when such assurances may be waived.

82. See *id.* § 4626(a): "If a Federal project cannot proceed to actual construction because comparable replacement sale or rental housing is not available, and the head of the Federal agency determines that such housing cannot otherwise be made available he may take such action as is necessary or appropriate to provide such housing by use of funds authorized for such project."

moving expenses, renters' and owners' benefits,<sup>83</sup> and requires that the displacing agency make relocation services available.<sup>84</sup> The Act is enforced by prohibiting the federal funding source from approving any program that will cause displacement unless the state or local agency has filed assurances that replacement housing will be available. The relocation provisions of URA have been held to be fully reviewable by the courts.<sup>85</sup>

The HCDA is silent on the issue of URA applicability. It seems clear, however, that URA coverage extends to the Act since the URA applies when displacement occurs as a result of "Federal Financial Assistance," defined as a "grant, loan or contribution" provided by the United States.<sup>86</sup> This is apparently the view of HUD, as their regulations clearly mandate the application of the URA to activities performed under the Act.<sup>87</sup>

Relief available under the multifarious causes of action discussed above would be broad and flexible. The equitable powers of the federal judiciary in addressing equal protection violations are extensive.<sup>88</sup> While the determination of the type of remedy is generally left to the discretion of the district court,<sup>89</sup> that discretion can be abused, resulting in a remand with directions to expand or contract the limits of the relief

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83. The agency must reimburse reasonable moving expenses and provide up to \$4,000 to enable the displacee to move into decent, safe and sanitary housing if he otherwise could not afford it. Furthermore, homeowners may be granted an amount up to \$15,000 to facilitate a move to suitable replacement housing. *Id.* §§ 4622-24.

84. *Id.* § 4625.

85. *Tullock v. State Highway Comm'n*, 507 F.2d 712 (8th Cir. 1974); *Jones v. District of Columbia Redev. Land Agency*, 499 F.2d 502 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd sub nom. Keith v. California Highway Comm'n*, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). *But cf. Seeherman v. Lynn*, 404 F. Supp. 1318 (M.D. Pa. 1975). *See also* *Tenants and Owners in Opposition to Redev. v. HUD*, 406 F. Supp. 1024 (N.D. Cal. 1970).

86. 42 U.S.C. § 4601 (1970).

87. 24 C.F.R. §§ 570.303(e)(3), 602 (1975). *See also id.* pt. 42.1.

88. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *But see* the limitations on metropolitan relief raised in *Milliken v. Bradley*, 418 U.S. 714 (1974), and hopes for the future outlined in *Kushner & Werner*, *supra* note 60. *See also* Note, *Developing Litigation Strategies for Multidistrict Relief: The Legal Implications of Milliken v. Bradley on Metropolitan School Desegregation*, 11 URBAN L. ANN. 187 (1976).

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

so that the remedy more closely fits the violation.<sup>90</sup>

As the Title VI and HUD nondiscrimination provisions utilize equal protection tests, their remedies can be considered jointly. Certainly continuing to aid discriminatory activities would be unlawful.<sup>91</sup> Thus a clear remedy would be to deny all funds to the community or to strike those activities contributing to the discrimination. Where the discrimination relates to nonactivity, relief should either be a denial of all HCDA funds or the conditioning of funds on the achievement of explicit performance standards. Clearly, the court should enjoin all discriminatory activities. Where prior proposals for low-income housing were rejected on racial grounds, a number of remedies would exist. Ideally a court might adopt a plan that would permit community development to go forward but only with the guidance of performance standards established under judicial supervision. Such a plan should include the development of housing opportunities through application for subsidies from HUD, the establishment of a local housing authority if none exists, the timing of activities to assure compliance with the plan, and a degree of equality for all program participants, but primarily for the class which has suffered discrimination.<sup>92</sup> Where it is determined that the application presents an "inconsistent" description of needs, all funds should be denied. This result should also follow where the recipient's certification of aiding those of low- or moderate-income or in preventing or eliminating slums is defective, or where the planned activities are "inappropriate" to needs and discriminatory activities cannot be carved out and eliminated. Thus, funds could be denied where the application simply ignores needed treatment in minority areas, or where discrimination results from affirmative

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90. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Gautreaux v. Chicago Housing Authority*, 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 96 S.Ct. 1538 (1976); *Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974); *further relief ordered*, 391 F.Supp. 1151 (E.D. Mich. 1975).

91. *Griffin v. School Bd.*, 377 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

92. *Compare Gautreaux v. Chicago Housing Authority*, 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 96 S.Ct. 1538 (1976), *and Garrett v. City of Hamtramck*, 335 F. Supp. 16 (E.D. Mich. 1971), *plan approved*, 357 F. Supp. 925 (E.D. Mich. 1973), *aff'd in part*, 503 F.2d 1236 (6th Cir. 1974), *further relief ordered*, 391 F. Supp. 1151 (E.D. Mich. 1975), *with Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975). *See also Kushner, Land Use Litigation and Low-Income Housing: Mandating Regional Fair Share Plans*, 9 CLEARINGHOUSE REV. 10 (1975) *reprinted in amended form*, in 27 ZONING DIGEST No. 6, at 12 (1975); Kushner & Werner, *supra* note 60.

activities directed at the minority community.

Where a NEPA remedy is imposed, preparation and review of an environmental impact statement should occur before undertaking any community development activities.<sup>93</sup> Where the provisions of the URA are violated, relief should first be directed at enjoining all displacement producing activities<sup>94</sup> to permit adequate relocation needs assessment and planning. Once a prepared relocation plan discloses the level of need, either the project can proceed in the presence of suitable safeguards<sup>95</sup> or the "Houser of Last Resort" section could be utilized to condition execution of planned activities on the recipient's provision of sufficient new housing resources to accommodate all displacee needs.

#### F. Community Participation under HCDA at the Application Stage

The Act sets out in extremely general terms the citizen participation requirements at the application stage. For an application to be approved the community must provide:

satisfactory assurances that . . . it has (A) provided citizens with adequate information concerning the amount of funds available for proposed community development and housing activities, the range of activities that may be undertaken, and other important program requirements, (B) held public hearings to obtain the view of citizens on community development and housing needs, and (C) provided citizens an adequate opportunity to participate in the development of the application; but no part of this paragraph shall be construed to restrict the responsibility and authority of the applicant for the Community Development Program.<sup>96</sup>

HUD's implementing regulations specify that two hearings must be held under subsection (B)<sup>97</sup> and further define the role of citizens vis-a-vis decision making:

The citizen participation requirements of this paragraph do not

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93. See generally notes 233-69 and accompanying text *infra*.

94. Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd sub nom.* Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); Golden Dawn Shops, Inc. v. HUD, 333 F. Supp. 874 (E.D. Pa. 1971).

95. See, e.g., Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974), *further relief ordered*, 391 F. Supp. 1151 (E.D. Mich. 1975).

96. 42 U.S.C. § 5304(a)(6) (Supp. IV, 1974).

97. 24 C.F.R. § 570.303(e)(2)(ii) (1975).

include concurrence by any person or group involved in the citizen participation process in making final determinations concerning the findings and contents of the application. The sole responsibility and authority to make such final determinations rests exclusively with the applicant.<sup>98</sup>

The citizen participation application requirements present an extremely vague measuring stick for litigation purposes. As the Act calls for "citizen" participation, questions may arise regarding which "citizens" must participate. Such an issue may arise where a recipient designates a "blue ribbon" citizens advisory group, that excludes minorities and the poor, to participate in planning and applications. The legislative history discloses that "citizen" must include those affected by proposed activities.<sup>99</sup> In addition, questions of what constitutes "adequate information" or an "adequate opportunity to participate in the development of the application" can be raised along with questions concerning the quality of any hearings held.

In many cases the community deals summarily with the certification requirements by holding hearings before the city council prior to formal adoption of the city's plan.<sup>100</sup> In Honolulu, two meetings were held. The first apparently was by invitation to neighborhood associations, and the second a public hearing before the city council.<sup>101</sup> More serious than the question of notice is the implication by Honolulu officials that citizens could not influence the choice of proposed projects. Preliminary to

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98. *Id.* § 570.303(e)(2).

99. The House Bill modified "citizens" by the phrase "likely to be affected by proposed community development and housing activities." H.R. 15361, 93d Cong., 2d Sess. § 104(a)(5)(A) (1974). The Senate version required the applicant to certify that it "has provided for the meaningful involvement of the residents of areas in which community development activities are to be concentrated." S. 3066, 93d Cong. 2d Sess. §§ 308(a)(3)(B), (C) (1974). As there was no difference in the versions of the bill it may be argued that "citizens" as contained in § 104(a)(6) of the Act includes both of the offered phrases. Otherwise a change in the philosophy of the Conference Committee surely would have been noted. See CONFERENCE REPORT, *supra* note 26, at 300.

100. Citizens in Dallas, Texas, have attacked the failure to create any citizen advisory groups for HCDA activities. *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), reported in *Community Dev. Digest*, Aug. 19, 1975, at 1-2. In *Ulster County Community Action Comm., Inc. v. Koenig*, 402 F. Supp. 986 (S.D.N.Y. 1975), the district court, dismissed the plaintiff's complaint that in part challenged citizen participation compliance, dealt summarily with the issue, and held that HUD's approval was prima facie proof of compliance with the Act.

101. Mayor's Message No. 56 from Mayor Frank F. Fasi, Honolulu, Hawaii, to the City Council, Feb. 3, 1975; letter from Robert P. Dye, Director, Office of Human Resources, Honolulu, Hawaii, to local community leaders, Feb. 28, 1975.



holding their public meetings, the Honolulu Office of Human Resources wrote to community groups intimating that projects to be undertaken were, in part, dictated by HUD.<sup>102</sup> In other communities the provisions were taken more seriously given citizen interest and awareness in the OEO poverty program (CAP), and the history of model cities and urban renewal.<sup>103</sup> Rarely, however, were citizens really made a part of a development process; generally they had only the opportunity to speak. Clearly, if the hearings are not held the Act is violated and the Secretarial review provision relating to requirements would dictate that the application is defective and that all funds should be denied.<sup>104</sup> More difficult questions arise where notice was either not timely or given at the wrong place. In such circumstances it would still seem the Act was violated and, in addition, that due process under the fifth and fourteenth amendments might have been denied by the absence of a meaningful opportunity to take part.<sup>105</sup> In this regard problems may arise where the community first makes its decisions concerning the application, next holds nominal public hearings without disclosing its plan, and subsequently issues its previously prepared application. While not a technical violation of the Act, it seems to suffer the same due process problems as well as running counter to the intent of the Act.<sup>106</sup>

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102. "Functionally, the projects are predominantly capital improvement projects and were predicated to a large extent on the federal requirements as well as the city's overall priorities." Letter from Robert P. Dye, Director, Office of Human Resources, Honolulu, Hawaii, to local community leaders, Feb. 28, 1975.

103. Suit has been filed in Saginaw, Michigan, attacking the city's use of private meetings to make selections to a citizen participation body designed to represent citizens under the HCDA. The suit charged both state law violations and due process infringement. *Campbell v. Saginaw City Council*, No. 75-01651-AW (Mich. Cir. Ct., Saginaw County, filed July 1, 1975), reported in 9 CLEARINGHOUSE REV. 342. (1975).

104. See generally note 32 *supra*.

105. See, e.g., *Armstrong v. Manzo*, 380 U.S. 545 (1966); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). But see *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied, 390 U.S. 921 (1968). In Edison, New Jersey, suit was filed by the State Department of the Public Advocate charging improper advertisement of hearings and the failure to encourage or consider meaningful citizen input. *NAACP v. Hills*, Civil No. 75-1461 (D.N.J., filed Aug. 22, 1975), reported in 9 CLEARINGHOUSE REV. 422 (1975). This suit was subsequently settled with an agreement for improved citizen participation procedures. 3 HOUSING & DEV. REP. CURRENT DEV. 865 (1976). See note 273 *infra*.

106. See *Southeast Legal Defense Group v. Brinegar*, Civil No. 72-64 (D. Ore., May 24, 1974), reported in 8 CLEARINGHOUSE REV. 202, 203 (1974) (new hearings ordered based on Department of Transportation's more specific hearing requirements where committed to highway location at time of hearing). This issue was raised in *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), reported in *Community Dev. Digest*, Aug. 19, 1975, at 1-2.

Obviously, citizens cannot compel a veto power. Successful litigation on this matter, however, may well result in stricter standards for citizen involvement and a more stringent definition of "adequate" in terms of the level of participation expected.<sup>107</sup> Certainly citizens should be advised and consulted on planned activities. The potential for litigation is great in this area considering the experience and expectations of citizen groups with participation under other federal programs, the lack of sophistication needed to identify the problem, and HUD's rejection of suggestions for greater detail regarding the procedures, process and local structure for citizen participation.<sup>108</sup>

Should these litigation strategies not result in improved citizen participation, there still remains access to decisionmaking via regional A-95 review requirements.<sup>109</sup> The A-95 mechanism requires state and local review of federal projects.<sup>110</sup> Of course, the failure to comply with A-95 review requirements constitutes a requirement violation and could result in nonapproval by HUD or a denial of program funds.<sup>111</sup>

Making matters extremely confused, HUD has promulgated performance standards for citizen participation that contain more substantive requirements regarding the formation of advisory groups at the city-wide and local level.<sup>112</sup> HUD has ruled that these requirements must be

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107. *Cf. North City Area-Wide Council, Inc. v. Romney*, 428 F.2d 754 (3d Cir. 1970), *dismissed on remand*, 329 F. Supp. 1124 (E.D. Pa. 1971), *rev'd*, 456 F.2d 811 (3d Cir. 1972), *cert. denied*, 406 U.S. 963 (1972) (Model Cities citizen participation).

108. "Such comments were given careful consideration and rejected since the proposed requirements would have imposed upon HUD the responsibility for specifying the manner in which local general purpose government related to its citizens. This role was not considered appropriate for HUD." 39 Fed. Reg. 40,136 (1974).

