Duquesne Law Review

Volume 10 | Number 2 Article 12

1971

Civil Rights - Housing Law - Effects of Racial Concentration in Renewal Area

Thomas A. Koza

prevent the dissemination of adverse and prejudicial publicity, and will further insulate the judicial process.

Groppi lacked sound constitutional foundation. The Court, through its misapplication of precedent, and its unconvincing analysis of the traditional alternative remedies other than the change of venue, showed that it had failed to go to the core of the community prejudice problem. The risk of community prejudice in misdemeanor cases is slight. When community prejudice does occur, as it allegedly did in *Groppi*, the change of venue possesses no inherent superiority over other procedures in correcting the harm that may be done to the right to an impartial trial. When press coverage has been so intense, and of such scope as to imperil the fairness of a misdemeanor trial, moving the trial to another county is unlikely to result in a less prejudiced jury.[33] Changing the venue will only serve to bring the same publicity problems to the new courtroom, where the defendant must rely on the same traditional procedures that the Court found insufficient.

Norman K. Clark

CIVIL RIGHTS—HOUSING LAW—EFFECTS OF RACIAL CONCENTRATION IN RENEWAL AREA—The United States Court of Appeals for the Third Circuit has held that the Department of Housing and Urban Development's approval of an urban renewal plan, by concentrating on land use factors without inquiry into the effects of the type of housing on racial concentration, does not comply with the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968.

Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809 (3d Cir. 1970).

Plaintiffs were white and Negro residents, businessmen and representatives of private civic organizations in the East Poplar Urban Renewal Area of Philadelphia. They brought this action against the Department of Housing and Urban Development (HUD) seeking an injunction

after the trial, including the following: prior criminal record of the accused, existence or contents of confessions, performance of examinations or accused's refusal to submit to them, identity and testimony of potential witnesses, possibility of a plea of guilty to the offense charges or to a lesser offense, and any opinion as to accused's guilt or innocence or the merits or evidence of the case. *Id.*

33. Case Comment, 80 HARV. L. REV. 180, 183-184 (1966).

against the issuance of a contract of insurance or guaranty, and against the execution or performance of a contract for rent supplement payment for Fairmount Manor. Fairmount Manor is a section 221(d)(3)[1] apartment project which was to be constructed in the East Poplar Urban Renewal Area. The original urban renewal plan contemplated redevelopment of Fairmount Manor primarily for single-family owner-occupied homes. HUD, however, approved a change in the plan to one which contemplated section 221(d)(3) dwellings with rent supplement[2] assistance by following what it called the "red line" procedure.[3]

Plaintiffs contended that the location of a section 221(d)(3) project with rent supplements on the site chosen would have had the effect of increasing the already high concentration of low income Negro residents in the East Poplar Urban Renewal Area. Plaintiffs further contended that HUD, in reviewing and approving this type of project on the site chosen, had no procedures for considering, and did not consider, its effect on racial concentration in that neighborhood and the City of Philadelphia as a whole.

The district court dismissed plaintiffs' complaint and held that HUD did not abuse its discretion in deciding that a change to a section 221(d)(3) rent supplement housing project was not a material change in the urban renewal plan, and in approving the change under a "red line" procedure without requiring a public hearing.[4] The United States Court of Appeals for the Third Circuit,[5] however, held that the procedures which HUD followed did not comply with the Housing Act of

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1. Housing Act of 1954 § 221(d)(3), 12 U.S.C. § 17151(d)(3) (Supp. V, 1969). This type of housing project is designed to assist private industry in providing housing for low and moderate income families, and provides that HUD may insure mortgages on housing owned by eligible sponsors for the entire replacement cost of the project.

2. Housing and Urban Development Act of 1965 § 101, 12 U.S.C. § 1701s (Supp. V, 1969).

3. Shannon v. United States Dept. of Housing and Urban Dev., 436 F.2d 809, 815 (3d Cir. 1970). The "red line" procedure was promulgated by a memorandum from the HUD Assistant Regional Administrator dated December 29, 1966. This memorandum sets forth an informal procedure for approving minor changes in an urban renewal plan, and establishes standards to be used to determine whether a proposed change will require a public hearing. The memorandum provides:

> Since all red pencil changes are changes to the renewal plan, they must be reviewed by the Planning Branch. Here is where the Regional Office determines:
> (1) Whether the change constitutes a material alteration in a basic element of the Plan; and
> (2) Whether or not the change is acceptable to us from a planning viewpoint.

4. Shannon v. United States Dept. of Housing and Urban Dev., 305 F. Supp. 205 (E.D. Pa. 1969).

5. 436 F.2d 809 (3d Cir. 1970).

