

**THE BOSTON FAIR HOUSING COMMISSION:
A CASE STUDY IN THE LOCAL IMPLEMENTATION
OF THE FEDERAL FAIR HOUSING ACT**

by

Fay Darmawi

B.A. University of Pennsylvania
(1988)

Submitted to the Department of Urban Studies and Planning
in partial fulfillment of the requirements for the degree of

MASTER OF CITY PLANNING

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

May 1990

© Fay Darmawi

The author hereby grants M.I.T. permission to reproduce and to distribute copies of this thesis document in whole or in part.

Signature of Author: _____

Department of Urban Studies and Planning
May 11, 1990

Certified by: _____

Yale Rabin
Thesis Advisor

Accepted by: _____

Donald Schon
Chair, Masters Committee



**The Boston Fair Housing Commission:
A Case Study in the Local Implementation
of the Federal Fair Housing Act**

by
Fay Darmawi

B.A. University of Pennsylvania
(1988)

Submitted to the Department of Urban Studies and Planning in partial fulfillment of the requirements for the degree of Master of City Planning.

ABSTRACT

This thesis is a case study of the local implementation of the federal Fair Housing Act of 1968, as amended in 1988, prohibiting discrimination in the provision of housing. It explores the legal and political aspects surrounding the enforcement efforts of the Boston Fair Housing Commission (BFHC). I argue that the two main constraints facing the BFHC in fulfilling its mandate to eradicate discrimination has been the enforcement limitations in the local fair housing ordinance itself and the resistance by conservative local politicians in funding a strong fair housing program despite repeated evidence of the prevalence of discrimination in Boston.

With the recent passage of a stronger federal fair housing law, the BFHC has the opportunity to overcome its legal constraint. In an analysis of its procedures, I show that the pending ordinance will increase the effectiveness of the BFHC to process individual complaints of discrimination. However, to change its weak ordinance, the BFHC is forced to deal with its second constraint, the resistance of conservative local politicians to fair housing law enforcement. I conclude that without federal political leadership and support from many local politicians, the BFHC must turn to its protected class constituency for support. Proposals are made concerning its systemic testing program and the building of support of protected class communities in the enforcement of fair housing in Boston.

Thesis Advisor: Yale Rabin

Title: Visiting Scholar to the Department of Urban Studies and Planning

Acknowledgements

I would like to thank Yale Rabin whose life-long dedication to civil rights has inspired me to write about distributive justice in housing and whose insights have sharpened my arguments in this thesis. I am very grateful to Langley Keyes who helped me to logically develop and present my ideas.

I especially would like to thank Bob Terrell at the Boston Fair Housing Commission for donating so much of his time to my interviews. Also thank you to Inga Bernstein, Christopher Burke, Richard DeWolfe, Richard Ellen, Steve Fahrer, William Holshouser, Frank Jones, Barbara Rabin, Regina Mitchell-Rodriguez, Laurie Rubin, and Diane Wilkerson for taking time out from your busy work days to speak to me.

Tom Hurt's constant kind attention and volunteering generously to complete grueling research tasks are greatly appreciated. Sarah Griffen's, Martha Oesch's and Bonnie Wolf's comments and moral support were very helpful in the tough and challenging stages of this thesis. I am extremely appreciative of Jordina Vidal's comforting gestures and tolerance of my constant typing. And without the generous assistance of Alexis Falicov, I would have never been able to print this thesis. Most of all, I would like to thank my parents and sister for their love, humor and encouragement throughout my two years at M.I.T.

Table of Contents

Chapter I

Introduction.....	1
A. Discrimination and National Housing Policy.....	1
B. Overview of Thesis.....	2

Chapter II

The Federal Fair Housing Act.....	6
A. Introduction.....	6
B. The Early History of the 1968 Federal Fair Housing Act.....	6
C. General Provisions of the Federal Fair Housing Act.....	8
D. 1988 Fair Housing Amendment Act: Impact on HUD.....	12
E. Summary.....	14

Chapter III

The Politics of Fair Housing in Boston.....	16
A. Introduction.....	16
B. Pre-BFHC Period (1968-82).....	16
C. The BFHC (1982-88).....	18
1. The Boston Fair Housing Commission.....	20
2. Investigation of Individual Complaints of Discrimination.....	21
3. Systemic Testing Program.....	21
4. Public Education and Community Outreach Programs.....	23
D. The Current Controversy (1988-90).....	25
1. Judge Skinner's Decision in <i>NAACP v. Kemp</i>	26
2. Substantial Equivalency of Boston Ordinance with the 1988 Fair Housing Amendment Act.....	29
3. The Question of Political Autonomy for the BFHC.....	30

Chapter IV

BFHC's Processing of Individual Complaints	33
A. Introduction.....	33
B. Complaint Processing Procedure Under 1982 Ordinance.....	33
1. Steps in Complaint Processing Procedure	33
2. Impact of Weaknesses of the 1982 Ordinance on the Complaint Processing Procedure	35
3. Outcomes of Complaints Under the 1982 Ordinance.....	36
4. Potential Impact of the Pending Ordinance	37

Chapter V

Conclusion and Recommendations.....	39
A. Conclusion.....	39
B. Recommendations: Systemic Testing Programs As the Future of Fair Housing Enforcement	40
1. Funding	40
2. Cooperation Between Civil Rights Agencies	43
3. Involvement of Organizations Representing Protected Class Constituencies.....	44
Appendix A: The Residential Racial Pattern in Boston, 1980-85.....	47
Appendix B: The Law Enforcement Tool of Testing.....	51
Bibliography	54

Chapter I

Introduction

A. Discrimination and National Housing Policy

The phenomena of real estate agents turning away minority homeseekers when in fact units are available is common throughout Boston and nationally. This discriminatory practice may be exacerbated in tight housing markets in which real estate agents can pick and choose who they would prefer to rent to. In a 1979 report, the Department of Housing and Urban Development (HUD) recorded over 2 million acts of racial discrimination in the national housing market annually. According to a 1981 systemic test in Boston, an African-American person has a 30% chance of encountering discrimination in one visit to a rental office. However, in the search for housing, a person visits more than one office. The probability of an African-American encountering discrimination increases to almost 90% for four visits to Boston real estate offices. Through a series of systemic tests of Boston's racially-mixed neighborhoods, discrimination against Latinos and Southeast Asians have also been proven to exist. These systemic tests for discrimination proved that the racially segregated neighborhoods found in Boston was not solely the result of the residents' personal preference to live next to their own race. The evidence of discriminatory practices by real estate agents proved that discrimination has contributed to the existence of several neighborhoods in Boston where whites constitute over 90% of the total population (see Appendix A). While in the past racial discrimination has been the primary focus of systemic tests, recent evidence show that source of income is becoming a major determinant of discrimination. In a 1988 systemic test, discrimination against Section 8 holders was found to be prevalent in Boston, despite the fact that landlords have nothing to loose when renting to a certificate holder since the total market rate rent is assured to the landlord from the federal government.

The current national housing policy emphasizes the role of the private rental housing market in providing adequate and affordable housing. The federal government has pulled back in its funding for the development of low-income housing and has instead emphasized the role of the private housing market in the provision of housing. The housing policies of the Reagan and Bush Administrations rely on the demand-side Section 8 program in which a low-income apartment seeker is given a certificate and is theoretically given free choice to select a unit in the private housing market. The assumption behind the

program is that homeseekers cannot locate housing because of insufficient incomes. Thus the Section 8 certificate makes up the difference between what the low-income person can pay and the market rate rent of the unit s/he selects. However, the evidence of discrimination from systemic tests suggests that the Section 8 certificate program may not provide freedom of choice in the selection of housing, even though the income barrier has been overcome. The Section 8 program does not account for the role of discrimination in barring choice and access to housing in the private market. However, another federal housing program does and has been created under the Fair Housing Act.

The federal Fair Housing Act, or Title VIII of the Civil Rights Act of 1968, mandates the Department of Housing and Urban Development (HUD) to pass-on the enforcement of the anti-discrimination law to civil rights agencies within state and local governments which have state and local fair housing laws similar to the national law. For example, in Massachusetts, the state fair housing law is enforced by the Massachusetts Commission Against Discrimination (MCAD), an all-purpose civil rights agency which deals with discrimination in employment, public accommodation as well as housing. However, in Boston, the Boston Fair Housing Commission (BFHC) focuses its activities on enforcing the local fair housing ordinance prohibiting discrimination in the sale and rental of housing. This thesis is a case study of how the federal Fair Housing Act is implemented at the local level through the BFHC.

B. Overview of Thesis

This thesis explores the legal and political aspects of fair housing law enforcement in Boston, in particular the enforcement efforts of the Boston Fair Housing Commission (BFHC). It focuses on the constraints facing the BFHC in the implementation of a federal law barring discrimination in housing. I show what exactly are the limitations in the federal law and how they translate into constraints for local implementation. The two main constraints facing BFHC has been the enforcement limitations in the local fair housing ordinance itself and the resistance by conservative local politicians in the funding of a strong fair housing program despite repeated evidence of the prevalence of discrimination in Boston. Working under these two constraints, the BFHC has been struggling to improve its record of enforcement. With the recent passage of the a stronger national law, the BFHC has the opportunity to overcome its legal constraint. However, to overcome its weak ordinance, the BFHC is forced to deal with the second constraint, local political resistance to fair housing law enforcement. Without federal political leadership and with

opposition from conservative local politicians, the BFHC must turn to other civil rights organizations for support as well as the protected class communities which it serves.

Before an examination of the local implementation of a national law can begin, I will set the national legal context in the next chapter. Thus chapter two provides the reader with a guide to the most important sections of the national Fair Housing Act to show its weakness and the effect of the 1988 Amendment, and to differentiate it from the Massachusetts and Boston laws. In chapter three I will provide the historical and current political context surrounding the movement to establish and incrementally strengthen the Boston Fair Housing Commission. Chapter four is a close look at effect of the proposed amended ordinance on complaints filed at the BFHC. Chapter five synthesizes the need for the BFHC to improve its image among its constituency and the enforcement procedures it currently uses in a recommendation to actively involve non-profit advocacy groups serving the thirteen protected classes in its systemic testing program.

The BFHC was created in 1982 to enforce the Boston fair housing ordinance by processing individual complaints of housing discrimination and educating city agencies, communities of color, and other protected groups on fair housing rights and procedures. Its enforcement efforts have been crippled by a weak ordinance and constant undermining of the funding and staffing of the organization by conservative local politicians. These constraints have limited the ability of the BFHC to process complaints quickly and to produce satisfactory monetary settlements. Its reputation for ineffectively enforcing the fair housing ordinance has consequently resulted in the loss of support from its potential complainant population. Currently, the BFHC is in the midst of a local political battle to amend and strengthen the 1982 Boston fair housing ordinance. The BFHC is making headway in passing an amended ordinance only because Boston has been threatened by a loss of CDBG funds in the recent case of *NAACP v. Jack Kemp*, and not because of a ground-swell of local political support.

On a practical level, the ordinance must be amended in order for the BFHC to continue to receive a major portion of its funding from HUD. On a legal level, the amended ordinance would give the BFHC the ability to impose civil penalties of up to \$50,000 and award damages to complainants, two functions which some civil rights leaders and BFHC staff believe would improve the case processing capabilities and increase community support for the BFHC. To what extent will the added powers improve the complaint processing capabilities and the legitimacy of the BFHC?