109. 42 U.S.C. § 5304(e) (Supp. IV, 1974); 24 C.F.R. § 570.303(e)(6) (1975). Circular A-95 is based upon Subchapter II of the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. §§ 3331-39 (1970). A revised circular is published at 41 Fed. Reg. 2052 (Jan. 13, 1976).

110. *See generally* Morganthaler, *OMB Circular A-95: A Neglected Environmental Assessment Tool Provides an Early Public Pressure Point*, 4 ENVIRONMENTAL L. REP. 50013 (1974); Rubinowitz & Dennis, *School Desegregation Versus Public Housing Desegregation: The Local School District and the Metropolitan Housing District*, 10 URBAN L. ANN. 145, 156-64 (1975); Salsich, *supra* note 10, at 319-23. *See also* notes 126-29 and accompanying text *infra*. HUD recognizes that regional review has often been meaningless in the past as has been HUD's review of the process under its § 701 planning program. *See* 40 U.S.C. § 461 (Supp. IV, 1974); 3 HOUSING & DEV. REP. CURRENT DEV. 401 (1975). For a hopeful expectation of improvement under HCDA see Salsich *supra*, note 10.

111. *See generally* notes 31-32 and accompanying text *supra*.

112. 23 C.F.R. § 570.900(d) (1975); Final HUD Reg. § 570.900(d), 40 Fed. Reg. 24,711 (1975). *See* notes 199-208 *infra*.

complied with to sustain the applicant's initial application certification on citizen participation.<sup>113</sup>

### III. HOUSING ASSISTANCE PLANS

To assist in understanding the concept of the Housing Assistance Plan (HAP) it will be helpful to be familiar with the statutory language:

No grant may be made . . . unless an application shall have been submitted to the Secretary in which the applicant- . . . (4) submits a housing assistance plan which-

(A) accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons (including elderly and handicapped persons, large families, and persons displaced or to be displaced) residing in or expected to reside in the community,

(B) specifies a realistic annual goal for the number of dwelling units or persons to be assisted including (i) the relative proportion of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance best suited to the needs of lower-income persons in the community, and

(C) indicates the general locations of proposed housing for lower-income persons, with the objective of (i) furthering the revitalization of the community, including the restoration and rehabilitation of stable neighborhoods to the maximum extent possible, (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low income persons, and (iii) assuring the availability of public facilities and services adequate to serve proposed housing projects.<sup>114</sup>

The HAP can be an extremely important document for a number of reasons. It can be used in the context of both an inner-city and an outer-city strategy to expand lower-income housing opportunities. The outer-city strategy may take the form of assuring that CD recipients in metropolitan areas surrounding central cities program and achieve a level of production to meet the needs of the region in terms of growth projections and the need for migration by the poor and minorities from inner-cities to gain access to job opportunities, improved housing and better living environments. This is particularly true in view of the reality that the central cities are incapable of adequately addressing their residents' housing needs. In this latter regard, the central city HAP

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113. See note 206 and accompanying text *infra*.

114. 42 U.S.C. § 5304(a)(4) (Supp. IV, 1974).

should provide dramatic evidence of the need for regional solutions to this nation's housing crisis.<sup>115</sup>

On the other hand, the inner-city HAP may provide the strategy to question displacement proposals and to flex some muscle to press for certain community development programs relating to housing needs. For instance, if the central city has realistically planned minimal housing construction but expects a sizeable degree of demolition and displacement, the HAP can be used to force a major commitment to rehabilitation activities and perhaps a lesser degree of displacement. Some of these strategies will be brought out in the following sections. Significant noncompliance and the response of litigation may be anticipated with HAPs as even HUD recognizes that review has been almost meaningless.<sup>116</sup>

#### A. Identification of Need

The Act requires that the application contain a HAP that "accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons (including elderly and handicapped persons, large families, and persons displaced or to be displaced) residing in or expected to reside in the community."<sup>117</sup> Where a recipient is proposing displacement, the extent of displacement must be indicated. The failure to indicate the housing demand generated by displacement presents the easiest fact pattern upon which to challenge a HAP.<sup>118</sup> The more difficult issues relate to housing needs as shown by a survey of housing conditions or by suburban

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115. See the discussion of *City of Hartford v. Hills*, 408 F. Supp 889 (D. Conn., 1976), at notes 120-24 *infra*. The importance of the HAP is underscored by the reliance of the Supreme Court on its requirements in unanimously affirming the potential for metropolitan-wide relief in the face of HUD funded housing discrimination. See *Hills v. Gautreaux*, 96 S.Ct. 1538, 1549-50 & n.21 (1976).

116. 3 HOUSING & DEV. REP. CURRENT DEV. 401 (1975). James H. Blair, HUD's Assistant Secretary for Equal Opportunity, believes complaints and legal challenges against HUD by civil rights groups over white suburbs' housing assistance plans have generally been valid and correct. *Id.* at 538 (1975). It has been reported that HUD's approval of HAPs is automatic even in the face of negative comments from regional planning agencies and from branches of HUD itself. Potomac Institute, Inc., *The Housing Assistance Plan: A Non-Working Program for Community Improvement?* (Nov. 1975).

117. 42 U.S.C. § 5304(a)(4)(A) (Supp. IV, 1974).

118. In Dallas, Texas, citizens claim the HAP fails to indicate displacement which will result from planned code enforcement and demolition. *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), reported in *Community Dev. Digest*, Aug. 19, 1975, at 1-2.

communities' attempts to anticipate the future needs of those "expected to reside" in the community.<sup>119</sup>

The failure to accurately identify existing housing conditions presents a difficult issue of proof in litigation. Communities often lack meaningful data on existing housing conditions. The census no longer lists substandard dwellings but instead is limited to compilations concerning overcrowding and the absence of plumbing facilities. To make matters worse, older cities, aware of the nearly insurmountable problems of housing conditions, may be motivated to allocate CD funds to pet civic projects rather than make the mammoth commitment to housing preservation and rehabilitation that would be generated by a realistic picture of housing needs in their HAP. The most dramatic test of the HAP requirement as it relates to suburban recipients is presented in *City of Hartford v. Hills*.<sup>120</sup> In *Hartford* a federal court permanently enjoined the suburban towns around Hartford, Connecticut,<sup>121</sup> from making HCDA expenditures because the towns failed to prepare HAPs which adequately addressed regional and local housing needs. *Hartford's* significance lies not only in the fact that the central city was pitted as the challenger, but is additionally noteworthy because of HUD's role in the matter; legal complications for HUD grew out of the approval of the suburban applications over the equal opportunity field staff's recommended disapproval.<sup>122</sup>

Judge Blumenfeld's decision, emphatically demanding strict compliance with the Act to accomplish the goals and purposes established by Congress, stands as a landmark in the early interpretation of the new community development law. Finding that "the 'expected to reside' figure is the keystone of the *spatial deconcentration objective* of the 1974 Act," the court held that HUD approval of HAPs in six of the suburban

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119. Final HUD Reg. § 570.303(c)(1), 41 Fed. Reg. 7504 (1976).

120. 408 F.Supp. 889 (D. Conn. 1976).

121. *Id.* The communities include Farmington, Windsor Locks, Vernon, Enfield, East Hartford, West Hartford and Glastonbury. So far the only response by the local defendants to the lawsuit has been the call by one suburban selectman for an economic boycott of the City of Hartford. 3 HOUSING & DEV. REP. CURRENT DEV. 361 (1975).

122. The court found that HUD had, by internal memorandum, waived the "expected to reside" HAP requirement as a prerequisite to first year approval and that such waiver was national in scope. 408 F. Supp. at 899-900 (D. Conn. 1976). HUD's Assistant Secretary for Equal Opportunity points to Hartford as a case where HUD's civil rights monitoring was "lax" and "wholly inadequate." 3 HOUSING & DEV. REP. CURRENT DEV. 538 (1975). Also cited was the Detroit area complaint filed by the National Committee Against Discrimination in Housing and recently denied by HUD. See note 130 and accompanying text *infra*.

communities containing “expected to reside” figures of zero was contrary to law.<sup>123</sup> The City of East Hartford based its “expected to reside” figure of 135 units upon projections from the public housing authority’s waiting list, a figure and methodology that HUD admitted to be unsatisfactory. The court declared this HAP to be “plainly inconsistent” with “generally available” information.<sup>124</sup> The *Hartford* decision is important in that it stands for the principle of strict compliance and close judicial scrutiny of HCDA requirements, and will no doubt encourage aggressive implementation and HUD review of the law’s requirements as well as a heightened interest for citizen and central city monitoring of HCDA performance. Finding the central city a plaintiff against the exclusionary suburbs is novel, yet the motivation is provided by the HCDA which allows funds denied to a recipient to be reprogrammed to other localities in the state with first priority to “any metropolitan area in the same state.”<sup>125</sup>

Several administrative complaints have been filed with HUD attacking suburban HAPs. A petition has been filed seeking to have funds for Burlington County, New Jersey, withheld pending adoption of a county low-income HAP and the elimination of exclusionary zoning.<sup>126</sup> Burlington County contains the Township of Mount Laurel

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123. 408 F. Supp. at 901-02. One purpose of the Act is to lessen “the isolation of income groups within communities and geographical areas and to promote an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income. . . .” 42 U.S.C. § 5301(c)(6) (Supp. IV, 1974). The cities included all of those listed in note 121 *supra*, with the exception of East Hartford.

124. 408 F. Supp. at 906. The court suggested that the city could have consulted the data sources listed in HUD’s regulations in 24 C.F.R. § 570.303(c)(2)(i)(A) (1975), or such sources as “studies conducted by or for state agencies; plant or shopping center surveys; zip code information from the payroll records of local companies; or data gathered by the local chamber of commerce.” 408 F. Supp. at 905. Moreover, the public housing waiting list would not reflect those in the lower income range with incomes in excess of the public housing admission maximum. *Id.* at 906. The court also noted that HUD required an amendment of the original HAP which, while raising the existing need figures for the city, lowered the figure for “expected to reside.” *Id.* HUD’s regulations require “estimates of the number of lower income families with workers expected to be employed in the community in the next three years as a result of known commercial, industrial, government, or service employment to be generated by new or expanded development. . . . Sources of information may include approved development plans, building permits, and awards of significant contracts.” Final HUD Reg. § 570.303(c)(2)(i), 41 Fed. Reg. 7505, 11,128 (1976).

125. 42 U.S.C. § 5306(e) (Supp. IV, 1974). HUD’s regulations give first priority for such funds “to the same metropolitan area.” Final HUD Reg. § 570.409(f)(1)(i), 40 Fed. Reg. 42,318 (1975). See note 136 *infra*.

126. *In re Lawrence* (filed Mar. 25, 1975), reported in 9 CLEARINGHOUSE REV. 52 (1975).

and the petition seeks an implementation of both the decision in *Southern Burlington County NAACP v. Township of Mount Laurel*<sup>127</sup> and the adoption of a county-wide plan to achieve the regional allocation plan goals. The Burlington application indicates a lower-income housing need of 10,000 units despite the fact that the regional allocation for the county sets the need at more than 92,000 of which approximately 23,000 would be for persons with yearly incomes below \$10,000. The Regional Planning Commission passed a resolution conditioning HCDA application approval on the inclusion of a HAP which conforms to the regional housing allocation system.<sup>128</sup> HUD has ruled that it will not approve applications unless they comply with the Act and other applicable laws, which includes orders of state and federal courts.<sup>129</sup> Thus, successful housing and land use litigation resulting in affirmative orders to build or supply housing units must be included in a HAP and complied with for HCDA approval.

Another administrative complaint has been filed against twenty-six suburbs in the Detroit metropolitan area. This complaint not only challenges the failure of HAPs to properly consider the needs of nonresident workers, but also assails the HAPs reliance on existing units to utilize Section 8 subsidies despite the presence of extremely low vacancy rates.<sup>130</sup> Finally, the National Committee Against Discrimination in Housing has charged that Parma, Ohio, has failed to identify the lower-income housing needs generated from the Cleveland metropolitan area, citing as evidence the huge public housing waiting lists.<sup>131</sup>

In reviewing HAPs, just as in the CD activities review, the Secretary is limited to data generally available in the community to determine whether the HAP is consistent with a community's need.<sup>132</sup> Thus it is

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127. 67 N.J. 151,336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975) (ordering that in the face of a constitutional violation based on exclusionary land use practices, communities may not foreclose the opportunity for lower-income housing and must affirmatively afford such opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefore). See Kushner, *supra* note 92. *Accord*, Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); Township of Willistown v. Chesterdale Farms, Inc., \_\_\_ Pa. \_\_\_, 341 A.2d 466 (1975).

128. *In re Lawrence* (filed Mar. 25, 1975), *reported in* 9 CLEARINGHOUSE REV. 52 (1975).

129. Community Dev. Digest, June 3, 1975, at 3.

130. Coalition for Block Grant Compliance v. HUD, *reported in* 2 HOUSING & DEV. REP. 1245 (May 5, 1975). The complaint has been rejected by HUD but a lawsuit is being prepared. 3 HOUSING & DEV. REP. CURRENT DEV. 538 (Nov. 3, 1975).

131. Potomac Institute, Memorandum 75-4, Apr. 24, 1975.

132. See notes 25-30 and accompanying text *supra*. HUD's regulations approved in early 1976, pose the possibility of exhaustion of claims by HUD and HCDA recipients in

essential to compare the HAP needs analysis with older studies, census information, previous Workable Program applications and urban renewal analyses. If a community has misrepresented housing conditions in its HAP and HUD has approved the application, the only remedy would appear to be a denial of all funds on the basis of the inconsistency between the application and their data. In light of the above discussion, the needs description will also have a significant effect on the proposed CD activities, as the failure to address or draw plans to meet the stated needs might dictate a reordering of CD priorities to relieve the housing needs situation.