1949[6] and the applicable sections of the Civil Rights Acts of 1964[7] and 1968.[8]

Under section 101(c) of the Housing Act of 1949,[9] the local public agency must submit to the Secretary of HUD a "workable program for community improvement"[10] before HUD can enter into any contract for federal financial aid or guarantee any mortgage.[11] A public hearing must be held before any land is acquired by the local public agency.[12] HUD has no regulations specifying the time or manner for conducting a public hearing, but it recognizes that a change in an urban renewal plan may require a new public hearing.[13] HUD further requires that the local public agency submit a Report on Minority Group Considerations[14] to show compliance with the requirement of a "workable program for community improvement." Title VI of the Civil Rights Act of 1964 prohibits discrimination in federally assisted housing, and directs the Secretary of HUD to prevent discrimination in housing.[15] Title VIII of the Civil Rights Act of 1968 directs the Secretary to promote fair housing throughout the United States.[16]

In defending its exercise of this responsibility, HUD contended that land use controls were the determinative factors, and since the proposed change to a section 221(d)(3) project with rent supplements was not a basic change in land uses, it could be made under the "red line" procedure. Plaintiffs' contention was that many factors other than land use must be considered in determining whether an urban renewal plan is part of a "workable program for community improvement." They argued that the original plan with resident home ownership would create a racially balanced environment. They further argued that a change to a section 221(d)(3) rent supplement housing project would

6. 42 U.S.C. § 1441 *et seq.* (1964).
7. Title VI, §§ 601-605, 42 U.S.C. §§ 2000d to 2000d-4 (1964).
8. Title VIII, §§ 801-819, 42 U.S.C. §§ 3601-3619 (Supp. V, 1969).
9. 42 U.S.C. § 1451(c) (1964).
10. 436 F.2d at 813 *citing* 42 U.S.C. § 1451(c) (1964).
11. *Id.*
12. Housing Act of 1949 § 105(d), 42 U.S.C. § 1455(d) (1964). The court noted that the purpose of this section is to give the public an opportunity to discuss, scrutinize, and participate in the local public agency's urban renewal plan before the agency enters into a contract for federal financial aid. 436 F.2d at 813.
13. 436 F.2d at 813 *citing* the Urban Renewal Handbook, RHA 7206.1, ch. 3 (1968). This Handbook is published by HUD for internal departmental use.
14. *Id.*
15. §§ 601, 602, 42 U.S.C. §§ 2000d, 2000d-1 (1964).
16. §§ 801, 808e, 42 U.S.C. §§ 3601, 3608(d)(5) (Supp. V, 1969).

cause racial concentration since other low income housing projects were already located in the neighborhood.

The court of appeals rejected HUD's contention, stating that exclusive concentration on land use factors without any determination of the social factors involved in the type of housing selected was prohibited since 1964. Thus, the court recognized the true dimensions—social and economic—of the national housing problem, and set aside HUD's administrative decision for failing to consider the relevant social factors.

The problem of racial concentration, the court reasoned, was the relevant social factor to be considered by HUD. The court stated that discrimination could result from "undue concentration of persons of a given race, or socio-economic group, in a given neighborhood. . . . Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy."[17]

No federal courts have dealt with the problem of the effects of racial concentration in housing as discrimination. The Arizona Court of Appeals, however, held that the racial character of the neighborhood surrounding the proposed project cannot be ignored in choosing a low income housing site.[18] Two federal courts have recognized that public housing site location is relevant to the issue of discrimination, but those cases involved an intention by state agencies to perpetuate racial concentration.[19] The court in *Shannon* noted that the lack of evidence showing discriminatory site selection was irrelevant and considered the effects of racial concentration as discrimination.

Discrimination in housing encompasses a wide range of conduct, both governmental and private. Judicial enforcement of racially restrictive covenants by state[20] and federal[21] courts has been prohibited. A municipal housing commission's refusal to admit Negroes to a low-cost housing project has been found discriminatory.[22] A city's refusal to grant rezoning essential to the construction of a low-income housing project has been held to be discrimination.[23] Private racial discrimina-

17. 436 F.2d at 820-821.
18. El Cortez Heights Residents and Property Owners Ass'n v. Tucson Housing Auth., 10 Ariz. App. 132, 457 P.2d 294 (1969).
19. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969).
20. Shelley v. Kraemer, 334 U.S. 1 (1948).
21. Hurd v. Hodge, 334 U.S. 24 (1948).
22. Jones v. City of Hamtrack, 121 F. Supp. 123 (E.D. Mich. 1954).
23. Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969). *See also* Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1969).

tion in the sale or rental of any property has been struck down.[24] In addition, a number of discriminatory practices in the sale, rental, financing and brokerage services of housing are prohibited by Title VIII of the Civil Rights Act of 1968.[25]

The decision in *Shannon* expands the scope of the policy against discrimination in housing by recognizing that mere racial concentration can in effect be discriminatory. This appears to be a logical extension in view of the duty imposed on HUD to take affirmative action to eliminate discrimination in federally assisted housing.[26] It is impossible for HUD to carry out this affirmative duty if it does not consider the effects of racial concentration.

As a result of this case, procedurally, HUD must utilize institutionalized methods[27] in determining site selection and type of housing selection. Substantively, these methods must provide the information necessary for HUD to consider the effects of site selection or type of housing selection on racial concentration.[28]

In addition, HUD cannot emphasize the economic considerations—that is, to build the most for the least amount of money—rather than the social considerations. In the future, economic reasons should not dictate the selection of a housing site or type of housing project to be constructed. HUD will have to develop criteria[29] for making a proper determination in the selection of type and location of future housing projects to de-isolate racial and minority groups.