Through a careful analysis of the BFHC complaint processing procedure, I show that the ability to impose fines will increase the number of complaints filed, speed-up the processing of individual complaints and result in higher monetary settlements than those

currently awarded. However, the new powers will only speed-up the processing of complaints already well-into the processing procedure and has no effect on cases withdrawn early in the process. The computerization of its intake procedures would decrease the number of withdrawn complaints and increase the number complaints which could potentially benefit from the added powers.

However, the larger obstacle facing the BFHC seems to be a political one. The legitimacy of the BFHC depends primarily on its legal powers and how its enforcement record is perceived by those who use its services, namely the population groups protected under the ordinance. Because under its original ordinance the BFHC could not guarantee remedies for legitimate complaints of discrimination, the BFHC may have lost the support of a significant portion of its protected class constituents. The proposed ordinance would give the BFHC significant powers for the benefit of victims of discrimination and thus an opportunity to gain back support of the population groups vulnerable to housing discrimination. But to amend the ordinance to expand its powers, the BFHC must garner the support of not only the civil rights community and progressive city politicians, but also its protected class constituents.

To increase the support of its protected class communities for current and future fair housing political battles, I recommend that the BFHC assume as its primary operating philosophy the involvement of non-profit advocate organizations of the protected classes in the enforcement process itself. Non-profit advocacy groups as much as possible should be involved in detecting discrimination, filing complaints, and monitoring compliance of real estate agencies through the BFHC's systemic testing program. In implementing such a strategy, the BFHC is recommended to consider the distinction between city-wide advocacy organizations and neighborhood specific groups serving the protected classes to determine their potential support to include fair housing law enforcement as part of their programmatic objectives.

The BFHC has involved some non-profit social service agencies in completing a survey and finding testers for its most recent systemic testing program. However, the BFHC relies mostly on individuals to file complaints and does not attempt to connect individuals with advocates from their communities. The involvement of advocacy groups serves pragmatic and political purposes. Pragmatically speaking, advocacy organizations are better able than individuals to take the time to file and follow-through with complaints, already have an affiliation with a lawyer, and are not in the midst of a housing search. On a political level, the involvement of organizations who serve as advocates for protected groups draws them into the fight for fair housing and thus become potential supporters for an amended ordinance currently facing the Boston City Council. The advocacy groups

who get involved in the enforcement process and experience the benefits of their efforts will become more inclined to join future battles in City Hall to increase the power of the BFHC. The BFHC should learn the main lesson of the U.S. civil rights movement of which it is a part; that only through constant grass-roots pressure is the passage and enforcement of laws prohibiting discrimination assured.

Chapter II

The Federal Fair Housing Act

A. Introduction

The purpose of this chapter is to describe the national legal and policy framework for the work of the Boston Fair Housing Commission (BFHC), the law enforcement agency which administers the federal Fair Housing Act on behalf of the U.S. Department of Housing and Urban Development under similar state and local fair housing laws. This chapter will first, describe the major provisions of the federal Fair Housing Act and highlight the major weaknesses of the original 1968 federal law, and second, discuss the importance of the 1988 Amendment Act in strengthening the original law. Relationships between the federal, Massachusetts and Boston laws and procedures will also be discussed.

B. The Early History of the 1968 Federal Fair Housing Act

The federal Fair Housing Act of 1968 was introduced and passed in the context of mounting pressure to diffuse the concentration of black ghetto residents. Urban riots ripped through over one hundred cities in the U.S. in 1968 alone. Angry blacks took to the streets to protest the degraded conditions of their ghettos and demanded that the federal government act to improve the poorly equipped and staffed public schools, to revitalize their neighborhoods with sanitary and suitable housing, and to break the walls which kept blacks out of the white suburbs. Legislators believed that the destruction of barriers to white communities and suburban housing would calm the tide of urban violence and improve the living conditions of blacks.

Thus, the intention of the federal fair housing bill was to eliminate the discriminatory behavior on the part of landlords and real estate agents which prevented blacks from escaping urban ghettos. A fair housing law would provide the authority to courts and administrative law enforcement agencies to punish discriminators and thus deter future discriminatory behavior. The assumption was that eliminating discriminatory behavior would lead to equal access for blacks and the promotion of residential racial integration. The Kerner Commission report of March 1968 urged the passage of a fair

housing law to address involuntary residential segregation, for it warned that America was becoming two societies, "one black and one white, separate and unequal"¹.

Senators Walter Mondale and Edward Brooke introduced the fair housing title as an amendment to a civil rights bill pertaining to expanding the legal protection of civil rights workers. However, the Mondale and Brooke amendment was soon replaced by Senator Everett Dirksen's compromise bill. Dirksen's proposal greatly weakened HUD's enforcement authority, providing it with only the powers of voluntary conciliation. The Dirksen bill removed from the original Mondale and Brooke amendment the power for HUD to subpoena respondents and issue "cease and desist" orders, basic enforcement mechanisms which would have given HUD some authority to demand action in mediating disputes.

Even with the Dirksen compromise, the bill was threatened by a filibuster. But in the wake of the assassination of Dr. Martin Luther King, Jr. and the ensuing riots in Washington D.C., Congress passed and President Lyndon B. Johnson signed the Dirksen bill. The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, declared the "policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States".

The passage of the Fair Housing Act was intended to symbolize the federal commitment to anti-discrimination and equal access to housing for blacks at a time of widespread civil strife. Later in the same year, the U.S. Supreme Court in *Jones v. Alfred H. Mayer, Co.* affirmed that the 1866 Civil Rights and the 1968 Fair Housing Act protects minorities from racial discrimination not only in public housing, but private housing as well.

In hindsight, legal scholars and civil rights activists have concluded that the original Fair Housing Act as it was finally passed in the version introduced by Dirksen, may have been simply a symbolic gesture -- as U.S. Senator Edward Kennedy said "a toothless tiger"². Moreover, the federal effort to implement and enforce the original law have also been criticized for being inadequate. Not until the passage of the Fair Housing Amendment Act of 1988 (hereafter 1988 Amendment), has the enforcement powers of the 1968 Fair Housing Act been expanded in a meaningful way. The will and ability of the federal government to take advantage of the new enforcement powers remains to be seen. The

¹A controversial interpretation of the intentions of Title VIII is that the law permits the maintenance of residential racial integration through quotas. Such an interpretation has been contested recently by the U.S. Department of Justice in *U.S. v. Starrett City*.

²Congressional Quarterly, "Backed by Reagan, Senate OKs Fair Housing Law, August 6, 1988

following is a general discussion of the provisions of the 1968 federal Fair Housing Act and its weaknesses.

C. General Provisions of the Federal Fair Housing Act

The federal Fair Housing Act is divided into several important sections which include: (1) a list of "protected classes", or population groups which are protected under the Act; (2) a description of discriminatory practices prohibited; (3) a list of "Mrs. Murphy" exemptions-- dwellings exempted from coverage; (4) a description of the remedies available if discrimination is found (i.e. fines, lawyers' fees, affirmative action, etc.), and (5) a description of the three means by which a person or organization can file a grievance of alleged discrimination (i.e. the court system, an administrative law enforcement agency, and the attorney general's office).

State and local jurisdictions have fair housing laws similar to the federal Act in form but may differ in the content of these five sections. Some states and local jurisdictions have stronger protections than the 1968 federal Act³. For example, "stronger" fair housing laws may mean that the law allows for the assessment of damages or high fines, or the administrative enforcement agency to enforce its orders in court.

(1) Protected Classes: The original Fair Housing Act of 1968 prohibits discrimination in the sale, rental, or financing of housing on the basis of race, color, religion, or national origin. The Act was amended in 1979 to prohibit discrimination on the basis of a person's sex. The 1988 Amendment provided for the prohibition of discrimination based on two additional protected classes -- familial status (i.e children and pregnancy) and handicap (i.e. physically and mentally disabled). This part of the federal law as amended is limited because it does not cover discrimination on the basis of age, sexual orientation, veteran status, or source of income which the Massachusetts and Boston fair housing laws cover.

(2) Discriminatory Practices Prohibited: One of the most important parts of the Act describes prohibited blatant and subtle discriminatory practices which may be exhibited during the property transaction⁴. Next I will describe in my own words the practices prohibited by federal law and provide examples to illustrate the general principles.

³ See "Appendix A -- A Comparison of State Fair Housing Laws and Title VIII" prepared by Eleanor C. Crow, Colorado Civil Rights Division, May 1983, in Franklin James, et. al., Minorities in the Sunbelt, (New Brunswick, NJ: Rutgers University Housing Policy Research Center), 1984, pp.148-184.

⁴ For more examples of the myriad ways discriminatory practices occurs see Harriet Newburger, Recent Evidence on Discrimination in Housing, Office of Policy Development and Research, Division of Community Development and Fair Housing Analysis, HUD, 1984.

Under federal law it is unlawful to conduct the following acts on the basis of a person's race, color, religion, national origin, sex, handicap or familial status:

-- After putting a unit for public offering, one cannot refuse to sell or rent a unit, or refuse to negotiate with an interested party from a protected class. For example, it would be unlawful for a broker to not call back an applicant who gave a home phone number beginning with the three numbers for the Roxbury neighborhood of Boston. The broker would be refusing to negotiate on the basis of the person's race because the broker assumed that the caller was black since s/he lived in Roxbury.

-- One cannot require different terms or conditions for persons with equal qualifications. For instance, a black renter may be required to give first and last months rent as a security deposit whereas no deposit is required for the white renter. The deposit requirement obviously creates a high monetary obstacle for the black renter which may lead her/him to seek a different apartment.

-- One cannot discriminate in the privileges allowed or in the provision of furniture, services or facilities to a renter or buyer. An overt example of this type of discrimination is to note that most of the apartments rented by blacks are less well maintained than those of whites. A change in the level of municipal services to an apartment building as a result of the change in racial composition is also unlawful.

-- A publisher cannot publish or a housing supplier cannot display discriminatory advertising. "Adult only" policies and signs at apartment buildings discriminate against families with children.

-- The most prevalent form of discriminatory practice is to tell an applicant that a unit is not available for rent or sale when in fact it is. A subtle form of misrepresenting the availability of dwelling units is, for example, the situation in which an agent makes available more units for inspection to a white person than a Latino applicant. Often the person of color will be shown units in such bad condition that s/he is forced to look elsewhere. Telling an Asian applicant that there is a waiting list when in fact there is not is also an unlawful discriminatory practice.

-- Also prohibited is the practice commonly known as "blockbusting". Manipulating the racial fears of some whites, real estate agents will induce white residents to sell or rent their

units by hinting that the neighborhood will soon become predominantly black. The agent will point to the recently arrived black newcomers as portents of the inevitable "tipping" of the area's minority composition. The real estate agent profits from "blockbusting" through the cascade of transaction fees.

-- "Steering" people of color from majority white neighborhoods or whites from integrated or black, Latino or Asian communities is an unlawful practice. Pointing a white person away from integrated areas is usually followed by a remark concerning the decline in the resale value of property as neighborhoods become less white.

Courts have broadly interpreted the specific language of the Act concerning what is included as discriminatory housing practices. Prohibited under the Act are mortgage and insurance "redlining" (refusal to provide home loans or insurance to property owners in neighborhoods of color), discriminatory appraisal practices, exclusionary zoning policies and practices, unequal access for minority real estate agents to multiple-listing services or real estate boards, and retaliating against an employee who sells or rents to minorities. Fair housing laws in Massachusetts and Boston have similar provisions with respect to discriminatory housing practices.