The outer-city strategy with regard to the HAP needs analysis may well prove to be the most dramatic effect of the HCDA. The Act specifies that an applicant must plan, not only for its present residents, but for those "expected to reside in the community." The HUD regulations expand this notion to cover those either "already residing in the community, or planning or expected to reside in the community as a result of planned or existing employment facilities."<sup>133</sup> Taking this discussion one step further, a community must also recognize in its HAP a need equal to at least its "fair share" of the regional low-income housing need.<sup>134</sup> Therefore, any regional low-income housing alloca-

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requiring submissions by citizens wishing to challenge HAPs. The challenges must set forth the identity and location of documents relied upon (citing pages and the specific HAP deficiency it relates to) and must be filed within 15 days after the applicant publishes that the application has been accepted by HUD for processing. Final HUD Reg. § 570.300(c), 41 Fed. Reg. 7503, 7504 (1976). The failure to utilize a regional allocation plan may prompt a finding of inconsistency with regional plans and thus inconsistency under the HCDA. This position is also taken in Franklin, *Open Communities Litigation and the Housing and Community Development Act of 1974*, in NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING, EXCLUSIONARY LAND USE LITIGATION, POLICY AND STRATEGY FOR THE FUTURE 83, 101 (1975); Salsich, *supra* note 10 at 323.

Unfortunately, HUD is reported to have often approved HAPs despite negative A-95 and regional planning comments. Potomac Institute, Inc., *The Housing Assistance Plan: A Non-Working Program for Community Improvement?* (Nov. 1975).

133. Final HUD Reg. § 570.303(c)(2), 41 Fed. Reg. 7504-05, 11,128-29 (1976). Authority for this position is found in the House Report which states:

The Committee wishes to emphasize that the bill requires communities, in assessing their housing needs, to look beyond the needs of their residents to those who can be expected to reside in the community as well. Clearly, those already employed in the community can be expected to reside there. Normally, estimates of those expected to reside in a particular community would be based on employment data generally available to the community and to HUD. However, in many cases, communities should be able to take into account planned employment facilities as well, and their housing assistance plans should reflect the additional housing needs that will result.

H.R. REP. NO. 1114, *supra* note 26 at 7.

134. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975). See generally M. BROOKS.



tion plans prepared by the regional planning agency should be examined for consistency with studies of industrial and commercial growth potential and the community's economic base.<sup>135</sup> Studies indicating the residences of persons presently employed in the community would also be relevant. Certainly the existence of a mechanism conditioning federal grants upon a proper recognition of low-income housing needs is a significant step toward achieving meaningful housing opportunities.

It may be advisable for housing-oriented groups to monitor all HAPs in a metropolitan area to determine if they are consistent with regional "fair share" allocation plans and with studies on the number of workers currently employed or expected to be employed in each community. To achieve a regional result, it may be necessary to include numerous communities in litigation.<sup>136</sup>

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LOWER INCOME HOUSING: THE PLANNERS' RESPONSE (ASPO Planning Advisory Serv. Rep. No. 282, 1972); H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 10; Kushner, *supra* note 92; Listokin, *Fair Share Housing Distribution: Will It Open the Suburbs to Apartment Development?*, 2 REAL ESTATE L.J. 739 (1974).

135. HUD allows communities to utilize regional fair share allocations in place of computations of those "expected to reside." Final HUD Reg. § 570.303(c)(2)(ii), 41 Fed. Reg. 7505 (1976).

136. This is obviously the direction being taken in Detroit and Hartford. See notes 120-24 and 130 and accompanying text *supra*. Efforts along these lines should be facilitated by the liberal standing requirements found in *Mount Laurel*. See Kushner, *supra* note 92, at 14. The Supreme Court's recent restrictive interpretation of standing in exclusionary land use litigation cases must be anticipated. See *Warth v. Seldin*, 422 U.S. 490 (1975); Note, *Alternatives to Warth v. Seldin: Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URBAN L. ANN. 223 (1976) [hereinafter cited as Note, *The Potential Resident Challenger*]. However, the Court recognized the possibility of congressionally established standing. The HCDA certainly contains a broad definition of the zone of interest in the field of community development. Moreover, the congressional findings set the stage for judicial recognition of the rather sophisticated injuries in fact which can exist in this area. See Franklin, *supra* note 132, at 90-98; Kushner & Werner, *supra* note 60, at 187 n.107. Herb Franklin, based upon the clear statutory directive in the HCDA to discourage concentration of lower-income and minority persons and for suburban HAPs to address the housing needs of their residents, employees and those who will be employed and might be expected to reside, has stated his definition of injury in fact:

[A] central city resident holding or desiring a suburban job is more likely to be injured in fact and is within the zone of interest established by the statute, to complain of CD funding to a locality that has submitted an inadequate housing assistance plan or has failed to implement its plan. The failure of the locality to comply with the statute means that whatever opportunity such a plaintiff may have to better his housing situation is being frustrated. He then has a direct stake in HUD's implementation of the statute even though there is no assurance that a cut-off of funds will stimulate the housing. The statutory scheme assumes that a threat to cut off the funds will stimulate the housing, and this threat is not credible unless the statute is enforced.

Franklin, *supra* note 132, at 94-95.

The HCDA should also provide cities and other governmental units with an adequate

Another potential method available to assure that HAPs reflect true community needs would be a suit under NEPA to require the preparation of an environmental impact statement on the overall application.<sup>137</sup> Certainly the housing needs of the community must be examined to determine any impacts from proposed activities. An insufficient needs component in the HAP could lead to overcrowding, rent inflation, difficult or nonexistent access to jobs, and in general, a situation with manifest blighting potential either within the community or in the areas where persons in need of housing would be restricted and concentrated.

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base of standing. *Cf. City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); Comment, *The Ninth Circuit Relaxes NEPA Standing in the Highway-Triggered Private Development Context*, 5 ENVIRONMENTAL L. REP. 10191 (1975). The city's standing argument is bolstered by the HCDA provision that where an application within a metropolitan area is not approved, those funds will be reprogrammed to other localities in that state, with any metropolitan area in the same state entitled to first priority. 42 U.S.C. § 5306(e) (Supp. IV, 1974). HUD's regulations go further and give first priority "to the same metropolitan area." Final HUD Reg. § 570.409(f)(1)(i), 40 Fed. Reg. 42,348 (1975).

In *City of Hartford v. Hill*, 408 F. Supp. 889 (D. Conn. 1976), the court found that the findings and purpose of the HCDA together with the urban condition of Hartford clearly placed the city within the zone of interests of the legislation. Injury in fact was premised on the statutory provision for a reallocation of funds to metropolitan areas in the same state where funds are denied to specific recipients (42 U.S.C. § 5306(e) (Supp. IV, 1974)), and on HUD's regulations that give first priority on such funds "to the same metropolitan area." Final HUD Reg. § 570.409(f)(1)(i), 40 Fed. Reg. 42,348 (1975). Regarding the two low-income minority plaintiffs, the court held they are "certainly" in the zone of interests created by the HCDA, citing the preamble material. 408 F. Supp. at 895. In addition the court cited the federal civil rights acts as entitling them to protection. *Id.* Distinguishing *Warth v. Seldin*, 422 U.S. 490 (1975), the court found that the plaintiffs are likely to benefit from the possible reallocation of denied funds. 408 F. Supp. at 896-97. The *Hartford* court, however, denied standing to individual city officials as their alleged inability to perform their official duties failed to constitute a cognizable legal interest. *Id.* at 895.

As to standing to challenge other aspects of the HCDA, *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783, 788 (E.D. Tenn. 1975), recognized that if standing were denied to the community's residents "it would be difficult to imagine any low- or middle-income plaintiff with standing to challenge alleged improper allocation of funds under the Community Development Act." Standing was found in *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., Dec. 24, 1975), because the HCDA does not preclude citizen review, and because plaintiffs' alleged injury was covered by the legislation's zone of interest. The court cited such asserted environmental injuries as "increased evictions . . . increased housing costs, increased rodent, pest, and trash problems, increased racial segregation, increased problems dealing generally with the quality of life and other aesthetic considerations, and the deprivation of information and the opportunity to participate meaningfully in the decisions affecting the plaintiff residents' environmental milieu." *Id.* Slip Opinion 6.

137. See generally notes 233-69 and accompanying text *infra*.

### B. *Relation of Planned Housing Production to Need*

Once the housing needs are adequately set out in the HAP the application must:

[Specify] a realistic annual goal for the number of dwelling units or persons to be assisted, including (i) the relative proportion of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance best suited to the needs of lower-income persons in the community . . . .<sup>138</sup>

Congressional housing goals need not be quixotic if either HUD or the judiciary would make an aggressive attempt to require a comprehensive and carefully conceived HAP. Ideally, HUD should utilize HAPs from program year one to allocate subsidies for succeeding years.

Unfortunately, although such a system is logical, it may have adverse effects in those communities allowed to produce insufficient HAPs. For example, a suburban community interested in avoiding its "fair share" of low-income housing could underestimate need and thus assure that a diminished supply of subsidies would flow into the area. Consequently, those communities committed to the goals of HCDA, and in tune with the needs of the region's poor, will assume a disproportionate share of the lower-income housing burden, and thereby increase the potential for a concentration of such housing.<sup>139</sup> Likewise, inner-cities intent on ignoring housing needs could effectively curb the amount of available subsidies. Alternatively, a relatively realistic nationwide HAP performance would provide a dramatic picture of this nation's housing crisis with the potential result that vastly expanded subsidies would be funded by Congress.

Once the HAP adequately defines housing conditions and needs, several defects can be expected.<sup>140</sup> Communities may simply set goals at unrealistically low levels conforming to political aspirations rather than to housing need.<sup>141</sup> This response may take several forms, in-

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138. 42 U.S.C. § 5304(a)(4)(B) (Supp. IV, 1974); Final HUD Reg. § 570.303(c)(3), 41 Fed. Reg. 7505-06 (1976). The application then requires the identification of locations. See notes 174-82 and accompanying text *infra*. The House bill that authored the HAP requirement had envisioned that local housing resources would, in large part, dictate how subsidies would be allocated. H.R. REP. NO. 1114, *supra* note 26, at 7.

139. HUD's provisional report on the status of the HCDA indicates that the average HAP submitted sets the time for goal achievement at 13.3 years. Housing & Urban Affairs Daily, May 13, 1975.

140. Separate discussion will be made of civil rights issues and economic exclusion.

141. HUD has disapproved the HCDA application for Parma, Ohio, as the HAP showed

cluding minimal housing production in the face of planned contraction of the supply by demolition and displacement, the programming of only subsidized housing for the elderly in the face of glaring family needs,<sup>142</sup> or the total absence of any goals.<sup>143</sup>

Several means exist to affect the HAP and its statement of goals. First, it is possible to use the "appropriateness" provision of the Secretarial review section to measure the adequacy of the HAP.<sup>144</sup> While the Act speaks only of setting goals, HUD regulations specify that goals must be consistent with the description of needs.<sup>145</sup> Where excessive contraction of the housing supply is planned in the absence of sufficient planned subsidized replacement units, the entire application, both in terms of

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an unmet need for housing assistance for 1537 households and an annual goal of zero in the face of 120 available assisted units. 3 HOUSING & DEV. REP. CURRENT DEV. 69 (1975). See discussion of *Hartford*, notes 120-24 and accompanying text *supra*.

142. HUD has recognized the potential for this abuse and has promulgated regulations designed to eliminate its effects. The regulations require, for example, that where a community's three-year goal includes 25% of units for the elderly, that no less than that percentage of available assistance could be used for elderly housing each year, allowing 10% ranges of deviation from goals. For instance, if 50% of the need is for families, HUD will allow a goal of 40% with exceptions for special circumstances. Final HUD Reg. § 570.303(c)(3)(iv), 41 Fed. Reg. 7505 (1976).

143. In this last category, Corona, California, presents the most dramatic example. Its HAP discloses the need for 600 units of housing for present residents and the existence of 248 substandard housing units, of which 122 are considered suitable for rehabilitation. Yet the plan sets no goals for housing and simply states that "the three year goals are not yet identified." HUD, Application for Federal Assistance, Community Development Block Grant Program, Corona, Cal., Apr., 1975. Columbia, South Carolina, is, in part, programming some 325 low-income housing units for which it possesses HUD commitments to meet the needs of proposed displacement. HUD, Application for Federal Assistance, Community Development Block Grant Program, Columbia, S.C., Mar., 1975. It is alleged, however, that these commitments reflect "Houser of Last Resort" funds intended for displacees of an earlier urban renewal project. Comments of Midlands Welfare Rights Organization to the Central Midlands Regional Planning Council, Mar. 21, 1975. To make matters worse, all Section 8 funds are programmed for elderly housing despite a current need in family housing for nearly 5,000 units with public housing waiting lists exceeding 2,000. *Id.* The city of Midlands, Texas, was advised of a possible turndown by HUD of its HCDA application for failing to apply for Section 8 subsidies and for failure to address family as well as elderly needs. 3 HOUSING & DEV. REP. CURRENT DEV. 70 (1975). Bloomfield, New Jersey, has also been so notified. *Id.* at 113. To demonstrate an even clearer inconsistency, the city of Columbia, South Carolina, proposes to rehabilitate 275 units through its CD activities in the first year. However, assistance is limited to owner-occupied houses for which the application cites only 241 such units that are substandard and suitable for rehabilitation. The inconsistency is more serious considering that the poor and minorities of Columbia live predominantly in rental housing that will not be assisted. Comments of Midlands Welfare Rights Organization to the Central Midlands Regional Planning Council, Mar. 21, 1975.

144. See generally notes 32-35 and accompanying text *supra*.

145. Final HUD Reg. § 570.303(c)(3), 41 Fed. Reg. 7504-05, 11,128-29 (1976).

proposed CD activities and the HAP, may be “inappropriate.” Likewise, the failure to program family housing in the face of great need may produce a finding of “inappropriateness.” This is especially so in light of a recent national trend to utilize public housing funds almost exclusively for noncontroversial projects for the elderly. Were this defect noted prior to the completion of the HUD application review, the HAP might be amended or the CD activities realigned toward the utilization and rehabilitation of existing housing; an especially desirable strategy in light of lead time essential to utilize subsidies or to construct new housing. After the application is approved, the appropriate remedy would be a denial of funds.

