

PRRAC

Poverty & Race Research Action Council

3000 Connecticut Avenue NW • Suite 200 • Washington, DC 20008 • 202/387-9887 • Fax 202/387-0764
www.prrac.org

AN ANALYSIS OF THE *THOMPSON v. HUD* DECISION

The background of the Thompson decision

The case of *Thompson v. HUD* is the latest in a series of federal civil rights lawsuits challenging segregation in public housing. The first major case, *Gautreaux v. Romney*, was filed in 1966 and reached the U.S. Supreme Court in 1976. *Gautreaux* established the proposition that HUD shared responsibility with local defendants for intentional housing segregation, and could be required to promote regional housing integration as part of a comprehensive court remedy. Since that time, several landmark cases have reached similar results in the Courts of Appeals, notably *Walker v. HUD* (the Dallas desegregation case) and *NAACP v. City of Yonkers*. Then, in the early to mid 1990s, with a new Democratic administration at HUD committed to reducing poverty concentration and racial segregation in America's cities, a comprehensive effort was made to forge constructive settlements in up to seventeen remaining cases, Baltimore among them.

Thompson v. HUD was filed in 1994 on behalf of a class of African American public housing residents. Like several other public housing desegregation cases, the *Thompson* case was triggered by the demolition of a high rise public housing development, with plans to locate replacement housing in neighborhoods with similar levels of segregation. And like many of the other cases, as part of the challenge to this policy of rebuilding the ghetto, the plaintiffs included a larger historical claim that the city and housing authority, with HUD approval, acted in concert over many decades to create a deeply segregated system of public housing, with project siting decisions largely driven by community opposition in white neighborhoods, in the context of a central city housing authority with limited jurisdiction over housing development outside its own city limits.

In 1996, a portion of the *Thompson* case was resolved in a "Partial Consent Decree" allowing the demolition and redevelopment of several public housing developments to proceed. However, while the Partial Consent Decree was being implemented (and litigated), the larger historical claims continued to be developed, with the case culminating in a month-long trial in December 2003.

The Trial

The trial in *Thompson*, held over four weeks in December 2003, presented a detailed chronology of evidence on the history of public and assisted housing in Baltimore, beginning before *Brown v. Board of Education*, and continuing into the early 1990s, to the mayoral administration of Kurt Schmoke (now dean of the Howard Law School).

Public housing residents also testified about their own efforts to find housing outside of high poverty areas, and about the harms of segregation.

Plaintiffs' expert witnesses in the case included historian Arnold Hirsch (Professor at the University of New Orleans), who presented his historical study of the development of public housing in Baltimore, the response to the *Brown* case by housing officials after 1954, and the interplay of federal and local policy decisions (for a related study see Professor Hirsch's historical study for PRRAC, "The Last and Most Difficult Barrier: Segregation and Federal Housing Policy in the Eisenhower Administration, 1953-1960," at www.prrac.org; Karl Tauber (Professor Emeritus, University of Wisconsin), who presented segregation indices for Baltimore and Baltimore public housing (including dissimilarity, isolation and centralization indices) and explained the time sequence of the siting of public housing in Baltimore, decade by decade, based on neighborhood demographics, and a comparison of the location of family and elderly public housing over time; Professor Rolf Pendall (Department of City and Regional Planning at Cornell University), whose testimony included a demographic analysis of neighborhoods of location of public housing, assisted housing, and Section 8 vouchers, by race, poverty level, unemployment, educational attainment, and employment opportunity; Joe Nathanson (Former Director of Research of Baltimore Metropolitan Council), who had conducted a planning assessment of suitability of sites in predominantly white areas that were not developed for family public housing; and Professor John Powell (Director of the Kirwan Institute for the Study of Race and Ethnicity at Ohio State University) (and a PRRAC board member), who presented an analysis of access to opportunity in the metropolitan area, the harms of segregation, and the development of public housing in the context of larger regional patterns, including HUD's failure to pursue regional approaches. Several of the reports and tables presented by plaintiffs' experts are available at the Maryland ACLU's website, including plaintiffs' Proposed Findings of Fact. See www.aclu-md.org.

Overview of the decision

The Court's decision places a strong emphasis on the need for regional solutions to the increasing segregation and racial isolation of Baltimore, and faults HUD for failing to promote regional solutions over several decades. At the same time, the Court refuses to fault the city officials on whose watch the case was brought, finding that their options were limited outside the city, and that they were primarily trying to improve low income minority neighborhoods. The decision places responsibility fully on HUD, the only party that can significantly influence a future regional housing plan for Greater Baltimore. However, the suburban counties and the state of Maryland are not parties to the lawsuit, and an important question going forward will be the willingness of these non-parties to participate, and whether HUD can either successfully demand their participation, or alternatively, implement a remedy without their participation.

HUD's failure to promote regional housing solutions

The Baltimore decision breaks no new legal ground – it relies heavily on a 1987 Court of Appeals decision in Boston, *NAACP v. HUD*, written by then Judge Stephen Breyer (now a U.S. Supreme Court Justice), which itself was a restatement of principles that have appeared in numerous other cases coming in the 20 years following the passage of the Fair Housing Act – including *Gautreaux* and *Yonkers*. Similarly, the facts recited by the Court in *Thompson* are little different than the role played by HUD in any number of metropolitan areas.

The Court's liability finding against HUD is based on the duty to affirmatively further fair housing, set out in §3608 of the Fair Housing Act. Thus, the Court observes that "Title VIII imposes upon HUD an obligation to do *something more than simply refrain from discriminating*," and that "through regionalization, HUD had the practical power and leverage to accomplish desegregation through a course of action that Local Defendants could not implement on their own, given their own jurisdictional limitations."