(3) "Mrs. Murphy" Exemptions: The Fair Housing Act of 1968 as amended does not prohibit discrimination against protected classes in office buildings, motels, or other types of commercial property. The Fair Housing Act prohibits discrimination in all residential dwellings, with certain exceptions called "Mrs. Murphy" exemptions. The "Mrs. Murphy" exemptions exclude owner-occupied single family homes which are not put for public sale (i.e. owner does not use a broker or does not put a discriminatory advertisement in the newspaper). It only includes owner-occupied buildings with 2-4 dwelling units if discriminatory advertising is used. If one is discriminated against on the basis of anything but race, one has to rely on Title VIII for coverage, with its many exemptions. However, for racial discrimination, one can turn to the Civil Rights Act of 1866.

The Civil Rights Act of 1866 (Section 1982) prohibits racial discrimination in all types of real or personal property, that is commercial, industrial or residential property. Moreover, the 1866 Act has no "Mrs. Murphy" dwelling exemptions as those included in Title VIII. Discrimination on the basis of the other protected classes such as religion or family status is not covered by the 1866 Civil Rights Act.

Boston had no such "Mrs. Murphy" exemptions in its original ordinance. However, with the recent passage of the home-rule petition, it seems likely that the

ordinance will have a "Mrs. Murphy" exemption of owner-occupied buildings with one to four dwelling units. It should be made clear that owners of these buildings who have been alleged to discriminate are not exempted from the BFHC's power to investigate the complaint but only its power to fine if discrimination is found⁵.

(4) Remedies -- The major weakness in the original Title VIII comes under the "remedies" section. Under the original Title VIII, the administrative agency, HUD, had no power to assess any type of damages nor impose fines. If a complainant received any monetary award as a result of the conciliation process at HUD, it is called a "settlement" and not a "damage" award. The difference is that a "settlement" is given without a finding of discrimination while a "damage" award means the complainant is compensated for an actual violation. Thus before the 1988 Amendment Act, "damages" were awarded only in court. The original Title VIII limited punitive damages to a maximum of \$1,000, hardly a sum to make a sufficient deterrent effect. In fact, such a small fine could be considered part of the cost of doing business in the real estate industry. Massachusetts had until recently a cap of \$2,000 for punitive damages. Under the original Boston fair housing ordinance, the BFHC, like HUD, had no power to assess any type of damages.

Occasionally, a determined complainant, after going to HUD, could take his/her case to court and be awarded damages. In the early period of fair housing litigation, damage awards were very small; an indication of the lack of understanding on the part of courts and juries of the humiliation and hardship incurred by victims of discrimination (Kushner, 1989). However in recent cases, total damages commonly reach up to \$100,000. In a February 1990 case in California, the damages totalled over \$450,000 to be awarded to the state, lawyers and the complainant. However, one must keep in mind that such large money damages are only awarded in those few cases which actually go to court, a small percentage of housing discrimination cases when compared to the number which come before administrative agencies such as the BFHC or HUD.

(5) Title VIII Enforcement Mechanisms -- Title VIII provided for three ways to challenge discriminatory practices in housing: (1) Department of Justice -- suits by the U.S. Attorney General in "pattern or practice" and "general public importance" cases; (2) Private Litigation -- direct court actions in state or federal court brought by private plaintiffs with the assistance of legal counsel; and (3) Administrative Enforcement -- complaints filed at the Department of Housing and Urban Development (HUD), or state and local

⁵ Under the Massachusetts Fair Housing Law, as amended, apartments in owner-occupied, two-family dwellings are exempted. The Massachusetts law has an exemption to the exemption though. Under Massachusetts law, it is unlawful to discriminate on the basis of rental or public assistance in all types of residential structures, including owner-occupied, two dwelling unit structures.

administrative law enforcement agencies. Under Title VIII, HUD must refer complaints to state or local administrative agencies certified "substantially equivalent" in statutory fair housing provisions and administrative capacity to HUD. Each time the federal fair housing law is amended, the state and local agencies must amend the state and local laws and reapply to HUD for equivalency status. Equivalency status is required to entitle state and local agencies to federal funding for processing fair housing complaints.

Before the 1988 Amendment, the Massachusetts Commission Against Discrimination (MCAD) and the BFHC were certified by HUD to be substantially equivalent agencies. Thus, most complaints filed at HUD originating in the state of Massachusetts were referred to the state civil rights enforcement agency, MCAD. Complaints alleging discrimination originating in the city of Boston were referred to the local public agency, BFHC. Since the 1988 Amendment, the Massachusetts Legislature has adopted the necessary laws to establish substantial equivalency for MCAD.

The BFHC must now lobby City Council, the Mayor, the State Legislature, and the Governor to pass a home-rule petition and an ordinance similar to the amended Title VIII. The home-rule petition submitted by the Mayor's Office has already passed City Council. Civil rights activists are not satisfied with the home-rule petition because although it gives the BFHC the power to assess damages and provide injunctive relief much like the federal amended law, it has exempted from coverage owner-occupied dwellings with one to four units. If the City does not adopt the necessary ordinance to give the BFHC enforcement powers similar to the additional provisions in the 1988 Amendment Act within 40 months of the passage of the 1988 Amendment, it will lose its eligibility for federal funds to process complaints.

D. 1988 Fair Housing Amendment Act : Impact on HUD

The 1988 Amendment has greatly increased the administrative enforcement capacity of HUD and thus all other state and local administrative law enforcement agencies that become substantially equivalent. To illustrate the significant change in the potential administrative enforcement capacity, I will contrast the powers of HUD before and after the 1988 Amendment.

For twenty years, the enforcement capacity of HUD has consisted of "informal methods of conference, conciliation, and persuasion" (Jacobs, 1988). It had no leverage to bring the respondent to the conciliation table because under the Dirksen compromise bill, HUD was not given the minimal powers to assess damages, hold hearings, or even issue a "cease and desist" order, a statement to the respondent to stop the discriminatory action

immediately. HUD's only course of action after conciliation failed was to refer the case to the Department of Justice, or advise the complainant to go to court. However, the U.S. Attorney General's office did not take individual complaints of fair housing violations since it only litigated cases which impacted a large group of people or changed the interpretation of the law. In other words, HUD could not threaten the respondent party with any negative legal or monetary consequences if s/he did not voluntarily negotiate a settlement during conciliation. With such limited powers it is not surprising that HUD closed 4,152 cases in FY 86 with settlement awards totaling only \$797,446, an average of less than \$200 each (Congressional Digest, 1988).

However, with the 1988 Amendment, HUD is authorized to act in a semi-judicial capacity under the Administrative Law Judge (ALJ) program, giving it the power to impose substantial damages and forms of injunctive relief. HUD can now use the threat of an ALJ hearing to bring respondents to the table to negotiate a settlement. The risk of a finding of discrimination leading to civil penalties of \$10,000 for the first offense, \$25,000 for the second and \$50,000 for the third is a powerful incentive ("civil" penalties are fines that are paid to the government, not the complainant). In addition, the ALJ has the power to award *unlimited* "actual" or "compensatory" damages which go to the complainant to compensate her/him for the monetary burden or emotional grief born as a result of discrimination. If the ALJ feels that the discriminatory action was especially onerous, s/he might award "punitive" damages, now no longer limited to the \$1,000 cap. Over and above monies to compensate the complainant, "punitive" damages serve to punish the guilty party. Finally, the ALJ can require the respondent to pay for attorney's fees for any complainant, not just those who could not afford it. Forms of injunctive relief provided by the new amendment include cease and desist orders (meaning a consent agreement to stop the discriminatory action and enforceable in court if not adhered to) and affirmative action (which probably should safely be interpreted as affirmative marketing in minority communities, and could questionably interpreted to mean mandatory housing of a certain number of minorities)⁶. Before the 1988 Amendment, these forms of damages and relief were only available to complainants who enforced the law by using the private litigation route. By providing an administrative agency semi-judicial powers, HUD ALJs have the ability to impose fines in the same way as court judges.

⁶ Under Reagan, the U.S. Department of Justice successfully argued against quotas in *U.S. v Starrett City*. Minority residential quotas is a form of affirmative action requiring the maintenance of a specific number of minorities over the long-term as a remedy for historical discrimination. It is not clear that the requirement to house a specific number of minorities on a one time basis as a form relief as a result of a housing discrimination complaint would be objected by the current U.S. Department of Justice.

The provision of ALJs was opposed by the National Association of Realtors (NAR) on the grounds that a hearing by a jury of peers afforded only in court trials was required before a finding of discrimination could be enforceable and fines charged. Civil rights activists and fair housing advocates supported the ALJ proposal since court proceedings were lengthier and thus more expensive than administrative instruments. The ALJ enforcement versus court enforcement debate has delayed the strengthening of the administrative enforcement route since it was first proposed in 1977. Finally in the 1988 Amendment, a compromise was reached in which both the complainant and the respondent have the option of choosing either the ALJ or the court procedures.

Furthermore, the new amendment requires HUD to review the current and past performance of state and local agencies applying for equivalency status. This is a new review process and no specific guidelines have been promulgated as to what level of performance warrants equivalency to HUD's performance which itself has not been rated very highly (see Kushner, 1989 and Jacobs, 1988). For example, although on record HUD supports the use of individual testers to verify complaints and has recommended state and local agencies to replace other investigative procedures with testing, HUD itself has not done so. Moreover, HUD has been repeatedly criticized for not handling complaints in a timely manner and lacks a mechanism for monitoring the compliance of its orders⁷.

E. Summary

The original Act gave HUD weak enforcement powers in which it played the mediator between a complainant and a respondent. HUD could not force either party to come to the table to conciliate the dispute because it could not issue any orders. The Secretary of HUD in 1976 testified before the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary that "respondents are aware that HUD has no meaningful enforcement power, and thus, many have virtually ignored HUD's conciliation efforts because they have no inducement to cooperate"⁸. The 1988 Amendment provides HUD with the powers to hold hearings before ALJs and to assess large fines and damages. These are strong inducements for respondents to come to the table to negotiate a settlement before it becomes necessary to spend time and money, and risk fines in the ALJ process.

⁷ See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort-- 1974, Volume II: To Provide for Fair Housing, December 1974; Alex Waldrop, "Enforcement of the Fair Housing Act: What Role Should the Federal Government Play?," Kentucky Law Journal, 74: 201-230, 1985-86.

⁸ U.S. Comptroller General Report to U.S. Congress, Stronger Federal Enforcement Needed to Uphold Fair Housing Laws, (Washington, D.C.: USGPO), February 1978, p.27.

The passage of the 1988 Amendment at the national level does not automatically result in its implementation at the state and municipality levels. The strengthening of local laws for substantially equivalency with the federal amended law is subject to the politics of the local municipalities. In Boston, the strengthening of the Boston fair housing ordinance has been met with resistance from conservative City Council members and lukewarm support from the Mayor's Office. The amended ordinance is inching through the process because the City has been threatened with the loss of CDBG funding in a 1989 federal court case. The politics of fair housing in Boston, from the initial creation of the BFHC until the present struggle to amend the ordinance is the focus of the next chapter.