From a litigation standpoint, the inner-city strategy should be to encourage a strong commitment to subsidizing housing rehabilitation and to the extent possible, seeking new construction and additional subsidies. The outer-city strategy generally should be construction-oriented or at least directed at utilizing leased housing under section 8<sup>146</sup> to make existing market rate units available to those with housing needs. A most effective strategy would look to the regional effort and the use of a single lawsuit to compel the establishment of meaningful goals. In addition, utilization of a NEPA over-all application environmental impact statement would be most appropriate to the study of an over-all housing development plan in measuring the adequacy of the community’s goals, the various subsidy and community development activity alternatives and their ability to most effectively meet the described housing needs.<sup>147</sup>

Where proposed community development activities would result in displacement and a HAP fails to expand the existing housing supply even though there is a high level of need, the URA<sup>148</sup> should be utilized to require the execution of a relocation plan. Where insufficient resources are disclosed by such a plan, the appropriate remedy would be either to develop housing as a “last resort” or to cut down proposed displacement activities.<sup>149</sup>

Another route for testing a HAP would be to challenge the A-95 review in light of an inconsistency with any regional “fair-share” allocation

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146. 42 U.S.C. § 1437(f) (1970). See generally Bishop, *Assisted Housing Under the Housing and Community Development Act of 1974*, 8 CLEARINGHOUSE REV. 672 (1975).

147. See generally notes 233-69 and accompanying text *infra*.

148. 42 U.S.C. § 4601 (1970).

149. See generally the discussion of the URA at notes 76-95 and accompanying text *supra*.

plan.<sup>150</sup> However, the Act requires only the submission of the application to the A-95 reviewing agency for "review and comment."<sup>151</sup> The HUD regulations merely require that the applicant explain any inconsistencies with area-wide plans.<sup>152</sup> While the wording of the HCDA may make it difficult to litigate whether there has been proper comment on inconsistencies with area-wide plans, HUD's approval of an application containing glaring inconsistencies may make a case for "inappropriateness" under the Secretarial review section.<sup>153</sup>

While the issue of restrictive land use regulations and their effect on HAPs will be taken up next, it is worth noting that recent developments in exclusionary land use litigation present a means for mandating both local approval and affirmative action in the implementation of the regional "fair share" of low-income housing needs.<sup>154</sup> One form of such relief, that could be based on federal or state constitutional notions of equal protection and due process,<sup>155</sup> would be to mandate the preparation of an adequate HAP or even to mandate the preparation of an application under the HCDA.

### *C. Housing Assistance Plans in the Environment of Restrictive Land Use Practices*

At this point we must presuppose a facially adequate HAP and an otherwise adequate community development application. The problem may then be that the applicant, under existing restrictive land use laws, regulations or practices cannot carry out the HAP goals. These restrictions may take several forms including exclusionary zoning through the use of large lot requirements or density limits,<sup>156</sup> building

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150. See generally notes 109-11, 132 and accompanying text *supra*.

151. 42 U.S.C. § 5304(e) (Supp. IV 1974); 24 C.F.R. § 570.303(e)(6) (1975). See also notes 120-24 and accompanying text *supra*.

152. 24 C.F.R. § 570.303(a) (1975).

153. See notes 32-35 and accompanying text *supra*.

154. For a discussion of the *Mount Laurel* decision see note 127 and accompanying text *supra*. See Note, *The Potential Resident Challenger*, *supra* note 136, at 251.

155. Where issues of race are involved, the United States Constitution may provide a remedy.

156. See generally U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 109-18 (1975); Aloï, *Recent Developments in Exclusionary Zoning: The Second Generation Cases and the Environment*, 6 SW. U.L. REV. 88 (1974); Aloï & Goldberg, *Racial & Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9; Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Freilich & Bass, *Exclusionary Zoning*:

restrictions in the form of minimum floor space, maximum limits on bedroom configurations and height limitations, and subdivision regulation in the form of set-backs or mandatory set asides for such amenities as open space, parking or public facilities. Other restrictive techniques include growth limitations linked to maximum annual starts,<sup>157</sup> timed sequential growth programs,<sup>158</sup> or regulations linking construction to the availability of supporting municipal services or schools. For example, an administrative complaint has been filed against Burlington County, New Jersey, for its failure to eliminate exclusionary zoning before seeking HCDA funds.<sup>159</sup> A similar attack has been made on the Parma, Ohio, application that HUD disapproved as inappropriate with existing housing needs.<sup>160</sup>

As the HCDA calls for a "realistic" description of annual goals, it might be argued that a HAP describing programmed low-income housing in the face of insurmountable legal obstacles is not "realistic." Such a syllogistic approach would permit either HUD or a litigant to utilize the Secretarial review provisions dealing with the need for compliance with the "requirements" of the Act.<sup>161</sup> Should HUD utilize this approach, it could result in either a denial or conditioning of funds on the elimination of such practices prior to the approval of the

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*Suggested Litigation Approaches*, 3 URBAN LAW 344 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *The Potential Resident Challenger*, *supra* note 136.

157. See, e.g., *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

158. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1973); Freilich & Ragsdale, *Timing and Sequential Controls — The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis - St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974).

159. 2 HOUSING & DEV. REP. CURRENT DEV. 1138-39 (1975); Potomac Institute, Memorandum 75-4, Apr. 24, 1975 (*reporting* *In re* Lawrence (filed Mar. 25, 1975)). The complaint was filed both with HUD and the regional planning commission. The commission passed a resolution that it would approve no HCDA applications in the absence of local approval of a housing allocation plan in conformance with that of the region. 9 CLEARINGHOUSE REV. 52 (1975). Suit has also been filed to enjoin HCDA funds from going to Willistown Township which was found by the Pennsylvania supreme court to be practicing exclusionary zoning in *Township of Willistown v. Chesterdale Farms, Inc.*, — Pa. —, 341 A.2d 466 (1975). *Johnson v. Chester County* (E.D. Pa., filed Dec. 30, 1975), *reported in* 9 CLEARINGHOUSE REV. 725 (1976).

160. See note 141 *supra*. See also *Cornelius v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio), *vacated and remanded*, 506 F.2d 1400 (6th Cir. 1974), *vacated and remanded*, 422 U.S. 1052 (1975).

161. See note 32 *supra*.

application. Litigation would seek a denial of all funds.

Another strategy, separate from the Act (although intricately related), would be to challenge restrictive provisions under state or federal due process and equal protection clauses, and state zoning enabling laws. This approach would mandate the steps necessary to meet the community's burden of producing its "fair share" of regional housing needs in the mold of *Mount Laurel*.<sup>162</sup> Relief in such a case would, in the first instance, require that the community rewrite its land use laws and regulations to eliminate such exclusions. Should that fail, litigation would seek to enjoin HCDA expenditure or condition expenditures on compliance, strike the restrictions down by court order,<sup>163</sup> order the establishment of a local housing authority where none exists, or require the utilization of all available federal subsidies.<sup>164</sup>

Where such remedies fail to achieve the desired objectives, for example because of an absence of subsidies, the court could establish performance standards geared to inclusionary zoning or to the adoption of land use laws or regulations that affirmatively assure the development of lower-income housing. Such a remedy could condition building permits or project approval on construction commitments to guarantee a certain percentage of lower-income housing either within a development or city,<sup>165</sup> or grant density variances in exchange for renting a percentage of

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162. 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975); see notes 127, 154 and accompanying text *supra*. Where racial exclusion is involved, claims might be based upon Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000(d) (1970), in the mold of *Evans v. Lynn*, 376 F. Supp. 327 (S.D.N.Y., 1974), *rev'd*, P-H EQUAL OPPORTUNITY IN HOUSING ¶13,712 (2d Cir. June 2, 1975), *rehearing en banc granted*, Potomac Institute, Memo 75-7 (Oct. 20, 1975) (standing granted to ghetto residents to challenge federal sewer and open space grants to exclusionary communities). *But see* Upper St. Clair Township v. Commonwealth, 13 Pa. Commw. 71, 317 A.2d 906 (1974) (holding Dep't of Community Affairs lacked authority to deny park funds to alleged exclusionary community), and *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972) (holding it improper to enjoin funding of Model Cities program due to discrimination in public housing site selection program and continued noncompliance with a district court's orders and decisions). While *Upper St. Clair Township* is on appeal, the *Gautreaux* decision might be distinguished since the HCDA represents a comprehensive community development program, and discrimination directly affecting such a strategy would be closely related to the entire HCDA scheme. *Contra*, *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969) (federal school funds to be terminated where used to support a program "infected by a discriminatory environment").

163. See *Gautreaux v. Chicago Housing Authority*, 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd sub nom. Gautreaux v. City of Chicago*, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974) (suspension of local governmental approval for public housing sites).

164. See discussion of potential performance relief in Kushner, *supra* note 92.

165. This is similar to subdivision regulations requiring a dedication of land for green space or parking.



units at a below market rate.<sup>166</sup> If all else fails, including the potential of forcing a repayment of HCDA funds, it may well be necessary for a court, in a sense, to place the community under receivership so that planning and development can be carried out apart from political resistance. This most extraordinary remedy, although it has not yet been ordered in any case, has certainly been judicially intimated.<sup>167</sup>

It should be understood that the distinction in both litigation strategies and potential remedies between racial exclusion and economic exclusion may disappear under the *Mount Laurel* decision.<sup>168</sup> Where exclusion can be shown to be racially motivated or where the effect of the exclusion falls more substantially upon a racial minority, remedies could also be achieved in a federal forum under notions of equal protection and the civil rights statutes.<sup>169</sup>

Another strategy that might be used to deal with exclusionary land use

166. For a discussion of inclusionary zoning devices see H. FRANKLIN, D. FALK, & A. LEVIN, *supra* note 10; Kleven, *Inclusionary Ordinances, Policy & Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A.L. REV. 1432 (1974); Rose, *From the Legislatures: The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) Is the Latest Technique of Inclusionary Zoning*, 3 REAL ESTATE L.J. 176 (1974); Note, *Mandatory Dedication of Land by Land Developers*, 26 U. FLA. L. REV. 41 (1973). *But cf.* Massachusetts Advisory Comm. to the United States Comm'n on Civil Rights and the Massachusetts Comm'n Against Discrimination, Route 128, Boston's Road to Segregation 62 (1975); Davidoff & Davidoff, *supra* note 156. *See also* Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U.L. REV. 37 (1974).

167. *Compare* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975), *and* Kushner, *supra* note 92, *with* Milliken v. Bradley, 418 U.S. 717 (1974), Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), *and* Garrett v. City of Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1971), *plan ordered*, 357 F. Supp. 925 (E.D. Mich. 1973), *aff'd in part*, 503 F.2d 1236 (6th Cir. 1974), *modified*, 394 F. Supp. 1151 (E.D. Mich. 1975) (amended relief previously granted in 1973). It might be argued that in the face of a constitutional violation, where inclusionary zoning would be ineffectual due to economic impossibility (*i.e.*, free land would not permit a low-income housing project to be feasible) and subsidies are non-existent, that communities might be ordered to enact laws requiring developers to create subsidies by increasing rents for higher income tenants, exacting license taxes on industry to provide subsidies, or even to exempt a bond issue from the electorate if all else fails.

168. *See* note 127 *supra*.

169. *See, e.g.*, United States v. Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). *But see* Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), *rev'g* 380 F. Supp. 228 (N.D. Ohio 1974), *cert. filed*, 44 U.S.L.W. 3428 (Jan. 15, 1976), *reported in* P-H EQUAL OPPORTUNITY IN HOUSING ¶13,736 (1976); Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). *See also* Kushner & Werner, *supra* note 60; Sloane, *The Changing Shape of Land Use Litigation: Federal Court Challenges to Exclusionary Land Use Practices*, 51 NOTRE DAME LAW. 48 (1975); Note, *The Potential Resident Challenger*, *supra* note 136; notes 56-67 and accompanying text *supra*.

practices would be the application of NEPA. Requiring the preparation of an environmental impact statement on the over-all application would disclose the legal impediments to achieving the HAP and community development goals. Thus it would force the consideration of litigation to eliminate restrictive land use practices.<sup>170</sup>

Finally, where the excluding community has proposed displacement of low-income groups (which may have been in residence prior to the vogue of development and exclusion) the URA<sup>171</sup> may provide a means to halt displacement, order a relocation study, and, where that study discloses impediments to the provision of replacement housing, order the construction of housing as a "last resort."<sup>172</sup>

Analogous to an application for CD funds in the face of exclusionary land use practices is the situation in which an exclusionary community avoids seeking its CD entitlement in order to avoid any responsibility to provide lower-income housing. Such an intention, especially if racially motivated, would be subject to judicial relief.<sup>173</sup>

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170. See the NEPA strategy discussion at notes 233-69 and accompanying text *infra*.

171. 42 U.S.C. § 4601 (1970).