As a practical matter, it is doubtful whether any criteria developed by HUD will work. It should not be difficult for HUD to utilize institutionalized methods for determining site selection or type of housing selection.[30] These methods can readily provide the information necessary for a determination by HUD of the effects of site selection and type of housing selection on racial concentration. But once HUD determines such effects, it will apply a balancing test and weigh the needs of additional minority housing at the site selected against the disadvantages of increasing or perpetuating racial concentration.[31]

24. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
25. §§ 804-806, 42 U.S.C. §§ 3604-3606 (Supp. V, 1969).
26. *See* 436 F.2d at 816.
27. 436 F.2d at 821. The court of appeals found two institutionalized methods which may be acceptable: (1) public hearing (see note 12, *supra*), and (2) Report on Minority Group Considerations. 436 F.2d at 821.
28. *Id.*
29. *See* 436 F.2d at 821-22 where the court suggests some considerations relevant to a proper determination by HUD.
30. See note 27, *supra*.
31. *See* 436 F.2d at 822.

It is not unreasonable to expect that the need for additional minority housing at the site in question will almost always outweigh the disadvantages of increasing or perpetuating racial concentration. The determination of the need for additional minority housing at a particular site remains with HUD. As long as HUD adopts institutionalized methods by which it can consider, and does consider the effects of a proposed housing project on racial concentration in the area chosen, it is not likely its administrative decision will be set aside.[32] No realistic alternative site for the project may exist. It is only logical that housing projects for low income families be located in those urban areas where there is an immediate necessity to tear down slums.[33] Since a large number of these urban areas are non-white, and with the trend continuing that way,[34] it is inevitable that these projects will tend to perpetuate racial concentration of non-whites.[35] Also, strong community opposition prevents the location of low income housing in suburban residential areas.[36]

The decision in *Shannon* represents a judicial attempt to deal with the social and economic problems of the urban renewal areas and cities as a whole. The decision is not surprising considering the expanding role of the courts in the remedying of social problems, particularly those involving alleged racial discrimination.[37] The judicial attempt in *Shannon,* however, cannot be expected to effectively cope with the social and economic complexities of the national housing problem. Mere consideration by HUD of the effects of type or site location of future housing projects on existing racial patterns alone will not remedy the housing problem. It is submitted that positive measures are needed to prevent housing patterns from remaining segregated.

One possible solution for eliminating racial concentration, and for achieving "well-planned, integrated residential neighborhoods,"[38] is the implementation of racial quotas. The successful use of racial quotas has been demonstrated.[39] The problem with their use is that they require classification by race, which the Constitution usually forbids.

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32. *Id.* at 819 where the court noted that administrative decisions which do not consider the relevant factors will be set aside.
33. Ledbetter, *Public Housing—A Social Experiment Seeks Acceptance,* 32 LAW & CONTEMP. PROB. 490, 524 (1967).
34. *See* SCIENTIFIC AM. July 1971, at 17.
35. See note 33, *supra.*
36. *See* Fisher, *Low Cost Housing Systems,* 2 URBAN LAW. 146, 163 (1970).
37. 1970 WIS. L. REV. 559, 567.
38. Housing Act of 1949 § 2, 42 U.S.C. § 1441 (1964).
39. Navasky, *The Benevolent Housing Quota,* 6 How. L.J. 31, 37 (1960).

Classification has been allowed for the purpose of achieving equality, and required to the extent necessary to avoid unequal treatment by race;[40] therefore, classification should not present an insurmountable problem.

Authority for the use of racial quotas is found in the analogous area of school desegregation. The United States Supreme Court recently sanctioned the use of racial quotas to eliminate racial discrimination in public schools in *Swann v. Charlotte-Mecklenburg Board of Education.*[41] In *Swann*, the Court approved the establishment of faculty ratios based on race[42] and the use of a mathematical ratio of students based on race.[43] The Court's objective in *Swann* was to eliminate all vestiges of state-imposed segregation from public schools.[44] Segregation in public schools was the evil attacked by *Brown v. Board of Education of Topeka.*[45] Although the Supreme Court stated in *Swann* that the important objective of *Brown* would not be served if school desegregation cases were used to accomplish purposes outside their scope, the Court indicated that "desegregation of schools ultimately will have impact on other kinds of discrimination."[46]

It is submitted that racial discrimination in housing is one type of discrimination where the school desegregation cases can have great impact. The underlying policy for desegregation of schools applies equally to desegregation of housing. It is hoped that the use of racial quotas to eliminate racial discrimination in schools will be adopted as a remedial measure in the analogous area of racial discrimination in housing.

Thomas A. Koza

40. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 932 (2d Cir. 1968). *See also* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); McDaniel, Superintendent of Schools v. Barresi, 402 U.S. 39 (1971); North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971).
41. 402 U.S. 1 (1971).
42. *Id.* at 18-20.
43. *Id.* at 25.
44. *Id.* at 15.
45. 347 U.S. 483 (1954).
46. 402 U.S. at 22-23.