Chapter III

The Politics of Fair Housing in Boston

A. Introduction

In keeping with the federalist approach to governance, the federal Fair Housing Act is intended to be implemented primarily at the local level. As mentioned in the previous chapter, state and local agencies administer the federal law under state and local statutes. This chapter is a historical analysis of the struggle between the federal government, city politicians and civil rights activists in Boston to create and strengthen a local fair housing agency, the Boston Fair Housing Commission (BFHC). In this chapter, I have organized Boston's fair housing legislative history into three major phases: (1) the pre-BFHC period (1968-82); (2) the BFHC (1982-1988) and; (3) the Current Controversy (1988-90).

B. Pre-BFHC Period (1968-82)

For fourteen years after the passage of the 1968 federal Fair Housing Act, Boston had no local fair housing law or enforcement agency. Thus most complaints originating in Boston were investigated at MCAD. Massachusetts has had a fair housing law since the 1950s. However, beginning in the late 1970s, HUD's Regional I Office of Fair Housing and Equal Opportunity (located in Boston) repeatedly accused the Kevin White administration of not using the city's CDBG monies to enhance the housing opportunities of people of color. HUD threatened to withhold CDBG funding if the city did not act to improve the situation. The city resisted but finally established a Mayor's Office of Fair Housing but gave it no enforcement powers what-so-ever. The Office was not even given the powers to receive or investigate any housing discrimination complaints. Thus, while it was well-funded by the released CDBG monies, the Office's activities merely consisted of distributing pamphlets and sponsoring public announcements about state and federal fair housing laws. In 1978, the NAACP filed suit against the central HUD office in Washington, D.C., claiming that HUD itself was not administrating its CDBG and UDAG funds for the equal benefit of blacks and whites in the city of Boston. (This NAACP suit was not to be resolved until 1989 in the famous Skinner decision of *NAACP v. Jack Kemp, Secretary of HUD.*)

In 1980, the HUD Regional I OFHEO actually withheld \$13 million of the total \$26 million in FY81 CDBG funds allocated to Boston to force the city to create a local fair housing law enforcement agency. The HUD Regional I OFHEO director Robert Upshur was the moving force behind the bold move. Later, Upshur became the first executive director of the Boston Fair Housing Commission, after leaving HUD frustrated at the Reagan Administration's lack of commitment to civil rights. While at HUD, Upshur had conditioned the release of the CDBG monies on the completion of four actions, the first being a study on racial discrimination in Boston's housing markets. Second he required the Boston's City Council to enact the city's first fair housing ordinance, third to submit a home-rule petition to the Massachusetts state legislature and fourth to establish an enforcement agency, the BFHC.

Following Upshur's demands, Mayor Kevin White hired the Cambridge-based planning consulting firm of Abt Associates to conduct a research audit to determine the extent of discrimination against African-Americans in the Boston housing rental and sales market (definition of "research audit" in Appendix B). For years, representatives of the real estate industry repeatedly denied the claims of the existence of discrimination in the Boston housing market. The Greater Boston Real Estate Board (GBREB) argued that although discrimination existed in isolated cases, none of their members were involved.

However, the Abt study found that African-Americans were receiving discriminatory treatment by real estate agents, some who were members of the GBREB. The audit was conducted in the neighborhoods of Back Bay/ Beacon Hill, Central (specifically the North End, downtown, and Waterfront), South End, Jamaica Plain, Hyde Park, Roslindale, North and South Dorchester (see Appendix A for exact racial composition). The predominantly white neighborhoods of Charlestown, South Boston, East Boston, and West Roxbury were excluded from the study because the Abt researchers assumed that in those areas "racial barriers were severe enough to preclude any black housing search" (Feins and Holshouser, 1984). The results of the audit were submitted to the State Attorney General's civil rights division for enforcement proceedings. Several real estate offices were found guilty of discrimination and were ordered to participate in broker training of fair housing laws, pay minimal fines and advertise in minority newspapers.

Moreover, the audit showed that upper-income African-Americans faced discrimination, a finding that contradicted the belief that African-Americans were unable to attain housing in high rent areas because they lacked adequate income. The study showed that African-Americans who could more than afford an apartment in Beacon Hill still faced racial discrimination in a neighborhood proud of its liberal reputation. Throughout early

1981, the study received extensive press coverage and quelled all arguments that discrimination did not exist in Boston (Feins and Holshouser, 1984).

At the same time as the Abt study, a Roxbury-based private non-profit fair housing organization called Education/ Instruccion, Inc. (E/I) was testing the racially-mixed neighborhoods of Allston-Brighton and Fenway-Kenmore for discrimination against African-Americans and Latinos in a systemic testing program funded by a 1981 HUD grant. As a result of its 1981 HUD-sponsored testing program, E/I filed discrimination complaints with MCAD and HUD against 12 major real estate firms. MCAD took responsibility for five complaints and HUD took the remaining seven. Of the five investigated by MCAD, three were found to lack probable cause of discrimination and two were settled. HUD failed to settle any of its seven cases. E/I was then forced to pursue redress for the seven unsuccessfully conciliated HUD cases in U.S. District Court, with one referred to the U.S. Justice Department which soon filed a discrimination suit. These E/I suits reaffirmed the legal standing of testers and non-profit organizations to sue and receive damages for housing discrimination under Title VIII (original precedent was set in *Havens v. Coleman*; see Appendix B).

E/I was a one-woman enterprise and when Patricia Morse, the executive director, left the area in the early 1980s, the only private fair housing organization in Boston went out of existence. However, before the E/I closed its doors it played a major role along with Citizens Housing and Planning Association in organizing the civil rights community to support the pending fair housing ordinance and commission.

In the year previous to the enactment of the Boston fair housing ordinance, systematic tests in all the racially-mixed neighborhoods of Boston provided clear evidence that landlords and real estate agents were discriminating against African-Americans and Latinos. The major impact of the Abt audit and the E/I suits was political since they provided proof that discrimination was a problem in Boston thereby legitimizing the need for an anti-discrimination law enforcement agency such as the BFHC.

C. The BFHC (1982-88)

Four months after the 1981 Abt study was released, the Fair Housing Ordinance introduced by Councilor Bruce Bolling was passed in City Council and the BFHC was born. The 1982 Boston fair housing ordinance gave the BFHC the authority to receive, investigate, conciliate, hear and refer to the courts, HUD and MCAD individual housing complaints of discrimination. The ordinance prohibited discrimination on the basis of race, color, national origin, religious creed, sex, age, sexual orientation, marital status, children,

military status, or source of income in all housing in Boston from single-family homes to large apartment complexes. While the ordinance was wide in coverage, it was weak in enforcement provisions. It did not formally provide the BFHC the authority to impose fines, request temporary injunctions (to hold a housing unit while case is pending), or file a complaint on behalf of the agency itself. Under its regulations (adopted in 1984), the BFHC assumed the powers to request temporary injunctions and file a complaint itself. The power to impose fines and assess damages has become the major issue in its struggle to increase its enforcement power.

The BFHC was certified substantially equivalent to HUD in 1983 because it had an ordinance with provisions similar to the 1968 Fair Housing Act. Although the power to impose fines was above what was required to gain substantial equivalency to the 1968 Fair Housing Act, the BFHC submitted a home-rule petition to the state legislature in 1982 to gain those powers.

Upshur's third condition for the release of the CDBG funds was the submission of a home-rule petition that would give the BFHC the power to impose fines of up to \$10,000. Upshur understood the enforcement limitations of the federal act and wanted to compensate for them at the local level if possible. However, the home-rule petition never passed as it was stalled in the state Judiciary and Ways and Means Committees for two years, and finally died in a "pocket veto". City Councilor Albert O'Neil spoke at the state hearings and misrepresented provisions of the bill, incorrectly stating that it would require the registration of all housing vacancies in Boston with the BFHC. State representative Michael Flaherty of South Boston and co-chair of the Judiciary Committee opposed the bill because it did not provide for an appeal process, when in fact it did.

In face of strong opposition from conservative state and local legislators, lobbyists from the BFHC and the civil rights community changed various aspects of the ordinance as compromise measures in hopes of receiving from the state legislature a less than perfect ordinance with formidable enforcement sanctions. The Boston City Council approved a change in the ordinance to exempt one, two, and three family owner-occupied buildings (which constituted approximately 30% of the housing stock in Boston) as a compromise to Flaherty and other hostile Judiciary Committee members. Next, the proponents of the home-rule petition offered to remove sexual orientation and source of income as protected classes. These concessions were made to state legislators who declared their support of the petition under the condition that the exemptions be included and protected classes be limited in the ordinance in return for the power to impose fines. These compromises to the petition were in the end to no avail since someone pocketed the bill and was nowhere to be found to sign before the state legislature in 1983 (Frank Jones, interview).

Because the home-rule petition was not passed, the BFHC like HUD before the 1988 Amendment, lacked the ability to impose fines and assess damages. Upshur had reason enough to free the CDBG funds in 1983 since Boston had met its minimal requirement to enact a fair housing ordinance substantially equivalent to the unamended federal Fair Housing Act. Like HUD, the BFHC had little leverage to bring the respondent party to the conciliation table without the threat of substantial damages. Thus even if the BFHC found a party guilty of discrimination, it had no power to punish the respondent or provide the complainant compensation. This weakness in the law limited the ability of the BFHC to conciliate individual complaints of housing discrimination. Those complaints which the BFHC could not conciliate were rarely brought to court since many complainants could not afford to do so. Thus many low-income victims of discrimination in Boston rarely received remedies through either the private litigation and the administrative conciliation mechanisms. In light of the legislative history of the BFHC, I will next describe the activities and programs of its staff.

1. The Boston Fair Housing Commission

The BFHC is governed by a board of five mayorally-appointed Commissioners representing the civil rights community, the real estate industry, community-based organizations, public housing, and the city at-large. Although the Commissioners hold the sole responsibility of setting policy for the BFHC, they are limited in the time they can allocate to the BFHC because they must attend to their other full-time jobs.

To fulfill its mandate "to eliminate discrimination and increase access to housing in Boston", the first Commissioners organized the BFHC into two principle arms: the Investigations and Enforcement (I and E) Unit and the community education Programs Unit. The BFHC's I and E unit investigates housing discrimination complaints, monitors the compliance of its orders, and with the availability of federal funding, conducts a systemic testing program. The systemic testing program was instituted because the Commissioners felt that the BFHC should take a proactive stance against discrimination through the generation of its own housing complaints based on evidence produced in the controlled tests. Its public education and community outreach Programs unit produce print and audio/visual media, and train city agencies and community organizations concerning fair housing laws and procedures.

2. Investigation of Individual Complaints of Discrimination

After the BFHC gained substantial equivalency in 1983, its budget doubled with grants from the HUD contract to process individual complaints of housing discrimination. Before substantial equivalency, the BFHC received its funding primarily from the city's CDBG coffers. Under the HUD contract and its own ordinance, if the BFHC feels it cannot process a complaint in a timely manner, it may refer the complaint to HUD or MCAD for further investigation. The first Commissioners did not write into the BFHC regulations reasons for interagency coordination, and left the matter open to determine as need arose in the future. The shuffling of individual complaints from the BFHC to MCAD and HUD was the main basis of interagency coordination (and remains so today). Some cases from the BFHC are brought to court by lawyers from the Boston Lawyers' Committee for Civil Rights, a special committee of the Boston Bar Association providing legal services in the areas of racial violence and discrimination. An assessment of the BFHC individual complaint processing record is closely analyzed in the next chapter. It is suffice to say for now that the BFHC does not process its complaints quickly or gain many and high monetary settlements in the cases that it resolves.