172. See the URA strategy discussion at notes 76-95 and accompanying text *supra*.

173. Some eligible recipients have failed to apply for entitlement funds due to the responsibility to plan for lower-income housing. See *Community Dev. Digest*, June 3, 1975, at 1-3, suggesting that a majority of the communities failing to apply did so to avoid low-income housing and from the expectation that there would be an increase in withdrawals from the program in future years. Several of the entitled communities electing to forego HCDA funds have been the sites of embittered litigation over discriminatory land use practices. *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 96 S. Ct. 560 (1975) (refusal to rezone for lower-income housing); *Yarborough v. City of Warran*, 383 F. Supp. 676 (E.D. Mich. 1974) (upholding referendum repeal of urban renewal program against allegations of racial motivation to avoid housing responsibilities); *Garrett v. Hamtramck*, 335 F. Supp. 16 (E. D. Mich. 1971), *plan ordered*, 357 F. Supp. 925 (E. D. Mich. 1973), *aff'd in part*, 503 F.2d 1236 (6th Cir. 1974), *further relief ordered*, 394 F. Supp. 1151 (E. D. Mich. 1975) (displacement of minority residents in absence of relocation housing). In addition, the hesitation of smaller nonentitlement cities may have prevented some counties from securing the requisite number of municipalities needed for an urban county application. Compare 42 U.S.C. § 5302(a)(6) (Supp. IV, 1974), *with id.* § 5306. It has been reported that the refusal of Runnemedede in Camden County and Belleville and South Orange in Essex County, New Jersey, to accept low-income housing precluded those counties from receiving HCDA funds. 3 HOUSING & DEV. REP. CURRENT DEV. 233-34 (1975). While there is no requirement in the HCDA that entitlement communities must apply for funds, and courts are unlikely to imply such a responsibility, there remains the possibility, albeit a limited one, that such inaction in the presence of other factors may constitute a claim by which affirmative relief might be attained. *But cf.* *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975). Such factors might include (a) a history of exclusion of the poor or minorities especially where there has been prior litigation, (b) a motive to avoid poor or minority residents, or (c)

#### D. Housing Assistance Plans and Considerations of Site Selection

A significant body of case law has developed over the past decade that requires HUD to consider the effect that its site selection practices (in the location of low- and moderate-income housing) have upon existing and developing concentrations of racial minorities.<sup>174</sup> Repeated examples of low-income housing concentration followed by judicial relief led to the recognition of a national policy for dispersal of lower-income housing

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denial of funds from HUD on the basis of either exclusionary land use restrictions or the existence of a practice of discrimination as revealed in the CD application. It is reported that Baltimore County, Maryland, was dropped as an entitlement urban county due to the absence of legal authority to carry out renewal activities. It is interesting to note that those powers were voluntarily relinquished in 1972 in a dispute over whether the county had to provide low-income housing. *Community Dev. Digest*, Apr. 8, 1975, at 2. Obviously, litigation could not be brought under the HCDA due to the lack of provisions mandating application. First, where the community has engaged in practices that were intended to, or had the effect of, exclusion of poor and minorities, including the maintenance of exclusionary land use restrictions, a *Mount Laurel* type of suit could be brought to terminate such restrictive practices and mandate certain performance standards. See notes 162-69 and accompanying text *supra*. Where racial discrimination is involved federal civil rights statutes and the equal protection clause provide an additional remedy. *Cf. Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir.), *cert. granted*, 96 S. Ct. 560 (1975); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (5th Cir. 1972); *Kennedy Park Homes Assoc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). Even in the absence of racial motivation or effect, when a community fails to achieve its "fair share" burden, a court may compel the filing of a CD application to obtain funding of adjunct facilities, rehabilitate existing available units, and facilitate maximum utilization of federal subsidies through the HAP and subsidy allocation formulas. Secondly, where racial considerations are present, constitutional and statutory civil rights remedies would be available to compel performance standards that would eliminate the motivation to avoid HCDA benefits and responsibilities in the hopes of not having to accept lower-income minority residents. See notes 56-67 and accompanying text *supra*. Certainly a CD application could be part of judicial relief where appropriate. These same remedies should lie where an application has been filed and rejected by HUD due to exclusionary practices. Such a denial of funds would merely exacerbate the need for lower-income housing and hamper attainment of regional allocation plan goals so that while HUD cannot supervise local performance in the absence of HCDA funding, the judiciary could monitor and make necessary orders to eliminate discriminatory practices and see that HCDA funds are properly utilized.

174. *Gautreaux v. Chicago Housing Authority*, 503 F.2d 930 (7th Cir. 1975). *aff'd sub nom. Hills v. Gautreaux*, 96 S.Ct. 1538 (1976) (for a further history of the litigation see *Rubinowitz & Dennis*, *supra* note 110); *Graves v. Romney*, 502 F.2d 1062 (8th Cir. 1974), *cert. denied*, 420 U.S. 963 (1975); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972); *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969). See generally Note, *Racial Discrimination in Public Housing Site Selection*, 23 *STAN. L. REV.* 63 (1970); 7 *URBAN L. ANN.* 336 (1974).

opportunities.<sup>175</sup> HUD officiated over the establishment of that policy when it issued "site selection criteria" regulations designed to assure the consideration of racial impacts generated by proposed projects.<sup>176</sup> This concept emerged as Congressional policy in the HCDA,<sup>177</sup> and is implemented in the HAP application requirement.<sup>178</sup> Even though Congress has affirmatively acted on this issue, it may still be necessary for concerned parties to make certain their HAPs are devoid of a racially impacting effect.

An obvious defect that might be anticipated when reviewing a community's HAP would be the proposal of a housing project that would have the effect of economic or racial impaction. This problem may be obscured in some areas such as Columbia, South Carolina,<sup>179</sup> by HUD's requirement that projects be identified by census tract, for in some communities projects could be located in different parts of census

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175. See, e.g., *Crow v. Brown*, 332 F. Supp. 382, 390 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972).

176. 24 C.F.R. § 200.700-710 (Subpart N, Project Selection Criteria). See also HUD's site selection regulations for assisted housing under Title II of the HCDA, 24 C.F.R. § 1273.103(j) (1975).

177. The Congress finds and declares that the Nation's cities, towns, and smaller urban communities face critical social, economic, and environmental problems arising in significant measure from — . . . the concentration of persons of lower income in central cities . . . . The primary object of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives — . . . (6) *the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spacial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income . . . .*

42 U.S.C. § 5301 (Supp. IV, 1974); 24 C.F.R. § 570.2(a)(6) (1975) (emphasis added).

178. No grant may be made . . . unless an application shall have been submitted to the Secretary in which the applicant . . . (4) submits a housing assistance plan which . . . (C) indicates the general locations of proposed housing for lower-income persons, with the objectives of (i) furthering the revitalization of the community, including the restoration and rehabilitation of stable neighborhoods to the maximum extent possible, (ii) promoting greater choice of housing opportunities and avoiding undue concentration of assisted persons in areas containing a high proportion of low income persons, and (iii) assuring the availability of public facilities services adequate to serve proposed housing projects . . . .

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

179. Comments of Midlands Welfare Rights Organization to the Central Midlands Regional Planning Council, Mar. 21, 1975. It has been reported that HUD has approved HAPs in the Boston area despite internal reviews indicating impaction. Potomac Institute, Inc., *The Housing Assistance Plan: A Non-Working Program for Community Improvement?* (Nov. 1975).

tracts having extremely diverse effects on existing concentrations. Thus, it may be essential to determine initially the specific location of proposed projects. It is suggested that a NEPA environmental impact statement, prepared on the over-all HCDA application, would both adequately disclose the location of proposed housing and be used as a vehicle to test the impacts of that location and alternative sites on a city-wide basis. Such a result would exceed even the congressional hopes that local officials consider site selection decisions on a comprehensive basis.<sup>180</sup> In addition, proposed impacting projects could be attacked under the Secretarial review provision calling for compliance with the provisions of the HCDA<sup>181</sup> or on constitutional and civil rights grounds.<sup>182</sup> Relief under these latter remedies should be limited either to the denial of all funds under the application or to affirmative relief to assure that the project will be built in a satisfactory location. Any middle ground that seeks merely the deletion of the proposed project would have serious negative impacts. If this approach were taken, the poor would again be denied what little housing opportunities available to them and, perhaps more importantly, the precedent could be set for communities to program unwanted projects for impacted sites to assure noncompletion. It should be understood that a prerequisite to carrying out our national dispersal policy is the aggressive opening of our suburbs and outer cities to their "fair share" of low-income housing production.

#### IV. PERFORMANCE STANDARDS

The next section of this Article will address problems that might be encountered after the initial approval of an adequate application. These problems could arise if a community failed to meet the program objectives and congressional goals contained in the HCDA and related legislation. HUD's regulations on performance standards in the areas of relocation, acquisition, equal opportunity and citizen participation<sup>183</sup> will be examined along with problems of maintaining local effort,

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180. For a discussion of the overall NEPA strategy see notes 233-69 and accompanying text *infra*.

181. See note 32 *supra*. In addition, HUD's noncompliance procedures provide a potential mechanism for correction. See notes 68-70 and accompanying text *supra*. HUD is considering such an approach in Buffalo, New York. 3 HOUSING & DEV. REP. CURRENT DEV. 781 (1976).

182. See notes 57-67 and accompanying text *supra*.

183. Final HUD Reg. § 570.900, 40 Fed. Reg. 24,710-11 (1975).

carrying out noneligible activities, failure to implement the HAP, failure to remove exclusionary land use restrictions, and failure to avoid impacted site selection practices. While HUD regulations require the filing of a comprehensive annual performance report touching many of these areas prior to the beginning of each fiscal year commencing with 1977.<sup>184</sup> Such belated reports may provide only a postscript to any program deficiencies given the extensive number of recipients and the limited resources available to HUD for application review and program monitoring.

### A. Relocation

HUD's regulations control relocation performance in an effort to guarantee proper relocation practices. These regulations require: (1) information regarding the reason for displacement and whether displacees are eligible for payments and assistance; (2) referrals to suitable housing with assistance to obtain the housing; (3) advisory services to help displacees adjust to the move; (4) benefits to be given to all eligible displacees; (5) coordination with other concurrent displacement programs; and (6) prompt claim determinations and an effective grievance mechanism.<sup>185</sup> HUD requires the maintenance of files on each displacee with claim and grievance forms attached.<sup>186</sup> In addition, HUD's regulations cover acquisition policies under displacement programs.<sup>187</sup>

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184. This report will contain information on the progress of activities, assessments of the program's effectiveness, information on the housing assistance provided, environmental reviews undertaken, as well as the citizen participation and public information programs carried out. Final HUD Reg. § 570.906, 40 Fed. Reg. 24,711-12 (1975). The annual performance report must be filed within the 30-day period prior to the submission of the next year's application and must be made available to local citizens. *Id.* § 570.300(d), 41 Fed. Reg. 4132-33 (1976). A performance report disclosing the failure to reach program goals creates a record upon which to challenge the following year's application.

185. *Id.* § 570.900(a), 40 Fed. Reg. 24,711 (1975).

186. *Id.* § 570.907(d), 40 Fed. Reg. 24,712 (1975). HUD has extended this requirement to cover all displacement even where the URA is inapplicable. *Id.*

187. Title III of the URA sets requirements for negotiation, acquisition and litigation. 12 U.S.C. §§ 4601, 4602, 4621-38, 4651-55 (1970). HUD's regulations indicate that Title III is applicable to the HCDA, and the regulations' performance standards simply call for local policy to comply with Title III. 24 C.F.R. §§ 570.303(e)(3), 570.900(b) (1975). HUD's regulations require the recipient to maintain files for each acquisition. These files include an invitation to accompany appraisers, the appraisal, statement of basis for the determination of just compensation, conveyance documents and the notice to surrender possession. *Id.* § 570.907(e). While Title III of the URA has been held not to be reviewable in the courts, the HCDA might now provide such a basis for review under the provision

For several reasons relocation deficiencies may dominate the list of potential problems encountered under the HCDA. First, no one, including HUD, has ever mastered the art of relocation planning and execution.<sup>188</sup> Secondly, HUD picked up the tab for relocation costs under prior displacement programs, while under the HCDA relocation benefits are an eligible cost paid totally by the recipient.<sup>189</sup> Thus, recipients may be motivated to minimize costs with the potential for a reduction in available assistance, services and, most importantly, the quality of replacement housing. There is absolutely no reason to anticipate significant improvement over the prior experiences with the mal-administration of relocation programs.<sup>190</sup> Planning will often fail both in analyzing the costs, availability and conditions of resources, and in correlating those resources with displacee needs. Concurrent displacement may not be sufficiently taken into account. Relocation agencies may ignore the potential for racial and economic impactation where whites take the opportunity to move to the outer city after relocation and minorities remain either in their traditional minority-dominated neighborhoods or move to areas undergoing rapid racial change. If the planning stage is improperly performed, relocation specialists will be unable to locate suitable replacement housing. Displacees may therefore be forced to select unsuitable housing, housing they cannot afford, or housing in economically and racially impacted neighborhoods.<sup>191</sup>

Where deficiencies are reported to HUD, the noncompliance procedures section of the HCDA can be utilized to deal with the

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requiring compliance with the provisions of the Act and calling for Secretarial review. See note 32 *supra*; cf. *Paramount Farms, Inc. v. Morton*, 527 F.2d 1301 (7th Cir. 1975); *Seeherman v. Lynn*, 404 F. Supp. 1318 (M.D. Pa. 1975); *Whitman v. State Highway Comm'n*, 400 F. Supp. 1050 (W.D. Mo. 1975); *Bethune v. United States*, 376 F. Supp. 1074 (W.D. Mo. 1972); *Barnhart v. Brinegar*, 362 F. Supp. 464 (W.D. Mo. 1973); *Martinez v. HUD*, 347 F. Supp. 903 (E.D. Pa. 1972); *Rubin v. HUD*, 347 F. Supp. 555 (E.D. Pa. 1972); *Will-Tex Plastics Mfg., Inc. v. HUD*, 346 F. Supp. 654 (E.D. Pa. 1972), *aff'd*, 478 F.2d 1399 (3d Cir. 1973). In addition, defects could be dealt with through the noncompliance procedures upon request to the Secretary. See notes 192-93 and accompanying text *infra*.

188. See notes 78, 85 and 94 *supra*.

189. 42 U.S.C. § 5305(a)(11) (Supp. IV, 1974); Final HUD Reg. § 570.200(a)(11), 40 Fed. Reg. 24,699 (1975).

190. See note 78 and accompanying text *supra*.

191. Such violations of the HCDA also constitute noncompliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 (1970). The remedy may be ordered under the URA litigation strategy. See notes 76-95 and accompanying text *supra*.

problem.<sup>192</sup> Under these provisions HUD must provide the recipient with notice and an opportunity for a hearing before an administrative law judge. After this hearing the Secretary can terminate or reduce payments, or request the Attorney General to sue for a recovery of payments or for injunctive relief.<sup>193</sup>

In summary, it can be anticipated that relocation under the HCDA will cease to be such a popular practice for a number of reasons. First, relocation costs make large-scale clearance prohibitively expensive. Secondly, displacement and demolition proposals can jeopardize the achievement of HAP goals. Thirdly, a tight housing supply can make relocation administration difficult and prone to delay by litigation. Fourthly, rehabilitation and preservation strategies should alleviate future needs to rely upon clearance for housing and urban development. Finally, community resistance to displacement will continue to present local government with confrontation on such proposals.<sup>194</sup>

### B. *Equal Opportunity in Performance*

HUD regulations include performance standards on equal opportunity that require the documentation of compliance with equal opportunity guidelines<sup>195</sup> and the maintenance of files on that documentation.<sup>196</sup> Where equal opportunity violations are encountered,

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192. 42 U.S.C. § 5311 (Supp. IV, 1974); 24 C.F.R. § 570.913 (1975).