The Court's assessment of HUD's failure to act regionally will seem familiar to fair housing advocates everywhere. Indeed, HUD's actions in Baltimore are characteristic of an agency that has consistently avoided challenging the prerogatives of exclusionary suburban jurisdictions, and has instead continued to funnel substantial low income housing resources into central cities. Consider some of the Court's findings in this section of the opinion in light of your own region:

"During the 1990s, 89% of public housing units developed with HUD's support in the Baltimore Region were in Baltimore City. "

"it appears that the relative expense and lack of affordability of housing outside of Baltimore City may present a significant barrier to Section 8 voucher-holders who might wish to pursue private housing in the Baltimore Region but outside the city."

"56% of the Region's Section 8 voucher-holders resided in Baltimore City."

"the majority--more than 67 percent--of the City's Section 8 voucher holders live in census tracts that are 70 to 100 percent Black."

"HUD itself recognized that one of the 'lessons learned' from its HOPE VI program is that housing vouchers are 'not viable replacement housing options' in tight housing markets like Baltimore's."

"The 4,869 units that were demolished [under HOPE VI] were, by-and-large, replaced by lower density housing in virtually the same sites."

The Court bolsters its ruling against HUD with 160 pages of "Supplemental Findings" that chart HUD's complicity in decades of decisions that effectively restricted low

income minority families to segregated neighborhoods in the central city. In conclusion, the Court announces that

“It is high time that HUD live up to its statutory mandate to consider the effect of its policies on the racial and socio-economic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African-American public housing residents in the Baltimore Region.”

Overall, the decision in *Thompson* should serve as a wake-up call to HUD. Even though it managed to avoid a major finding of liability in the 1990s, with the creative settlements in over a dozen major cases, the agency has a deep reservoir of future liability for the kinds of failures documented in the Baltimore.

No liability for local defendants

The Court was far more lenient in assessing the liability of the City of Baltimore and the Baltimore City Housing Authority (HABC), finding that city officials in the 1990s had few regional options and could not be faulted for using federal funds to try and improve conditions in poor inner city neighborhoods – even though this activity was part of the pattern of increasing segregation in the region’s housing.

Thus, in regard to the question of continuing discrimination in the 1990s, the Court gave substantial weight to testimony of former Mayor Kurt Schmoke and former Housing Authority Director Jim Henson. In response to evidence that siting decisions were made in response to community opposition that was based at least in part on race, the Court found that the mayor and housing authority director were primarily focused on improving housing conditions for African American residents and their communities, and thus could not be said to be discriminating. Relying on these justifications, the court rejected plaintiffs’ liability claims under both the Constitution and the more lenient standards of the Fair Housing Act.

The Court’s analysis of local government officials’ actions is unusual in that it seems to combine the analysis of intentional discrimination and discriminatory impact (which are usually treated as two separate bases for liability), and it also seems to rely in part on the racial identity of the defendants in assessing their motives. Although the Court notes correctly that a public official’s lack of personal “bias” is not dispositive of whether, for example, they may be liable for acting knowingly in response to the racially motivated political opposition of others, there appears to be underlying ambiguity on this point throughout the decision. Also, the Court’s decision does not fully explain why the local defendants should not share some liability for building new public housing adjacent to formerly “de jure” black projects or why the HABC consistently failed to develop new housing in predominantly white neighborhoods despite opportunities to do so. Again, the Court’s findings were largely based on the testimony of the mayor and housing authority director that they were acting in the best interests of low income African American families and working to revitalize poor communities.

Again, the Court also stressed the powerlessness of the local defendants to effect any change on a regional level, since, as the court assumed (despite some evidence to the contrary), their jurisdiction was limited to the city of Baltimore:

The Court finds Local Defendants' reasons for focusing their efforts primarily within the City, as opposed to considering options throughout the Baltimore MSA, understandable and reasonable. On balance, these policies were based upon choices made (in recent years by officials answerable to an African-American majority within the City) to use limited resources for the maximum benefit for all of the citizens of Baltimore City. The City government had no realistic options whereby it might have devoted its public revenues on projects outside of its jurisdiction by virtue of financial and political realities. It is perfectly obvious that, as a practical matter, Local Defendants did not have the ability to affect regionalization that Federal Defendants had.

Overall, these fact findings will have little precedential impact outside of Baltimore, but the practical effect of the court's findings will be to make it more difficult to force the local defendants to participate in whatever remedy the Court and HUD design. But these defendants nonetheless have a continuing obligation under the Fair Housing Act to affirmatively further fair housing, and they are also still subject to the obligations of the Partial Consent Decree.

What's next: the remedy stage

The challenge now for HUD and the other parties in Baltimore will be to develop a comprehensive remedy in a case where the other major regional players (the suburban counties and the state) are not formal parties to the lawsuit. Such a remedy is attainable: there is much that HUD can do to encourage and require state and county participation, and there are also a range of remedial steps that can be taken that do not involve the participation of county government. We should also learn from some of the lessons of the desegregation settlements of the 1990s to develop a more effective set of remedies in the Baltimore region.

Judge Garbis has scheduled remedial hearings to begin on July 18th in Federal Court. The hearings are expected to last 1-2 weeks. Judge Garbis also appointed a "Housing Settlement Advisory Panel," to be co-chaired by Stephen Sachs, who has been serving as chair of the community advisory board for the case, and the current special master, Anne Perkins. The Settlement Advisory Panel has no formal authority, but has been authorized to appoint other members and engage in factfinding as needed. It is possible that the Panel will hold informal hearings and visit one or more sites of prior remedy implementation. Judge Garbis also urged the parties (HUD and the plaintiffs) to reach a negotiated settlement, and he referred settlement negotiations to Magistrate Judge James Bredar. Both plaintiffs and defendants are scheduled to submit confidential settlement proposals in the near future.

PRRAC
February 2005