3. Systemic Testing Program

In addition to being an agency which receives complaints, the BFHC also seeks to take a proactive stance against discrimination by generating its own complaints through the development of a systemic testing program. Says Laurie Rubin of MCAD, "If you don't have a systemic testing program, you're fighting a losing battle against discrimination because most people don't know they are being discriminated against" (interview). However, the BFHC has not fully developed its capacity to conduct systemic tests relative to the scale and innovation exhibited in MCAD's systemic testing program. The BFHC staff itself has only conducted two systemic testing programs both completed in 1988, providing evidence of discrimination against Southeast Asians and Section 8 holders in some Boston neighborhoods.

The only other BFHC-sponsored test was conducted by an outside consulting firm. In 1984, the BFHC hired Abt Associates, the same organization which conducted a test for discrimination against African-Americans in 1981, to conduct a systemic test for discrimination against Latinos in the racially-mixed neighborhood of Dorchester, and African-Americans and Southeast Asians in Allston-Brighton, a neighborhood experiencing a large influx of Asian immigrants.

The 1984 Abt study repeatedly found that real estate agents were less likely to make available a unit for inspection to a minority than a white applicant in both neighborhoods tested. The author concluded that "housing discrimination is not a rare occurrence, but rather an everyday experience for minority persons seeking housing..." (Holshouser, 1984)⁹. The making of units unavailable is the most basic type of discrimination and is explicitly prohibited by Title VIII. Unfortunately it is one of the most difficult types of discrimination to detect without a test. Imagine a scenario in which a minority applicant receives the most courteous service complete with assistance in submitting a rental application, and walks away satisfied that the rental agent was telling the truth when s/he said that no unit is currently available (but in fact is). That minority applicant would have no way of knowing that the rental agent was discriminating if were not for a follow-up test in which a white applicant was offered the unit in question. According to the Abt study this scenario repeats itself everyday to many minority applicants in search of housing in Boston. Thus the few hundred complaints filed at the BFHC is not an accurate reflection of the magnitude and frequency of discriminatory housing practices. Homeseekers experiencing discrimination either cannot detect it or if they do, cannot take time out from their harried housing search to file and follow-up on a discrimination complaint. For newer immigrants to the U.S., not only is detection difficult, but they are also less likely to be aware of the methods to address possibly discriminatory behavior. This seemed to be the experience of Southeast Asian immigrants to the Boston area.

Although the Southeast Asian population was growing in Boston, there was only one complaint filed at the BFHC by a Southeast Asian in 1987. In 1988, the BFHC staff itself conducted a systemic test to find out if discrimination existed against Southeast Asians in Allston-Brighton and West Roxbury, and if it did, why few Southeast Asians filed complaints. This testing program also had the objective of garnering enough evidence to file complaints against discriminating real estate agents.

The 1988 in-house test did not develop enough evidence to support legal complaints of discrimination against Southeast Asians¹⁰. This is not to say that the test did not find disparate treatment between white and Southeast Asians testers but rather the underdeveloped testing methodology resulted in the BFHC failing to come up with repeated evidence against specific real estate agents for enforcement action. Many factors contributed to the inconclusive evidence, including the inadequate preparation and

⁹ This systemic test also looked at disparate treatment in terms and conditions and evidence of steering but the findings were inconclusive for these two discriminatory practices.

¹⁰ Boston Fair Housing Commission, Type II FHAP Testing Program Final Report, submitted to HUD, September 1989.

inexperience of Southeast Asian testers which led to their misinterpretation of the behavior of rental agents and the testing coordinator's lack of timing of testers which resulted in the inability to compare instances of repeated disparate treatment displayed by the same agent. The most significant finding of the test was that many social service agencies serving the Southeast Asian community were not aware of the role and procedures of the BFHC, thus were not educating that population on Boston's civil rights laws. While discrimination against Southeast Asians existed, many did not file because of unfamiliarity with the fair housing program.

The second 1988 systemic testing program at the BFHC focused on discrimination against Section 8 holders. Historically BFHC's case files showed that a majority of the complaints filed listed source of income and race as their primary basis of discrimination. The BFHC decided to test for discrimination against Section 8 holders, a practice prohibited under the Boston fair housing ordinance. The test for Section 8 holders was simply for the purposes of proving that source of income discrimination was prevalent in Boston and not for enforcement action like the test for Southeast Asians. The findings in the systemic test for discrimination against persons with Section 8 reaffirmed the conclusion that source of income discrimination has made the search for housing difficult for low-income persons in Boston. However, the BFHC failed to log a publicity campaign around its findings of discrimination against Southeast Asians and Section 8 holders. The BFHC missed an opportunity to use evidence of persistent discrimination as a political tool to support its anti-discrimination mandate. As shown in the past, evidence of discrimination from previous systemic tests in Boston has been instrumental in the creation of a fair housing program.

4. Public Education and Community Outreach Programs

To prepare for the 1988 systemic testing programs and to recruit Asian testers, the I and E and Programs units worked together to conduct an outreach program in the Southeast Asian community. However, the I and E and Programs units, as a general practice, do not work together. This may be attributed to the different roles that personnel in each unit plays where the investigation/enforcement arm tend to perceive themselves as neutral mediators (many have mediator experience) and the community education staff tend to be advocates for the protected classes (Programs staff are members of boards of community organizations).

To educate the public about fair housing laws and procedures, the BFHC's Programs unit distributes pamphlets, posters and newsletters, airs public service

announcements, sponsors presentations and trains community groups and city agencies like the Public Facilities Department (PFD), Massachusetts Department of Social Services, the Boston Housing Authority and the Rent Equity Board. The training of social workers at the Massachusetts Department of Public Welfare, Homeless Unit is especially important because they work closely with Section 8 holders living in shelters, a group most vulnerable to discrimination in the rental housing market. The community education and outreach staff have made presentations at women's shelters, Vietnamese, Ethiopian and Haitian social service agencies, and almost every agency in the city which comes into contact with populations who may be discriminated and need the services of the BFHC¹¹. The BFHC Programs staff conducts its oral presentations and trainings in English and Spanish but translates its brochures and public service announcements into Spanish, Portuguese, Chinese, Laotian, Vietnamese, Khmer, Cape Verdean, and Haitian Creole.

During the past four years, the BFHC Programs unit has begun to focus its education efforts to members of the real estate community through the voluntary training of landlords on rental subsidy programs and fair housing laws barring source of income discrimination, and private for-profit and non-profit developers regarding the City's affirmative marketing policy. Mayor Flynn under considerable pressure from MCAD created Boston's first affirmative marketing policy in 1986. The BFHC is in charge of monitoring the compliance of all developments assisted by the city in the form of land, monetary subsidy or zoning easements. Developers must advertise in minority newspapers, hire staff sensitive to the discrimination issues facing minorities and female-headed households, and place equal opportunity slogans on all printed matter. The developer is precluded from offering any units if the BFHC finds that the developer has not formulated an adequate affirmative marketing plan.

The affirmative marketing plan provides the BFHC with weak enforcement powers since the sanction for non-compliance is only a slight delay in the selection of tenants. This sanction only comes after the development is completed, and provides no threat of the revocation of city-assistance while the building is in progress. On the other hand, whereas before the legal institution of the policy, affirmative marketing agreements were won on a case by case basis, under the plan, the affirmative marketing procedures of developers are constantly monitored by the BFHC.

According to Christopher Burke, legal counsel and acting director of BFHC, the major emphasis of the Commission is public education and community outreach. He

¹¹ See list of agencies served by BFHC in U.S. Department of Housing and Community Development Community Development Block Grant Grantee Performance Report , City of Boston, 1987.

believes that this is the experience for fair housing law enforcement agencies across the country working under weak ordinances. "If you don't have any power to enforce fair housing, you spend your time talking about it..." (interview).

But the emphasis of the BFHC has been changing. The BFHC is cutting back on the staff of the Programs unit from seven to two and increasing the staff of the investigations and enforcement arm by one to improve its complaint processing record. Regina Mitchell-Rodriguez, the assistant director in charge of the Programs unit criticizes this policy shift and speaks to the importance of maintaining community awareness as integral to enforcement, "education helps people come to the agency with better information, and may cause an increase in caseload but may also cause the investigations to go faster. The community education component has decreased and so has the number of cases coming into the BFHC." (interview). Indeed the number of discrimination calls received at the BFHC has decreased from a high of about 2,000 in 1985 to 200 in recent years¹². However, the reduction in the number of calls cannot be solely attributed to the decrease in educational programming but also to a lack of confidence in the BFHC in the communities who are potential beneficiaries of the anti-discrimination ordinance. It seems like a catch-22 situation in which the protected classes do not believe in the effectiveness of the BFHC to change discriminatory practices while at the same time the BFHC needs the support of the communities to increase its enforcement power to become more effective.

With the passage of the 1988 Amendment Act, Boston now has the opportunity to amend its weak 1982 ordinance to give the BFHC the power to assess civil penalties of up to \$50,000 and other types of monetary damages. The amendment of the ordinance is a political process since it requires the review of state and local legislative and executive bodies. Unfortunately, the community outreach arm staff has been reduced at a time when their community organizing skills are needed to garner grass-roots pressure to pass the ordinance in counteraction to the delay tactics of conservative factions within Boston City Hall.

D. The Current Controversy (1988-90)

After the passage of the federal 1988 Amendment, the BFHC is entering its third phase of fair housing legislative history. In this phase, the BFHC is currently facing three major challenges: first, a battle to amend the city's fair housing ordinance to become substantially equivalent to the amended Title VIII; second, to work with the Mayor to

¹² CDBG Grantee Performance Reports, City of Boston, 1985-1989.

clarify and implement the Skinner ruling; and third, to continue its on-going battle to remain an autonomous law enforcement agency while imbedded in the political structure of City Hall.

1. Judge Skinner's Decision in *NAACP v. Kemp*

Beginning in the early in 1970s, the NAACP's Boston Chapter noticed that the city's CDBG monies were not being used to build as much housing in the minority communities as in white neighborhoods in Boston. Nancy Wilkerson, chair of the NAACP housing committee said that the monies predominantly were used to subsidize the development of elderly housing, thus benefiting whites more than people of color since minorities tended to be in the younger age brackets. Moreover, she said that the housing development subsidies were going to developments sited in white areas more than neighborhoods with majority people of color (interview).

Originally, the NAACP wanted to sue the city of Boston for discrimination in the way it allocated its CDBG monies. However, the courts had made it difficult to prove discrimination, not only requiring the showing of discriminatory effect but also discriminatory intent. The NAACP could only show that Boston had used its monies in a way that in effect discriminated against people of color. Short of coming across a confidential memo or tape recording of a racist remark, the NAACP could not show that the city politicians and bureaucrats had intentionally built and sited elderly housing to discriminate against people of color. Thus in 1978, the NAACP decided to sue HUD for not following its statutory mandate to ensure that its CDBG grantees allocate funds to the equal benefit of whites and blacks.

After 11 years and two appeals, U.S. District Court Judge Skinner in *NAACP v. Kemp* finally ruled in favor of NAACP finding that

First, HUD did not require the City to establish an effective fair housing enforcement program in the face of its knowledge of pervasive racial discrimination in the City. Second, despite its knowledge that a housing emergency existed which had a disproportionate impact on low income black families, HUD did not condition its provision of federal funds, specifically UDAG funds on construction of affordable integrated public housing¹³.

The Judge's first finding relates to the lack of enforcement powers of the BFHC created as a response to the overwhelming evidence of discrimination collected in the research audit in

¹³ *NAACP v. Kemp*, Judge Skinner's Decision, 1989.