193. 42 U.S.C. §§ 5311(a), (b) (Supp. IV, 1974); 24 C.F.R. §§ 570.913(a), (b) (1975). Decisions of HUD's administrative law judge are reviewable by the United States Court of Appeals in the circuit with jurisdiction over the recipient. 42 U.S.C. § 5311(c) (Supp. IV, 1974); 24 C.F.R. § 570.913(o) (1975). It is unclear whether it would be more desirable to pursue litigation under the URA or attempt to encourage HUD to institute non-compliance proceedings. The HUD procedures guarantee substantial delay, while temporary injunctive relief via the URA might be available more quickly should irreparable harm be threatened. Although it is conceivable that HUD could by-pass its slow mechanism by referring the matter to the Attorney General for litigation, the prospects for swift relief are dubious. 42 U.S.C. § 5311(b) (Supp. IV, 1974); 24 C.F.R. § 570.913(a) (1975).

194. A survey conducted by the National Association of Housing and Redevelopment Officials has found that almost 30% of its sample of HCDA recipients were intentionally avoiding displacement activities due to the high costs of relocation. National Ass'n of Housing & Redev. Officials, *NAHRO Reports on Its Monitoring of the First Year of the Community Development Program*, 32 J. HOUSING 445, 447 (1975).

195. 24 C.F.R. § 570.900(c) (1975).

196. *Id.* § 570.907(f). The documentation must cover actions undertaken on the following issues: (a) methods of administration to assure that persons were not excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under funded activities, *id.* § 570.900(c)(1)(i); (b) criteria used for selecting public facilities



litigation could be undertaken under the equal protection clause and applicable civil rights statutes, including the HCDA provisions.<sup>197</sup> HUD has also promulgated nondiscrimination compliance regulations wherein the recipient will be provided an opportunity to achieve compliance. If the recipient fails to comply HUD can refer the matter to the Attorney General or for a hearing under the HUD noncompliance procedures.<sup>198</sup>

### C. Citizen Participation

The performance standards under the HUD regulations make several important program requirements.<sup>199</sup> First, a local citizen participation plan must be developed and made public.<sup>200</sup> Secondly, the recipient

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sites, *id.* § 570.900(c)(1)(ii); (c) plans for overcoming the effects of conditions which resulted in limited participation, in the past, under similar programs, *id.* § 570.900(c)(1)(iii); (d) promotion of equal employment opportunity, *id.* § 570.900(c)(1)(iv); (e) encouragement of the development and enforcement of fair housing laws, *id.* § 570.900(c)(2)(i); (f) prevention of discrimination in housing and related facilities developed and generated with HCDA assistance and in the lending practices of recipients or lending institutions, *id.* § 570.900(c)(2)(ii); (g) assurance that land use and development programs funded by the HCDA provide greater housing opportunities throughout the planning area, *id.* § 570.900(c)(2)(iii); and (h) promotion of equal opportunity in housing through site selection, *id.* § 570.900(c)(2)(iv).

To assist HUD in monitoring, recipients must retain the following data: (a) demographic data by census tract including population, with breakdowns by race, ethnic group, sex, age and head of household, *id.* § 570.907(f)(1); (b) racial, ethnic and gender data showing the extent to which these categories of persons have participated in, or benefited from funded programs and activities, *id.* § 570.907(f)(2); (c) information on affirmative action in employment including upgrading, demotions, transfers, recruitment or recruitment advertising, layoffs, terminations, compensation and selection for training, *id.* § 570.907(f)(3); and (d) good-faith efforts to identify, train and/or hire lower-income residents of the project area and to utilize business concerns which are located in or owned in substantial part by persons residing in the area of the project, *id.* § 570.907(f)(4). This provision is designed to help implement § 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701(u) (1970), *as amended*, (Supp. IV, 1974). See 24 C.F.R. § 135 (1975) (Employment Opportunities for Businesses and Lower Income Persons in Connection with Assisted Projects).

197. See notes 57-67 and accompanying text *supra*.

198. 24 C.F.R. §§ 570.912-13 (1975). For a discussion of HUD's noncompliance procedures see notes 192-93 and accompanying text *supra*.

199. Final HUD Reg. § 570.900(d), 40 Fed Reg. 24,711 (1975).

200. Under this plan, the recipient must specify a timetable and indicate: (a) how information will be disseminated; (b) when, in the initial planning process, hearings will be held; (c) when and how citizens will have an opportunity to participate in the development of the application; (d) how technical assistance will be provided to assist citizen participants in understanding program requirements; and (e) the nature and timing of citizen participation in the development of any future community development program amendments, including reallocation of funds and designation of new activities

must afford an adequate opportunity to permit "citizens likely to be affected by community development and housing activities, including low and moderate income persons, . . . to articulate needs, express preferences about proposed activities, assist in the selection of priorities, and otherwise participate in the development of the application, and have individual and other complaints answered in a timely and responsive manner."<sup>201</sup> In addition, the annual performance report must describe the progress made toward meeting these performance standards.<sup>202</sup> In accord with these requirements recipients must maintain records that contain accounts of public hearings and narratives, and must keep other records outlining the information and opportunities for participation provided.<sup>203</sup>

The performance standards would seem to assure a continuous, ongoing citizen participation mechanism for overall community development to permit participation in amendments<sup>204</sup> and future development projects, as well as local ongoing mechanisms relating to specific ongoing projects. In a most unexpected ruling, HUD even went so far as to determine that the performance requirements apply to pre-application citizen participation and that initial application certification relating to citizen participation could be attacked if the performance standards were not complied with.<sup>205</sup> Inequities, however, still

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or locations. *Id.* § 570.900(d)(1), 40 Fed. Reg. 24,711 (1975). In this new regulation HUD has clarified its position that such plans and timetables must be made public.

201. *Id.* § 570.900(d)(2), 40 Fed. Reg. 24,711 (1975) (suggesting bilingual opportunities for citizen participation where feasible). Previously, the regulation had called for the recipient to develop a local process that would permit this described quality of participation to occur. 24 C.F.R. § 570.900(d)(2) (1975). HUD explained that the amendment and deletion was "to avoid unintended limitations beyond the requirements of this section." 40 Fed. Reg. 24,693 (1975). The impact of the amendment is unclear but it can be expected that recipients will argue that they need not create or recognize ongoing citizen groups. In rebuttal citizens might argue that without a local process of some sort beyond occasional public meetings, meaningful input and participation is an impossibility and that HUD's regulation was intended only to indicate its role and was not meant to define the mechanism.

202. 24 C.F.R. § 507.906(b)(6) (1975).

203. *Id.* § 507.907(b) (1975).

204. Suit was filed in Edison, New Jersey, alleging the failure to include citizens in a HUD-ordered application amendment. *NAACP v. Hills*, Civil No. 75-1461 (D.N.J., filed Aug. 22, 1975), reported in 9 CLEARINGHOUSE REV. 422 (1975). The suit was subsequently settled. See 3 HOUSING & DEV. REP. CURRENT DEV. 865 (1976). A similar claim has been filed in *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), reported in *Community Dev. Digest*, Aug. 19, 1975, at 1-2.

205. U.S. Dep't Housing & Urban Dev., Special Issues Committee, reported in 2 HOUSING & DEV. REP. 999 (1975).

may exist.<sup>206</sup>

Where the recipient has failed to live up to citizen participation performance standards, or has failed to fully comply with amendment procedures, HUD may be requested to intervene under its non-compliance procedures.<sup>207</sup> As a litigation strategy, complainants may sue HUD and the recipients to force compliance with the Act, for the citizen participation requirements clearly exist for the benefit of the affected citizens.<sup>208</sup>

#### D. Failure to Implement the Housing Assistance Plan

Given the questionable success of the Workable Program requirements in expanding the supply of low-income housing,<sup>209</sup> it should be expected that HCDA recipients will have a difficult time meeting their HAP goals for lower-income housing production. Litigation strategies at this stage may take several forms. First, if the failure to carry out the plan is racially motivated, the constitutional and statutory civil rights remedies would be available to compel compliance and to establish performance orders.<sup>210</sup> Where the failure to expand the housing supply occurs in the face of demolition and displacement, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970<sup>211</sup> would provide a remedy to enjoin displacement<sup>212</sup> and possibly to compel construction of housing with HCDA funds under the

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206. While lower-income residents must be involved in specific project proposals, there is no such requirement for the overall planning group. This poses the danger of having a "blue ribbon" committee that may not represent or be sensitive to the interests of the poor. See note 99 and accompanying text *supra*. It should also be noted that any amendments to the initial application must contain a certification indicating that the amendment conformed with all citizen participation requirements applicable to the initial application, including the two hearing processes. Final HUD Reg. § 570.305(a), 40 Fed. Reg. 24,702 (1975).

207. See notes 192-93 and accompanying text *supra*.

208. Cf. *Marshall v. Lynn*, 497 F.2d 643 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 970 (1974); *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973). It would be advisable to name HUD as a party to permit mandamus jurisdiction to force compliance with the Act. 28 U.S.C. § 1361 (1970).

209. 42 U.S.C. § 1451 (1970). See *Ley v. Shell Oil Co.*, Civil No. C-71 1645 RFP (N.D. Cal. 1972); *LeGates, The Workable Program; Litigation and More Administrative Complaints Bringing Results*, 5 CLEARINGHOUSE REV. 137 (1971); National Housing & Dev. Law Project, *The Workable Program*, 4 CLEARINGHOUSE REV. 243 (1970).

210. See notes 57-67 and accompanying text *supra*.

211. 42 U.S.C. § 4601 (1970).

212. See notes 76-95 and accompanying text *supra*.

“Houser of Last Resort” provisions.<sup>213</sup>

It might be expected that some noncompliance will result from the lack of federal housing subsidies, in which case citizens should encourage HUD to have communities amend their activities to devote more CD funds to housing rehabilitation programs. The failure to carry out the goals may not amount to noncompliance in some cases, but when bad faith or lack of diligence is responsible HUD could use its noncompliance procedures to compel more activity.<sup>214</sup> In addition, suit could lie under the mandamus statute to compel HUD and the recipient to comply with the Act and carry out their responsibilities.<sup>215</sup> This may be particularly relevant where noncompliance occurs in the face of the HUD subsidy moratorium.

Considering the large number of outer-city HCDA recipients, it may also be expected that implementation of the Act will not purge recipients of prior exclusionary land use practices. Remedies would exist under HUD’s nondiscrimination<sup>216</sup> and noncompliance<sup>217</sup> procedures, constitutional and statutory civil rights requirements,<sup>218</sup> a *Mount Laurel* type of exclusionary land use suit,<sup>219</sup> and through a suit to mandate HUD and the recipient to comply with the Act.<sup>220</sup>

#### E. Avoidance of Program Requirements

Avoidance occurs if a recipient uses devices to avoid arduous or costly responsibilities under the Act. The potential for avoidance is perhaps

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213. See Final HUD Reg. § 570.201(f), 41 Fed. Reg. 2768 (1976).

214. See notes 192-93 and accompanying text *supra*.

215. See note 208 and accompanying text *supra*. It should also be noted that recipients might engage in illegal site selection impacting practices despite representations contained in an approved HAP. Despite the disclosures and protections contained in the various regulations (see notes 174-82, 195-98 and accompanying text *supra*), if projects and housing opportunities have the effect of causing further concentration of either low-income or minority persons, relief would lie under HUD’s nondiscrimination procedures (see note 203 and accompanying text *supra*) as well as litigation strategies. Where racial impaction has occurred or is threatened, one could proceed on constitutional and statutory civil rights bases. See notes 57-67 and accompanying text *supra*. In the case of economic impaction, as well as racial impaction, HCDA requirements would be violated and HUD and the recipient could be compelled to comply with the Act.

216. See note 198 and accompanying text *supra*.

217. See notes 192-93 and accompanying text *supra*.

218. See notes 57-67 and accompanying text *supra*.

219. See notes 162-69 and accompanying text *supra*.

220. See note 208 and accompanying text *supra*.

greatest in the areas of compliance under NEPA and the URA.<sup>221</sup> This is due to the huge costs involved that must be assumed, for the most part, by the recipient, and due to the distaste that agencies have for such red tape.<sup>222</sup> The most overt example of avoidance would occur if a recipient undertook a strict area-wide code enforcement program in a deteriorated housing area prior to submitting an application calling for acquisition and clearance in the same area. The effect would, in many cases, result in displacement; displacement that would not be assisted under the URA due to the absence of acquisition and federal assistance. At the application approval stage only demolition and inexpensive land acquisition would remain as an impediment to development or land marketing, thus greatly reducing the costs of the activity as well as the time required for execution. Such attempts at avoidance have, unfortunately, already proceeded beyond the hypothetical stage.

In Charlotte, North Carolina, for example, while HCDA application proceedings were going on, the city began systematic code enforcement in a low-income black area of the city. The section of the city was slated for activity under the city's plan, and it was alleged that the city planned only to acquire existing "good quality" housing, as the deteriorated housing would be vacated by code enforcement. This would have permitted the city to later amend its plans to acquire the abandoned or condemned housing while paying relocation benefits only to those in good housing. When these allegations were brought to the attention of the city council of Charlotte, the city council ordered the payment of URA benefits to all persons displaced by code enforcement as well as acquisition.<sup>223</sup>

Another avoidance mechanism may emerge where a recipient

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221. 42 U.S.C. § 4601 (1970).