1981. The second finding relates to the fact that HUD only attached requirements of income and not racial mixing to the UDAG financing of Harbor Point, Winslow Court and Tent City housing developments.

Judge Skinner argued that HUD had failed to affirmatively act to further fair housing goals by first, not monitoring the grantees and recipients of HUD housing subsidy programs (CDBG, Section 8, UDAG, etc.) to assure racial integration, and second, not requiring the adequate enforcement of Boston's fair housing laws. Thus although the Judge never explicitly stated what exactly constituted fair housing goals he implied that they are residential racial integration and the enforcement of anti-discrimination ordinances.

The Judge ordered HUD to require Boston and the state of Massachusetts to fulfill two major conditions if they are to receive any HUD funding: first, to create at the BFHC a clearinghouse on available housing units, and second to amend the Boston fair housing law. Both the city and the state must require managers and owners of "any assisted public or private housing" located in the Boston SMSA to list available units at the Boston Housing Opportunity Clearing Center to be administered by the BFHC. The Center is to affirmatively market the listed units to minorities, specifically low income African-American households.

Furthermore, the Judge ordered the state and the city to promulgate legislation that empowers the BFHC to levy fines and "bring administrative and judicial proceedings against persons engaging in discriminatory practices". The passage of such legislation is also necessary for the BFHC to gain substantial equivalency under the 1988 federal Fair Housing Act¹⁴.

The Ray Flynn administration is appealing the Skinner decision, claiming that it was not a party in the suit and thus cannot be required to follow court orders to remedy a situation for which it was not found directly liable. In public however, Flynn's aide Neil Sullivan, said that the administration fully supports the court's orders but needs clarification on what the Judge exactly means when he writes "publically-assisted" and which "private units" are required to be listed in the new housing information clearinghouse. The Mayor's Office would also like clarification on whether the judge

¹⁴ The plaintiff received a court order to amend the ordinance and a housing information clearinghouse but did not get from the court the original objective of the suit, additional monies to fund subsidized housing for people of color. The NAACP originally requested the Judge to require HUD to grant additional monies to the city of Boston to build affordable desegregated housing and provide increased rental subsidies. However, the Judge argued that granting of additional funds for particular projects is under the discretion of the Secretary of HUD and not for a court to decide. Instead, the Judge ruled to withhold federal funding until HUD, the state and the city take steps to further fair housing.

meant the elimination of the five or less unit exemption from the ordinance or the city's affirmative marketing plan (Sullivan statement at Hyde Park public hearing).

The unclearly worded Skinner decision and its convergence with the requirement to strengthen the local ordinance under the amended federal fair housing law has been used by conservative City Council members to confuse the public and delay its implementation. The City Council held a hearing on the court order to amend the ordinance in early December 1989. Among those who voluntarily testified in support of the ordinance were representatives from the Lawyers' Committee, the NAACP, the Greater Boston Legal Services, Local 26 of the Hotel and Restaurant Workers' Union, and one disabled person who was a complainant of discrimination served by the BFHC.

The City Council did not vote on the proposed amended ordinance but rather held a public hearings in South Boston, Hyde Park and West Roxbury, all predominantly white neighborhoods. According to Diane Wilkerson of the NAACP, because no one testified against the fair housing ordinance at the December hearing, the conservative City Councilors have been putting on "a traveling road show" of public hearings held in the councilors' neighborhoods to create opposition to the ordinance (interview). At the community hearing in South Boston, Councilors James E. Byrne (Dorchester) chair of the City Council housing committee, Albert L. O'Neil (at-large), and James M. Kelley (South Boston) misinformed the mostly white audience on the requirements of the Skinner decision. The three councilors incorrectly stated that the Skinner decision requires the city to assign every available unit to a tenant. The Boston Globe quoted a resident's reaction to the councilors' statements as follows,

"Don't tell us that we have nothing to fear. We're well-experienced with federal judges and what they've done to the Boston school system. I say to you, I say to Judge Skinner, no one is going to decide who I rent to. If this legislation passes and I have an empty apartment, I would lock the door"¹⁵.

The councilors had misconstrued Judge Skinner's decree that a Boston Housing Opportunity Clearing Center be set up "in which shall be listed all assisted public or private housing units available for sale or rental in the Metropolitan Area, or any private units which are offered for listing by their owners or operators"¹⁶. Thus the court order merely required the listing of available publically-assisted units and not the assigning of units to any tenant, black or white. The purpose of such a centralized list is only to assist

¹⁵ Steve Marantz, "Fair housing resurfacing as problem for Flynn," The Boston Globe, February 2, 1990, p. 29.

¹⁶ *NAACP v. Kemp*, Skinner Decision, 1989.

homeseekers, specifically minorities, in locating affordable housing in the tight market of Boston, and not forced residential integration.

2. Substantial Equivalency of Boston Ordinance with the 1988 Fair Housing Amendment Act

Lawyers at the NAACP anticipated the local resistance to the requirement of the BFHC to become substantially equivalent to HUD under the 1988 Amendment. They suggested to Judge Skinner that he make the promulgation of an amended local fair housing ordinance part of his decision, creating judicial pressure on the city to pass an amended fair housing ordinance as a condition for the release of CDBG funds. Thus the city and the BFHC must work to pass an amended ordinance under the court order and to fulfill a contractual agreement with HUD to process Title VIII complaints. In practical terms, the Boston Fair Housing Commission must become substantially equivalent to HUD so it can receive operating funds for the processing of Title VIII complaints and Boston its CDBG funds.

The existing ordinance must be amended to give the BFHC the power to impose fines and assess damages plus attorney's fees for complainants. The five appointed Commissioners of the BFHC would act as the administrative law judges. The BFHC has 40 months to become substantially equivalent, beginning the month the 1988 Amendment went into effect, April 1989. In this short timeframe, the BFHC must work to get City Council and the Mayor to sign an amended ordinance, to pressure the state legislature to sign a home-rule petition, receive HUD approval of its equivalency application, and perhaps to go through the process again if HUD demands additional modifications.

In late March 1990, the City Council and the Mayor's Office is finally taking steps to fulfill part of the court order which requires the city to pass an ordinance substantially equivalent to the 1988 Amendment. They have submitted a home-rule petition which includes the power to impose fines and assess damages but which removes from coverage owner-occupied buildings with one to four dwelling units. (A home-rule petition is required to gain permission from the state for the city to pass the local ordinance to give the BFHC greater enforcement powers.) The home-rule petition must now be signed by the Mayor before it goes to the state. The Mayor is expected to sign since his office drafted the petition with the first exemptions ever to be included in the Boston fair housing ordinance. It is clear that the exemption would clear substantial equivalency requirements of the amended federal Fair Housing Act since Title VIII also contains a similar "Mrs. Murphy" exemption. However, Judge Skinner, although not explicitly stating it, has implied that he

would not tolerate such an exemption. The importance of the Skinner decision is not solely whether the Judge would tolerate exemptions, but rather that the decision came down at a time when the BFHC needed to strengthen the ordinance. Without the Judge's orders to revoke city CDBG funds, the petition to give the BFHC more power would not have come so far in a local political climate that has historically been hostile to fair housing.

3. The Question of Political Autonomy for the BFHC

Even if the BFHC wins an amended ordinance and becomes substantially equivalent, the BFHC must still tackle the reluctance of the Flynn administration to promote its autonomy. Judge Skinner recognized in the first opinion of the NAACP suit that the then Mayor's Office of Fair Housing was "merely a cosmetic" change in the city's commitment to address fair housing issues since the office was at the mercy of the Mayor and City Council for staffing and funding. While the current BFHC has a more diverse funding base than city CDBG monies appropriated by City Council, it seems that the City will utilize every means to intervene in the operations of the Commission. In 1985, the former executive director Upshur left the Commission frustrated at the need to constantly lobby the City to receive adequate funding to staff the Commission (Frank Jones, interview).

Recently Mayor Flynn "has overstepped his legal powers" (Diane Wilkerson, interview) to virtually paralyze the BFHC which has been functioning without the leadership of an executive director for almost two years. This has resulted in the BFHC's legal counsel double dutying as the acting executive director, thereby slowing down many of its normal operations (Chris Burke, interview). On his own accord, the Mayor has promoted a nominee for the executive directorship of the BFHC although the fair housing ordinance explicitly states that the power to choose an executive director is under the jurisdiction of the five Commissioners. Miguel Satut, former chairman of the Commission said, "they (the Flynn Administration) must feel they can do whatever they want to do, no matter what the rules and ordinances on the book"¹⁷. It seems that the Mayor was not satisfied with simply the power to appoint Commissioners but also who he thought would be an appropriate executive director.

The BFHC Commissioners selected Thomas Saltonstall, the former Regional I Director of the U.S. Equal Employment Opportunity Commission, a man who has made a

¹⁷ Peter J. Howe and Brian C. Mooney, "Reshuffle hits panel arguing with Flynn," The Boston Globe, November 23, 1989, p.33.

career as a staunch supporter of civil rights. The Flynn administration objected to Saltonstall's appointment, arguing that the post be filled by a person of color. The Mayor, after purportedly utilizing a national search as comprehensive as the one conducted by the BFHC, nominated Theodore Landsmark of the Mayor's Office of Jobs and Community Services in Boston. However, in light of Boston's reluctance to enforce fair housing laws, the issue does not seem to be whether or not the executive director is a person of color, but whether or not the director is adept as a team player within city government. A former federal official such as Saltonstall is less inclined to play political games than to force Boston to create a strong enforcement program, much in the same way as Upshur did from his posts as the HUD regional director and BFHC executive director. Indicating the seriousness of his intentions to institute a strong enforcement program, Saltonstall requested that the Mayor endorse a large-scale systemic testing program as a precondition for accepting the post.

After intense criticism from the NAACP, the Lawyers' Committee for Civil Rights and the Greater Boston Coalition for Civil Rights, MCAD, and the BFHC, the Mayor backed down from his nominee and expressed full support for Saltonstall. However, Saltonstall has declined the offer, questioning the Mayor's commitment to the creation of an independent and strong Fair Housing Commission after recent disclosure of plans to subsume the BFHC and four other agencies under a new Human Rights Department. The Flynn Administration contends that such a consolidation is in response to budget cuts. Neil Sullivan, Flynn's policy advisor states that "the entire administration is going to cope with cutbacks now...We will be able to deliver better services by consolidating the staffs of all these commissions rather than by allocating cuts to each one separately..."¹⁸.

However, the consolidation seems to be more than a money saving matter for the proposed Human Rights Department will have a mayorally-appointed executive director, thereby rendering the leadership of each now independent commission powerless over staffing. The consolidation would effect the Women's Commission, Human Rights Commission, Commission for Persons with Disabilities and the Emergency Shelter Commission who under the new plan would have "independent" boards and executive directors accountable to the mayor's appointee. In subsuming the BFHC under a Human Rights Commission directed by a mayor's appointee, the Mayor is attempting to take the power over staffing and programming away from the BFHC. While some may argue that increasing the power of the Mayor over decision-making at the BFHC may not result in a decrease in resources for the agency, historical evidence points to the conclusion that the

¹⁸ Brian C. Mooney, "Saltonstall undecided on job," The Boston Globe, November 30, 1989, p. 30.

current administration does not have the political will to endorse a meaningful fair housing program for Boston.