222. See generally *Hearings on Red Tape*, *supra* note 2.

223. This is permitted under HUD's relocation regulations. U.S. DEP'T OF HOUSING & URBAN DEV., HUD HANDBOOK, RELOCATION POLICIES AND PROCEDURE, 1371.1 rev. ch. 1, ¶1-6(b)(2) (Feb. 20, 1975). A less pronounced example of such tactics occurred when Macon, Georgia, acquired the right of way for a highway improvement project with general revenue sharing funds and now proposes to use HCDA funds to put in new water facilities and fire hydrants. *Goolsby v. Simon*, Civil No. 75-74 MAC (M.D. Ga., Mar. 1, 1976); interview with Mrs. Mary B. Asbell, Director, Community Dev. Dep't. in Macon, Ga., May 1, 1975; 9 CLEARINGHOUSE REV. 131 (1975). In granting the government's motions for summary judgment, the *Goolsby* court ruled that the CD expenditures were de minimus. Despite HUD's regulations making URA applicable to any CD expenditures, the court held the activity was too slight to convert the entire project to the status of a "federal program" requiring URA applicability. *Goolsby v. Simon*, Civil Action No. 75-74 MAC (M.D. Ga., Mar. 1, 1976). See also note 227 *infra*.

negotiates with a private developer interested in acquiring occupied land for development activities. The city might urge the developer to acquire the property on the open market in the absence of URA benefits and acquisition policy compliance, with the city promising to condemn certain parcels if the developer was unable to secure the purchase of the desired land. This practice allegedly occurred recently in San Diego with regard not to HCDA funds, but in avoidance of the California Relocation Assistance Law<sup>224</sup> requirements that are modeled after the URA. The California Legislature responded with an amendment to the state relocation law to cover such tactics.<sup>225</sup>

Such practices clearly constitute an evasion of the law,<sup>226</sup> and courts are unlikely to permit the observance of form over substance.<sup>227</sup> Therefore, a URA litigation strategy should provide compliance under the illustrations of avoidance provided here.<sup>228</sup> Where avoidance practices are directed at minority groups, a strategy under constitutional and statutory civil rights provisions should prove effective.<sup>229</sup> In

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224. CAL. GOV'T. CODE. ANN. §§ 7260-74 (Deering Supp. 1975).

225. The amendment covers acquisition "by a public entity or by any person having an agreement with or acting on behalf of a public entity." *Id.* § 7260.

226. HUD apparently takes the position that the URA applies where displacement results from any land acquisition for a CD funded activity, regardless of how the specific acquisition is financed. For example, city acquisition in contemplation of a future CD funded project would be covered. Housing Affairs Letter 6, June 13, 1975 (citing HUD's amended regulations of June 9, 1975); see Final HUD Reg. § 570.602(a), 40 Fed. Reg. 24,708 (1975).

227. *Cf.* Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972) (decision to not seek federal funds for a small highway segment that ran through a city park to avoid difficulties in compliance with environmental and protective parklands statutes); Mathews v. Massell, 356 F. Supp. 291 (N.D. Ga. 1973). See also *La Raza Unida v. Volpe*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974) (potential for utilizing federal funds required compliance with federal highway requirements).

More subtle instances of avoidance may go unremedied in the courts. In Macon, Georgia, the city used general revenue sharing funds (State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 1221-64 (Supp. II, 1972)) to displace residents for a proposed street widening and highway improvement project, subsequently using HCDA funds to provide water and sewage components for the project. The district court held that the participation was insufficient to require URA application to the entire project and that the URA is inapplicable to general revenue sharing. *Goolsby v. Simon*, No. 75-74 MAC (M.D. Ga., Mar. 1, 1976) (decision rested on a ruling that NEPA was inapplicable to general revenue sharing). See *Carolina Action v. Simon*, 389 F. Supp. 1244 (M.D.N.C. 1975), *aff'd*, 522 F.2d 295 (4th Cir. 1975) (*per curiam*) (NEPA not applicable to general revenue sharing).

228. For a discussion of the URA strategy, see notes 76-95 and accompanying text *supra*.

229. See notes 57-67 and accompanying text *supra*.

addition, where such discrimination occurs, the HUD discrimination compliance procedures may provide a route to a remedy,<sup>230</sup> as will the noncompliance procedures, wherever avoidance has occurred.<sup>231</sup> Also, the strategy of seeking mandamus against HUD and the recipient should provide a method to compel compliance with the avoided requirements.<sup>232</sup> There would also appear to be an action maintainable under common law fraud.

## V. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

The National Environmental Policy Act of 1969 (NEPA) requires that prior to taking action on a federal or federally assisted project that significantly affects the environment, the responsible official prepare an environmental impact statement (EIS) that carefully examines the impacts of the proposed action and surveys the various alternatives to the project.<sup>233</sup> The HCDA complements NEPA by requiring the latter's policies to be "effectively implemented."<sup>234</sup> The following section will demonstrate that not only must recipients comply with NEPA on specific project proposals, but it is advisable that they also review their entire application to determine whether potential impacts of the totality of proposed activities are significant and, more importantly, whether alternatives exist that require either the preparation of an EIS on the total plan or a reviewable declaration that an EIS need not be prepared.

Primary responsibility for deciding whether to prepare an EIS and for deciding whether a prepared statement is adequate lies with the recipient. HUD's role is essentially that of an independent commentator on the decisions made by the recipient.<sup>235</sup> Given the huge cost of NEPA

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230. See note 198 and accompanying text *supra*.

231. See notes 192-93 and accompanying text *supra*.

232. See note 208 and accompanying text *supra*.

233. 42 U.S.C. §§ 4321-47 (1970), *as amended*, 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975).

234. 42 U.S.C. § 5304(h)(1) (Supp. IV, 1974). For a detailed examination of § 104(h) of the HCDA and its implementing regulations see Note, *HUD's NEPA Responsibilities Under the Housing and Community Development Act of 1974: Delegation or Devogation?*, 10 URBAN L. ANN. 179 (1975) [hereinafter cited as Note, *HUD's NEPA Responsibilities*].

235. See Note, *HUD's NEPA Responsibilities*, *supra* note 234, at 187. See generally Comment, *Controversial NEPA Implementation at HUD: Shifting Environmental Review Responsibilities to Local Grant Applicants*, 4 ENVIRONMENTAL L. REP. 10,193 (1974). The delegation authorized by the HCDA has been attacked by the United States Environmental Protection Agency as causing delays and for encouraging or forcing localities to plan activities that will not require significant environmental analysis. In

compliance, communities may be motivated to make findings that no EIS is required.<sup>236</sup> If it is determined that an EIS is required, it will most assuredly be prepared from a self-interested point of view, placing the community's proposed project in the best light possible.

It is very hard to clearly define what activities require an EIS preparation<sup>237</sup> but some examples are worth identifying. Highway improvements,<sup>238</sup> urban renewal or NDP activities,<sup>239</sup> housing production,<sup>240</sup> surcharges on freight rates,<sup>241</sup> and even the sale by HUD of foreclosed houses<sup>242</sup> all have been held to require the preparation of an EIS. The Council on Environmental Quality (CEQ) has interpreted the requirement very broadly.<sup>243</sup> The CEQ definition may not be definitive but it does indicate that NEPA's applicability is extensive. The courts reviewing NEPA have frequently called for strict compliance with its requirements and have in many cases leaned toward a finding of applicability where the law has not been clearly to the contrary.<sup>244</sup> In light of NEPA's policy, CEQ's broad interpretation of its coverage, and

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addition, EPA is rejecting more statements prepared under the HCDA than under any other federal program. 6 ENVIRONMENT REP. CURRENT DEV. 1074 (1975). Poor efforts at compliance with NEPA plagued HUD even before the 1974 delegation of authority. COMPTROLLER GENERAL, ENVIRONMENTAL ASSESSMENT EFFORTS FOR PROPOSED PROJECTS HAVE BEEN INEFFECTIVE — DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (1975).

236. See Note, *HUD's NEPA Responsibilities*, *supra* note 234, at 201-02.

237. See generally F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* 56-141 (1973); U.S. Dep't of Housing & Urban Dev., *Environmental Reviews at the Community Level*, Oct. 1975; Yarrington, *The National Environmental Policy Act*, 4 ENVIRONMENTAL REP. Monograph No. 17, at 22 (1974).

238. See, e.g., *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971).

239. See, e.g., *Jones v. District of Columbia Redev. Land Agency*, 499 F.2d 502 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975); *Businessmen Affected Severely by Yearly Action Plans, Inc., v. City Council*, 339 F. Supp. 793 (D.D.C. 1972). In *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), plaintiffs seek coverage of an expanded code enforcement program. *Community Dev. Digest*, Aug. 19, 1975, at 1-2.

240. Compare *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973) (EIS required on 138-unit project), with *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973) (no EIS required on 272-unit project), and *Echo Park v. Romney*, 3 E.R.C. 1255 (C.D. Cal. 1971) (no EIS required on 66-unit project).

241. *United States v. SCRAP*, 412 U.S. 669 (1973), *rev'g on other grounds*, 346 F. Supp. 189 (D.D.C. 1972).

242. *Brotherhood Blocks Ass'n v. HUD*, 5 E.R.C. 1867 (E.D.N.Y. 1973).

243. See 40 C.F.R. § 1500.6(a) (1975).

244. See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir.) *cert. denied*, 412 U.S. 931 (1972); *Environmental Defense Fund v. TVA*, 468 F.2d 1164 (6th



the interpretation of applicability received in many courts, it can be said that in HCDA litigation the courts are likely to find NEPA's requirements binding. HUD has developed certain threshold points where projects must receive EIS treatment.<sup>245</sup> These are only guides, however, and the courts may not be willing to recognize projects below these threshold points as exempt from NEPA.<sup>246</sup> In the past, where projects were deemed to require preparation of an impact statement, courts did not hesitate to grant injunctive relief and assure NEPA compliance.<sup>247</sup>

HUD has taken the position that the preparation of an impact statement on the application itself would be inconsistent with section 104(h) of the Act.<sup>248</sup> This position, however, may not stand. While section 104(h) refers to releasing funds for specific "projects," it should not be read to *sub silentio* amend or limit NEPA to projects as opposed to the overall activities impact.<sup>249</sup> If anything, section 104(h) provides

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Cir. 1972); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971); *National Helium Co. v. Morton*, 455 F.2d 650 (10th Cir. 1971); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

245. 24 C.F.R. § 58.25 (1975). This regulation requires that an EIS be prepared (unless there is specific HUD waiver based upon HUD preparation under another program) on any project to "remove, demolish, convert or emplace a total of 500 or more dwelling units" or where water and sewer facilities will serve "undeveloped areas of 100 acres or more."

246. In *Goolsby v. Simon*, Civil No. 75-74-MAC (M.D. Ga., Mar. 1, 1976), reported in 9 CLEARINGHOUSE REV. 131 (1975), the court found that HCDA funded water and sewer improvements made in conjunction with a general revenue sharing funded street widening project did not subject HUD or the city to responsibility for compliance with NEPA. See Note, *HUD's NEPA Responsibilities*, *supra* note 234, at 185 n.44.

247. *Conservation Council v. Froehlke*, 473 F.2d 664 (4th Cir. 1973); *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973); *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1972); *Environmental Defense Fund v. TVA*, 468 F.2d 1164 (6th Cir. 1972); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972); *District of Columbia Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972) *cert. denied* 409 U.S. 1000 (1972); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971). A test of the effectiveness of congressional delegation of NEPA duties may arise when Dallas, Texas, defends a finding that no EIS was required on a major code enforcement and demolition project. *Bois D'Arc Patriots v. City of Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975), reported in *Community Dev. Digest*, Aug. 19, 1975, at 1-2 (alleging a reduction of low-income housing will result in increased costs, evictions and housing abandonment).

248. 24 C.F.R. § 58 (1975). HUD's position has been taken at face value without analysis in *Ulster Community Action Comm., Inc. v. Koenig*, 402 F. Supp. 986, 991-92 (S.D. N.Y. 1975). This issue has also been raised in *Bois D'Arc Patriots v. Dallas*, Civil No. 3-75-0906-D (N.D. Tex., filed July 23, 1975).

249. See *United States v. SCRAP*, 412 U.S. 669 (1973); Note, *HUD's NEPA Responsibilities*, *supra* note 234, at 191-93; cf. *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).

HUD with some discretion to permit project expenditures where other proposed projects fail to meet the NEPA process requirements, as opposed to forcing HUD into writing off all HCDA funds when a community fails to carry out its responsibilities. An argument to support HUD's position is that the overall NEPA analysis runs counter to the intent of HCDA: to eliminate red-tape and the traditional federal bureaucratic requirements. This argument falters, however, upon a simple reading of section 104(h), which declares that NEPA requirements are not to be diminished. If Congress seriously intended to replace community development red-tape with a pure revenue sharing scheme, certainly NEPA analysis would have been clearly eliminated or diluted—something Congress was unwilling to do.

A "project only" view of NEPA applicability was taken by the AEC regarding its fast breeder nuclear reactor research program. The government argued unsuccessfully in *Scientists' Institute for Public Information, Inc. v. AEC*<sup>250</sup> that impact statements on individual reactor construction projects would meet NEPA requirements. The court held that in view of the magnitude of planning and research involved in the program, an environmental analysis should be made of the research project *and* the overall program policy. The analogy to a community development application can be made with little difficulty. First, the EIS would be appropriate for an applicant's identification of need for community development activity.<sup>251</sup> The HCDA application represents a total analysis and program to deal with a recipient's community development needs. This plan lends itself extremely well to an overall environmental analysis, something that may be impossible

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250. 481 F.2d 1079 (D.C. Cir. 1973); *accord*, *American Elec. Power Sys. v. Sierra Club, consolidated with Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), *cert. granted*, 96 S.Ct. 772 (1976); *See* Comment, *Comprehensive Planning Under NEPA: D.C. Circuit Widens Applicability of Program Impact Statement*, 5 ENVIRONMENTAL L. REP. 10118 (1975); Comment, *Planning Level and Program Impact Statements Under The Environmental Policy Act: A Definition Approach*, 23 U.C.L.A.L. REV. 124 (1975). *See also* *National Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), where the Department of Interior prepared a programmatic EIS on western grazing permits but wrongly failed to prepare EIS's for subdistricts. The Interior Department has agreed not to appeal the litigation and will prepare 212 statements over the next 13 years. 6 ENVIRONMENT REP CURRENT DEV. 388-89 (1975); *see* *Kelly v. Butz*, 404 F. Supp. 925 (W.D. Mich. 1975). *But cf.* *Nucleus of Chicago Homeowners v. Lynn*, 524 F.2d 225 (7th Cir. 1975), *aff'g* 372 F.Supp. 147 (N.D. Ill. 1973), *cert. denied*, 96 S.Ct. 1462 (1976) (no overall EIS required for scattered site public housing program).