The Mayor's attempt to undermine the autonomy of the BFHC has not been met by outrage from anyone but those who have worked at the BFHC. Since the original enforcement powers of the BFHC was virtually non-existent, it may have been difficult in the past to garner the support of the constituency served by the BFHC. However, the proposed amended ordinance provides the necessary powers of enforcement. The new conciliation process is supported by a prospect of a semi-judicial hearing with high monetary sanctions. Thus the protected classes stand to benefit from the increased power afforded to the BFHC by the proposed ordinance. Exactly how the increased powers of the BFHC will improve the enforcement capacity of the BFHC is the subject of the next chapter which looks at the potential impact of fines on the BFHC complaint processing procedures.

Chapter IV

BFHC's Processing of Individual Complaints

A. Introduction

This chapter is a close look at the potential impact of the pending ordinance on the processing of individual complaints at the BFHC. To discuss the impacts, it is necessary to lay out the current complaint enforcement procedure, discuss its weaknesses and how those weaknesses have effected the outcomes of complaints processed at the BFHC. Then, I will explain the potential impact of the new power to assess damages and fines on the processing of complaints.

B. Complaint Processing Procedure Under 1982 Ordinance

1. Steps in Complaint Processing Procedure

The BFHC complaint processing procedure can be broken down into six phases: intake, investigation, determination, conciliation, public hearing and decision. Intake: After the BFHC, a representative of an aggrieved party (tester, community group, civil rights organization, etc.), or the aggrieved party him/herself files a complaint, the BFHC determines if it has jurisdiction over the allegations of discrimination. Determining jurisdiction means finding out where the alleged discriminatory action happened and for what reason. The BFHC can only take complaints originating in Boston and discrimination against the protected classes listed in its ordinance (race, ethnicity, sex, etc.). For example, family size is not a basis of discrimination covered under the Boston fair housing ordinance. Thus, if a woman files a complaint against a landlord for not renting to her on the basis of the size of her family, the BFHC cannot investigate the case (neither can HUD or MCAD)¹⁹. If it finds that it has jurisdiction, the BFCH has 20 days to notify the complainant and the respondent that an investigation is in process. The complainant may

¹⁹ Discrimination on the basis of family size is not the same as discrimination against children. Discrimination on the basis of family size effects many immigrant families of color who, when compared to white families, tend to not have the traditional nuclear family but rather unite grandparents, aunts, uncles or grandchildren under one roof.

withdraw her/his complaint at any time during the procedure, and do so because the complainant loses interest, or s/he wants to file in court instead.

Investigation: When jurisdiction is determined and the parties are notified, the formal investigation begins. During the investigation phase, the staff investigator assigned to the case gathers evidence from the complainant, respondent and eyewitnesses. The investigator may review records, take testimonies, or even conduct a test.

Unlike MCAD, the BFHC's regulations does not allow it to hold "fact-finding conferences". When the regulations were adopted, the BFHC decided that it placed too heavy of a burden on the respondent to come to a negotiating table before a finding of probable cause of discrimination has been made. Thus, the BFHC investigative staff has to use cumbersome methods of interviews and on-site record searches to complete its investigations.

From the moment the investigation begins, the investigator encourages the parties to agree to a no-fault settlement. They are formally called "predetermination settlement agreements" meaning the respondent has to do something to appease the complainant even though the respondent has not been determined to be guilty of discrimination. If the parties cannot agree to a settlement during the investigation phase, the investigation continues until the investigator makes a determination of probable cause or no probable cause.

Determination: The full investigation is completed when a written report is issued justifying the determination of no probable cause or probable cause of illegal discrimination. A finding of no probable cause results in the dismissal of the complaint. The dismissed complainant may appeal in which case the complaint is reopened by one of the Commissioners.

A finding of probable cause means that it was more likely than not that there was illegal discrimination. A probable cause finding is a preliminary finding and still *not a final determination of liability*. While during the previous stages the BFHC plays the role of a neutral fact finder and mediator, after a finding of probable cause it may now act as an advocate for the complainant.

Conciliation: Under its own regulations, only after the probable cause finding can the BFHC investigator require that both parties come to a conciliation conference in which after a series of options are discussed, the parties may agree to a written and signed settlement. For example, through conciliation, the investigator may suggest that the rental agent agree to offer the complainant the unit in question or some monetary compensation for economic

or emotional hardship. The BFHC has the power to subpoena a respondent to come to the conciliation arena. The BFHC monitors the compliance of the signed agreement and will reopen the case if a violation is found.

Public Hearing: If the conciliation procedures fails to produce an "adequate" resolution, and the complainant has not withdrawn or gone to court, the BFHC may certify the case to a public hearing or administrative trial before one or more Fair Housing Commissioners. If the complainant does not have counsel, BFHC staff may argue on behalf of the complainant. At this point, the BFHC may also refer the case to MCAD or HUD.

Decision: At the public hearing, the Hearing Commissioner may either agree or disagree with the earlier probable cause finding of discrimination. If the Hearing Commissioner finds that there is no discrimination the complaint is dismissed, after the complainant is offered an opportunity to reopen the investigation. If the Hearing Commissioner makes a probable cause finding of discrimination, s/he may order the respondent to: (1) write an apology, (2) attempt to market affirmatively, and (3) award the complainant monetary compensation. Either party may appeal the decision of the Hearing Commissioners in a Boston municipal, a district, or a county superior court.

2. Impact of Weaknesses of the 1982 Ordinance on the Complaint Processing Procedure

Primarily because it cannot impose fines and assess damages under the current ordinance, the BFHC lacks the power to pressure respondents to settle quickly or with large monetary settlements. Remember that the BFHC's policy is to try to settle disputes as quickly as possible, with the objective of gaining a fair "pre-determination settlement" before the completion of a full investigation. If the respondent settles early it is usually because s/he does not want to go through the hassle of the rest of the administrative complaint procedure and not because of any significant threat of litigation or fines at the end of the administrative trial. It is a rare case that a complainant has the resources to litigate in court, or that the BFHC counsel take unsettled complaints to court. The investigator must appeal to the moral conscious of the respondent to quickly remedy the alleged complaint. Obviously, the investigators do not have much leverage to force a rental agent who is aware of the limitations of the local law to demand quick resolution or large remedies for the complainant. The weak ordinance has indeed resulted in the slow processing of complaints and low monetary settlements at the BFHC.

3. Outcomes of Complaints Under the 1982 Ordinance

Neither HUD Regional I OFHEO nor the Boston Public Facilities Department, the agencies which monitor the use of Title VIII and city CDBG monies respectively, keep records of the BFHC enforcement activities in a systematic format over one year to the next. Thus it is nearly impossible to determine exact changes in complaint processing time or case outcomes. However, using disparate sources, I can provide a sketch of BFHC complaint processing activities. As predicted by in the discussion above on weaknesses of the ordinance, the BFHC in general has not processed complaints in a timely manner nor has it reached many predetermination settlements with large monetary awards.

Until the recent hiring of a third junior investigator, the two full-time investigators receive 200 phone calls annually about possible discrimination, but only half result in formal written complaints (Inga Bernstein, interview). According to a HUD reviewer, the BFHC completed about 72 full investigations in 1988-89²⁰, including cases opened in previous year. Thus some cases took more than a year to process.

HUD has consistently criticized BFHC for its slowness in resolving cases, with a significant number of complaints having to be reopened by HUD. In 1988, the average time to process a complaint was 276 days, which was an increase of 61% from the previous year's average of 167 days²¹. The range was a high of 549 days to a low of only over 30 days for 1988. Despite the Boston and federal examples, timely and fair processing of complaints is not impossible. As shown in the Fair Housing Assistance Program Evaluation, the only HUD-sponsored comprehensive statistical analysis of cases processed in a national sample of state and local fair housing law enforcement agencies, an unnamed state agency processes complaints in which the unit in question is still available through a "fast track method". In this "fast track method", each of these complaints is verified by a test, a temporary injunction is requested, and a settlement is reportedly reached in less than ten days (Abt Associates, 1985).

Even though the BFHC tries to reach a settlement as quickly as possible, even before it makes a finding of probable cause of discrimination, most of BFHC complaints are not settled early. The majority go through the full investigative process and are dismissed due to a finding of lack of probable cause (which means the evidence produced

²⁰ Russell J. Archibald, Annual Performance Evaluation of the Boston Fair Housing Commission 1988-89, U.S. Department of Housing and Urban Development, September 1989.

²¹ Ibid.

cannot lead a reasonable person to believe that discrimination occurred)²². Obviously if most cases go all the way to the determination of probable cause phase then few cases at the BFHC result in "predetermination settlement" agreements.

As the BFHC current acting executive director and General Counsel Christopher Burke states, " a smart real estate agent would deny discrimination and ride out the process to the end..." (interview; also made same comment at Hyde Park public hearing). It is a tribute to the mediation skills of the investigators that the BFHC not only brings respondents to the table but receives monetary settlements at all. Because the case files of the BFHC are not computerized, no hard statistic is available on the average payment dollar figure. The number of \$2,000 was estimated by ex-Fair Housing Commissioner Frank Jones, first chairperson of the Boston Fair Housing Commission (interview). However, according to a 1989 HUD audit of the BFHC, of those cases receiving monetary settlements, most did not reach more than \$450, with an exceptional settlement of \$12,000 for a case of discrimination against children²³.

The monitoring of compliance of agreements becomes necessary to make sure that respondents fulfill the provisions of the either predetermination or conciliation settlement agreements. According to the HUD audits, the relatively simple and few agreements reached by the BFHC whether in the form of monetary relief, apology or offering of housing units have been so far adequately monitored by the staff member who investigates the complaint.

4. Potential Impact of the Pending Ordinance

The fair housing ordinance pending in City Council would give the BFHC's Commissioners the power to fine respondents \$10,000 for the first offense, \$25,000 for the second, and \$50,000 for the third offense as well as assess damages and attorney's fees. The power to assess damages and impose fines potentially may have four effects on the BFHC's complaint processing procedure. First, the number of cases filed at the BFHC will increase because now complainants can more confident than before the amended ordinance that they will receive remedies. Second, it will reduce the time it takes for individual cases to settle. The threat of having to pay damages at a public hearing will induce respondents to settle before the complaint is decided by the Commissioners. Third,

²² About 40- 45% of cases closed at MCAD and the Kentucky Human Rights Commission are dismissed due to a finding of lack of probable cause, a significant proportion given the fact that these two state agencies have greater enforcement powers to push for early predetermination settlements than the BFHC.

²³ Ibid.

it will also raise the leverage of BHFC to request higher monetary pre-determination or conciliation settlements than are currently won since fines may potentially range from \$10,000 to \$50,000. A respondent would rather pay a lesser monetary settlement in the earlier phases than risk paying a fine, damages, plus attorney's fees for him/herself and the complainant after a public hearing. Fourth, since the power to assess damages creates an incentive to settle before a finding of discrimination, the BFHC monitoring of compliance with "predetermination settlement" agreements becomes more important than it has been in the past.

Does the power to assess damages entirely account for the slowness in the processing of complaints at BFHC? No because it seems that evidence from a HUD review of its activities, complaints are not processed quickly due to a cumbersome intake process. The threat of damages only effects the processing of complaints which reach the investigation stage but has no effect on cases which do not get into the pipeline due to the BFHC's inability to maintain contact with the complainant during intake.