251. For a discussion of the problems of consistency of needs see notes 22-30 and accompanying text *supra*.

on a project-by-project basis in terms of identifying priorities and the consideration of alternative projects.<sup>252</sup> It is ironic that HUD previously recognized that certain comprehensive activities would require overall assessment: "Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance."<sup>253</sup>

Secondly, it is with respect to the issue of program priorities that NEPA applicability makes imminent sense.<sup>254</sup> HUD recognized, prior to passage of the HCDA, that environmental considerations include such items as "land use planning, site selection and design, . . . urban congestion, overcrowding, displacement and relocation resulting from public or private action[,] . . . urban blight, code violations, and building abandonment, urban sprawl, urban growth policy. . . ."<sup>255</sup> These environmental issues are implicitly related to the goals and provisions of the HCDA. A CD program formulated with an eye to HUD's present interpretation of section 104(h) could ignore significant problems and potentially result in an ever-increasing deterioration of environmental quality despite HCDA expenditures. Pictures of such phenomena are easy to formulate. Such a result might be caused by the failure to address the cause of blight where slum clearance merely results in the poor being forced into overcrowded conditions in surrounding neighborhoods, with increasingly deferred maintenance by citizens awaiting stabilized conditions (never seeing themselves as significant contributors to the pathology). While the slum clearance activities might in a vacuum pass NEPA and HCDA muster, such activities, in the absence of supporting code enforcement and adjunct blight prevention programs, may be counter-productive. A similar result might occur if a community, in an effort to appease constituents and vocal political factions, spreads a little CD money to every neighborhood and census

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252. It might be noted that California's Environmental Quality Act (CEQA), modeled after NEPA, has been administratively determined to require the preparation of an environmental impact report on CD applications. Letter from California Attorney General's Office to the Office of Planning & Research, Cal., Dec. 6, 1974. The city of San Francisco, believing that NEPA also applies to the application despite the HUD regulations, prepared a joint EIS/EIR under CEQA and NEPA and assured compliance with both laws. Draft Environmental Impact Report and Statement for the Community Development and Housing Proposal for HUD Block Grant, EE 75.3, City of San Francisco, Calif., Jan. 17, 1975.

253. See 39 Fed. Reg. 6816, 6819 (1974).

254. See the discussion of the appropriateness of activities at notes 31-42 and accompanying text *supra*.

255. See 39 Fed. Reg. 6816 (1974).

tract. It may never be realized that the level of activity is so thin that the net effect could cause residents to defer making repairs and await subsidized rehabilitation or relocation only to observe exacerbated blight and the neighborhood falling apart at an ever increasing speed. A careful look at the level of proposed activities might suggest a need for concentrated treatment and such analysis could best be done on an application or city-wide basis. The major benefits of NEPA are the identification of potential impacts<sup>256</sup> and the consideration of alternative strategies including project abandonment.<sup>257</sup> When HUD, since 1954 in the Workable Program requirements, later in the Community Renewal Program, and now in the HCDA, argues so strenuously for comprehensive planning, it is ironic that it is in a posture of resisting NEPA applicability when it would be beneficial to the planning process.<sup>258</sup>

A third situation in which a NEPA analysis would be beneficial would be when an application is so vague as to the location and extent of projects that the public and decision makers would have to guess at the proposed activity and its potential effects. An impact statement review process would have to disclose the nature and extent of proposed activities to permit an analysis of impacts and the consideration of alternatives.<sup>259</sup>

Fourthly, where an applicant is engaged in a discriminatory housing policy<sup>260</sup> the NEPA procedure might aid in the disclosure of that process and provide a vehicle for attack. The EIS on the overall application may well provide an extremely powerful tool to define and measure the extent of the discriminatory treatment. But more importantly, it could provide a vehicle to review and control the final decisions on whether to proceed with planned activities or to restructure the application to affirmatively address the affected community development need. Certainly contractions of the housing supply or displacement into

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256. See, e.g., *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir.), *cert. denied*, 412 U.S. 908 (1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

257. See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir.), *cert. denied*, 412 U.S. 931 (1972); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir.), *cert. denied*, 409 U.S. 1000 (1972).

258. HUD also opposed federal land use legislation in 1975 for budgetary reasons. 5 ENVIRONMENT REP. CURRENT DEV. 1823 (1975).

259. See note 32 *supra*.

260. See notes 57-95 and accompanying text *supra*.

overcrowded or substandard units are blighting influences and environmental impacts worthy of extended study.

Lastly, the EIS may be effective in dealing with an applicant's exclusionary land use practices.<sup>261</sup> Requiring the preparation of an environmental impact statement on the over-all application would disclose the legal impediments to achieving the HAP and community development goals and thus force the consideration of mitigating measures such as the elimination of restrictive land use practices.

Were a court to order that NEPA applied at the application stage the relief would be an injunction pending the preparation of an environmental impact statement and review<sup>262</sup> with possible exceptions for activities essential for public health reasons.<sup>263</sup> There is also authority for the affirmative order to prepare an impact statement.<sup>264</sup>

The environmental impact statement would have to either include or refer to available studies, or make new studies if existing ones are dated or not trustworthy.<sup>265</sup> This strategy would fulfill the requirement of studies "generally available" in the community.<sup>266</sup> If impact statements were made the needs of the community would become clear. A statement of needs in the HCDA application at variance with an impact statement would be "plainly inconsistent" with generally available facts and data, requiring disapproval of the application.

No attempt will be made in this Article to indicate the depth required in environmental impact reporting on the various types of community development projects that will be undertaken. However, simply filing

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261. See notes 156-82 and accompanying text *supra*.

262. See note 247 *supra*.

263. *Conservation Soc'y v. Secretary of Transp.* 508 F.2d 927 (2d Cir. 1974), *vacated*, 423 U.S. 809 (1975); *Jones v. District of Columbia Redev. Land Agency*, 499 F.2d 502 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975); *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973).

264. See, e.g., *First Nat'l Bank v. Richardson*, 484 F.2d 1369 (7th Cir. 1973); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972).

265. See, e.g., *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Rankin v. Coleman*, 394 F. Supp. 647 (E.D.N.C. 1975); *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105 (D.N.H. 1975); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd sub nom. Keith v. California Highway Comm'n*, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

266. The NEPA strategy also raises the specter of forum shopping as well as defendant shopping since NEPA claims may be raised in state or federal court. In addition, suing the recipient and not HUD will often produce a defendant inexperienced with both NEPA and the federal court review and litigation process (see Note, *HUD's NEPA Responsibilities*, *supra* note 234, at 198-200), while naming HUD in an action to enjoin the release of HCDA funds will result in a defense by the U.S. Attorney and possibly the Justice Department.

and circulating an "environmental impact statement" does not end either the recipient's responsibilities or those of the reviewing court. Cases uniformly have held that the EIS is not a "paper tiger" but rather must adequately and comprehensively outline impacts and alternatives to proposed actions.<sup>267</sup>

NEPA can be used in litigation as a mechanism to assure that the impacts and alternatives of proposed activities are comprehensively studied. Where a recipient proposes CD activities that have the effect of deferring realistic solutions to blight and deterioration, proposes projects in the absence of strategies to avoid the future spread of blight, contracts the communities' lower-income housing supply with the potential for overcrowding, or simply ignores the communities' real community development needs, NEPA stands as the best tool for forcing official analysis of the issues.

Where community development activities are proposed which pose the threat of environmental harm, either through the potential for secondary growth and blight production or in the context of immediate harm to the community through contraction of the housing supply, to the extent that courts will be willing to go in substituting their judgment for that of the decisionmakers who, under the HCDA, are the recipients becomes an issue. While the "inappropriate" provision of the Secretarial review procedures can be used to attack proposed harmful activities,<sup>268</sup> NEPA provides a means to require that issues be comprehensively studied and that decisions reached be consistent with NEPA and not "arbitrary" or "capricious."<sup>269</sup>

### CONCLUSION

The goals of Title I of the Housing and Community Development Act of 1974 can best be achieved with an aggressive attitude on the part of recipients to comply with the letter of the law and, more importantly, to seriously address the housing and community development needs of all

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267. See, e.g., *Environmental Defense Fund v. Froehke*, 473 F.2d 346 (8th Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). A question may remain, however, whether the EIS as employed by an HCDA recipient will remain an effective vehicle in forcing the responsible official to make a good faith effort toward limiting any adverse effects of HCDA-aided projects on the environment. See Note, *HUD's NEPA Responsibilities*, *supra* note 234, at 198-202.

268. See notes 32-35 and accompanying text *supra*.

269. See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir.), *cert. denied*, 412 U.S. 931 (1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

segments of its population. This Article is designed to alert HUD, the legal community, HCDA recipients, and Title I block grant beneficiaries to potential violations of the HCDA or problems that may occur in the Act's implementation. The emphasis on litigation is designed to demonstrate the seriousness of a callous approach toward strict compliance with the law. The summary discussion of remedies is intended to define the scope of judicial relief rather than to recommend how to proceed under the various suggested litigation strategies. It should be recognized that whether the Act provides a reviewable standard under which a community's performance can be tested and modified will depend on a number of factors in each case. When the application is being reviewed on its face, success may well depend upon the availability of studies clearly presenting inconsistency with the submitted application. Where a specific strategy is attacked, success will probably turn on how outrageous the community's actions are in comparison to existing needs and alternative programs. Total ignorance of lower-income resident needs may be remediable, but courts are unlikely to second guess a strategy chosen by the applicant to deal with its recognized ills. Most notably, the Act will be of greatest use to those desiring to attack exclusionary tactics of suburban communities where there exists a continued policy of refusing to address the need for lower-income housing opportunity.

The author believes, based on the litigation experience under the prior law, that community development litigation is generally too costly and too complex to be expected in a significant number of communities. However, more legal challenges have been made in the first year of the HCDA than under the past decade of urban renewal and categorical grants. While this increase may subside as the newness of the HCDA wears off, success by the initial litigants may have the opposite result, especially given the growth in the sophistication of citizens concerned with community development issues. This litigation will probably be effective, if at all, in at least compelling the promulgation of additional HUD review standards for all recipients, and in encouraging most recipients to adopt court-established principles rather than risk the costs of protracted litigation. The newest litigation tool in the area of community development, and one which perhaps will provide recipients the greatest fear, is NEPA. Except in those states with state versions of the federal environmental law<sup>270</sup> most recipients have no

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270. Hagman, *NEPA's Progeny Inhabit the States — Were the Genes Defective?*, 7 URBAN L. ANN. 3 (1974); Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 ENVIRONMENTAL L. REP. 50090 (1973).

experience at either environmental assessment or legal defense.<sup>271</sup> The costs of an attack can be sizeable, not to mention the delay.<sup>272</sup> Even where challengers fail to succeed on the final merits, the trauma of litigation can often stymie plans due to frustration and inflating project costs. If litigation under the HCDA finds a receptive ear in the courts, the widespread effect may be to encourage communities to engage in low profile activities, aimed at minimal compliance with program requirements, perfunctory environmental assessment and relocation assistance — in short, evading major problems and major controversies wherever possible. Unfortunately, such a result may have the negative effect of returning us to the same pitfalls encountered under categorical grants where communities once again are constrained to ignore their priority problems. On the other hand, if recipients see their responsibilities at the outset and plan accordingly, they should find their program defensible and immune from judicial interference. Certainly it must be recognized that the potential for litigation under the HCDA will be based entirely on actions of the applicants. The applicants will not be able to take shelter under the “rubber stamp” approval of HUD and must therefore aggressively seek to comply with the letter and spirit of the Act.

Once a controversy turns to the courts, parties in community development litigation carry a very serious burden: the burden to make community development work rather than sacrificing the potential for improvement of urban life that might have been available with HCDA funds. The law, in many respects, is quite rigid and litigation strategies often lead toward mandating the loss of funds as where, for example, the subject of the lawsuit is to prove that the application was arbitrarily approved. In such cases parties would do well to consider negotiation that may tend to be much more flexible than federal court orders. Such a situation might arise if a community programs no residential rehabilitation in the face of a large stock of vacant but substandard dwelling units and a housing need that could not be satisfied by the most imaginative of housing assistance plans. It may well be that under a proper set of facts a court would find application approval improper and enjoin the expenditure of HCDA funds. This counter-productive remedy could be avoided if the parties could negotiate a mid-year

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271. See Note, *HUD's NEPA Responsibilities*, *supra* note 234, at 198-200.

272. *Cf. Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1032 (D.C. Cir. 1974), *rev'd sub. nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (environmental suit stated to have consumed over 4,500 attorney hours).



amendment of the CD application to make a greater commitment to rehabilitation. This type of negotiation strategy, at all stages of the process, can be far more imaginative,<sup>273</sup> challenging and productive than an unwavering litigation strategy that could spell serious delay and a lost opportunity to improve this nation's communities.

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273. See generally Huffman, *The Opportunities for Environmentalists in the Settlement of NEPA Suits*, 4 ENVIRONMENTAL L. REP. 50001 (1974). An example of an innovative and successful negotiation strategy is the community development litigation in Edison, New Jersey. It is reported that a consent order has been filed in the case which challenged citizen participation and program priorities under the community's \$152,000 grant. The city has agreed to change its participation procedures and has guaranteed that in its second year expenditures of \$100,000 for site improvements in certain residential neighborhoods will be made and that \$70,000 would be spent for rehabilitation grants and loans during 1976 and 1977. In addition, the city will spend \$4,000 to study possible improvement of a public housing project and will make certain improvements including the installation of new siding and a new sewer line regardless of the outcome of the study. *NAACP v. Hills*, Civil No. 75-1461 (D.N.J., filed Aug. 22, 1975), reported in 9 CLEARINGHOUSE REV. 422 (1975), consent order and settlement reported in 3 HOUSING & DEV REP CURRENT DEV. 865 (D.N.J., Jan. 14, 1976).