The BFHC lacks a computerized system for processing new complaints and uses a rotation procedure to staff the intake position. All members of the staff take turns to interview complainants in the intake room, a procedure that leaves a lot of room for details to fall in-between the cracks. Moreover, the intake forms are handwritten and typed, two steps which would be eliminated if the procedure were computerized. Especially disturbing was the fact that the BFHC "intake procedure does not obtain the names of other persons or means by which the complaint may be contacted"²⁴; a procedure which is crucial in maintaining contact with the complainant who is usually in the process of relocating. The inability of BFHC staff to keep in touch with complainants results in the "administrative" withdrawal of complaints (the BFHC removes case because it failed to reach complainant) or in the complainants themselves removing their complaints for lack of interest.

Thus, the record of BFHC's processing of individual complaints show that on average it takes about 200 days to close a complaint and that of the few cases which resolved in settlements, the amount ranges from a rare \$12,000 to an average of \$450. The BFHC's poor record for timely and satisfactory processing of complaints explain the loss of support from its potential complainant population. The power to assess damages may raise the number of total complaints filed, shorten the period it takes to close complaints, and raise the dollar amount of settlements. Thus, in theory, the pending ordinance will increase the effectiveness of the BFHC in enforcing its anti-discrimination mandate and may therefore lead to broad-base support from protected class communities.

²⁴ Ibid.

Chapter V

Conclusion and Recommendations

A. Conclusion

Since its inception in 1982, the BFHC has been an enforcement agency in name but only a conciliation and mediation body in practice. Unsuccessful attempts have been made in 1982 and 1983 to give the BFHC enforcement powers -- the power to fine discriminators. Without this enforcement power, "the BFHC can only guarantee to a complainant that people will come together to talk -- even if they disagree. The BFHC cannot give assurance that victims of discrimination will get remedies. The complaints can only be passed on to MCAD or federal courts" (BFHC Commissioner testimony at December 1989 public hearing). As the previous chapter showed, this lack of enforcement power and its lack of a computerized intake system, has given the BFHC a reputation of slow and unsatisfactory complaint resolution. This record has contributed to the low level of support it has received from its protected class constituencies.

Presently under pressure from the federal mandate for substantial equivalency and the Skinner threat of funding withdrawal, City Hall has drafted and submitted a home-rule petition to give the BFHC the power to assess civil penalties, compensatory and punitive damages plus attorney's fees. Such powers will now make it worthwhile for individual victims of discrimination to file complaints thus increasing the number of complaints filed at the BFHC, speed-up complaint processing, and increase the dollar value of monetary settlements.

The BFHC is on the brink of receiving the necessary legal powers to carry out its fair housing law enforcement mandate. However, it still needs to garner enough staff and funding to exercise its potential powers. Because of its placement within the political structure of Boston, the gaining of funding (for staff or computer systems) is a political process requiring either Council or grass-roots support. The adequate enforcement of individual complaints may improve its image but it will not lead to organized community-level support for the BFHC.

Moreover, evidence from systemic tests conducted in the Boston area suggests that discrimination is much more prevalent than the number of individual complaints currently filed at the BFHC would suggest. Because the discrimination found in the systemic tests is of a kind which is extremely difficult to detect, many incidences of illegal discrimination

go unreported. Both the Abt and the most recent BFHC studies of discriminatory behavior of real estate agencies indicate that the prohibited practice of making units unavailable to minorities, when in fact they are available, is common in both racially-mixed and predominantly white neighborhoods. Discrimination on the basis of one's source of income has also been proven to exist. Moreover, the tests show that the growing numbers of linguistic minorities to Boston, in particular Cape Verdeans, Haitians, Vietnamese and Cambodians, are not only discriminated on the basis of their race but are also less aware of and willing to assert their rights. For example, the BFHC found it difficult to recruit Southeast Asian testers which some Southeast Asian community experts explained was a result of their reluctance to participate in government-sponsored activities. This reluctance was attributed to the experiences of many recent Southeast Asian immigrants with the regimes in their native countries, and their views of the U.S. government. Therefore, even though there will be more incentive for individual victims to complain, the number of complaints filed at the BFHC may not increase because discrimination is difficult for American minorities to detect and because new immigrants are not aware of the possible avenues of redress for discrimination.

B. Recommendations: Systemic Testing Programs As the Future of Fair Housing Enforcement

The BFHC staff members understand the great need to take the burden of detection and complaint proceedings off the hands of individual victims of discrimination because (a) discrimination is difficult to detect; (b) most members of protected classes are not aware of their civil rights and remedies available for potential discrimination; and (c) addressing discrimination on a one-to-one basis does not necessarily develop organized grass-roots pressure which it needs to remain adequately funded and staffed. The most promising strategy to address these limitations of individual complaint processing is to develop a strong systemic testing program. In recommending the institutionalization of a systemic testing program, I recognize and have tried to raise suggestions concerning funding constraints, the need for inter-agency cooperation, and the involvement of organizations representing protected class constituencies.

1. Funding

One of the greatest barriers to implementing such a policy has been securing permanent monies. Up until now, funding for its systemic testing program has relied on

the BFHC winning occasional HUD competitive systemic testing grants. These federal grants have virtually disappeared for public civil rights enforcement agencies and thus forces the BFHC to look at the local level for funding prospects in the near future.

Presently, I see three alternatives for permanent sources of systemic testing funding: (1) city CDBG monies, (2) the Greater Boston Real Estate Board, and (3) HUD.

It may be politically prudent for the BFHC to request the Mayor, who is currently considering running in the Massachusetts gubernatorial race, to support the permanent CDBG funding of a systemic testing program as an indication of his support for a strong fair housing program in Boston. Proponents of fair housing have begun to question the Flynn's level of commitment to creating a strong fair housing program in light of his recent interference with the selection of a new BFHC executive director and endorsement of a plan to reduce the power of the BFHC over its staffing decisions. In endorsing a plan to channel CDBG monies to the BFHC's testing program, the Mayor will be supporting in concrete terms what he has verbally endorsed, a strong fair housing program for Boston. In making this proposal, I understand that the Mayor still is faced with the task of convincing the City Council to approve the use of CDBG funds in this manner. However, if City Hall did endorse such a permanent systemic testing program²⁵, it would be more than making a best faith effort to respond to Judge Skinner's accusations of Boston's continued reluctance to enforce its fair housing ordinance.

A second source of potential funding is the Greater Boston Real Estate Board (GBREB). In 1988, the GBREB had publicly promised to contribute to the funding of a systemic testing program at the BFHC but never did so. The board members at the GBREB voted the proposal down ostensibly because its national headquarters threatened the revocation of its liability insurance. But according to Richard DeWolf, ex-chair of the GBREB equal opportunity committee, the proposal was voted down mainly because the

²⁵ To facilitate the targeting of its systemic testing program, the Commissioners of the BFHC should reconsider changing BFHC regulations to require landlords owning 25 units or more to submit reports on the socio-economic characteristics of tenants and applicants. When the regulations of the BFHC was first adopted in 1984, the BFHC considered the requirement of all landlords owning 25 units or more to submit quarterly reports on the socio-economic characteristics of their tenants and applicants. Due to political opposition to placing undue burden on landlords to disclose business practices, the BFHC decided to table the matter for reconsideration at a later date. The real estate reports could potentially show discrepancies between the racial composition of certain buildings and their surrounding neighborhoods. Moreover, keeping records of minority and female-headed tenants and applicants will force landlords to confront the fairness in which they market and accept applicants. Such reports have been part of the enforcement of fair housing laws in Montgomery County, Maryland since 1982 and used by the non-profit Suburban Maryland Fair Housing Inc. as background information in its systemic testing program (Richard Ellen, interview). The real estate report requirement was challenged in district court but the regulation was upheld by the presiding judge argued that Montgomery County's regulation was permissible under the state's general welfare power.

majority of the board members were antagonistic to an in-house fair housing systemic testing program and the idea that a trade association should police itself (interview).

The funding of a systemic testing program at the BFHC was the last in a series of proposals from the GBREB to respond to evidence that some of its members were found to have violated fair housing laws. Internal policy changes were instituted at the GBREB after MCAD found that one of the largest real estate companies in New England was discriminating against African-American homeseekers in a large systemic testing program conducted in Milton in 1986. At the time of the test, the owner, Richard DeWolfe of DeWolfe New England was also the chairman of the equal opportunity committee of the GBREB, the trade association for 5,300 professional "realtors". In response to the findings, DeWolfe took personal initiative to institute what was going to be the first mandatory testing program sponsored and implemented by a local real estate board. The testing program received national press coverage and was announced with great fanfare in Boston.

However, under considerable pressure from the National Board of Realtors who at that same time was fighting in Congress to change regulations regarding testing procedures, the board changed the mandatory testing program to a voluntary one, and then all together aborted it. In 1988 DeWolfe resigned as chair of the equal opportunity committee. BFHC and MCAD officials had shared important information on testing with the board and were angry at the board's renegeing on its commitment to start a testing program.

In mid-1989, several members of the GBREB were found to have discriminated against a black journalist in a test conducted by two Boston Herald reporters. In reaction to the findings, the GBREB firmly argued that the best way to address discrimination was through education. Presently, the GBREB's fair housing program consists of a mandatory three hour educational program which DeWolfe describes as "no big thing" (interview). In seeking funding for systemic testing from the GBREB, the BFHC will face the obstacle of convincing a board which is still reluctant to go beyond educational fair housing efforts. However, the GBREB has yet to "save face" (Richard DeWolfe, interview) from abandoning its own promises to support testing as a means to regulate its own members.

The third potential source of funding is the least feasible in the short-term but which may prove to be the most stable in the long-run if it is approved. The BFHC could lobby HUD central to fund systemic testing not as "special projects" but as law enforcement programs as routine as individual complaint processing, and with each round of funding targeted at different protected groups. With the passage of the 1988 Amendment Act, two new protected class categories, families with children and handicap, are now included in

the federal fair housing law. Thus systemic testing funding should also parallel the addition of protected classes since state and local agencies must now gain expertise in enforcing the rights of populations with different barriers to housing access.

2. Cooperation Between Civil Rights Agencies

Presently, public and private law enforcement agencies compete against one another to receive federal grants for testing programs for all types of discrimination. The competition for scarce funding has resulted in little cooperative enforcement efforts between HUD Regional I, MCAD, BFHC, and the Lawyers' Committee for Civil Rights (who recently won a HUD grant to fund its first systemic testing program). Instead HUD central should create funding incentives that encourages the cooperation of HUD Regional I, MCAD, the BFHC, and private civil rights organizations like the Lawyers' Committee to develop systemic testing programs that strategically target the real estate industry for significant changes in its policies and procedures.

Cooperation is feasible between these four agencies because they have different geographical jurisdictions and could have different programmatic emphases. HUD Regional I processes complaints from states and municipalities in New England which do not have fair housing programs whereas MCAD focuses its activities in areas in Massachusetts which lack or are just beginning fair housing plans. Even though the BFHC and the Lawyers' Committee both focus on Boston, they may consider specializing in discrimination of different types. The Lawyers' Committee, in accordance with its by-laws, could target its systemic testing program on discrimination based on race and national origin, while the BFHC could concentrate on discrimination based on familial status (children)²⁶, source of income and other protected classes. In coordinating systemic testing expertise, the BFHC, MCAD, HUD Regional I and the Lawyers' Committee can begin a new level of interaction above its present relationship of conciliating and litigating individual complaints.

²⁶ According to Barbara Sard of Greater Boston Legal Services, discrimination against children is rising in Boston because landlords find it cheaper to discriminate against families with children and pay a fine than to remove poisonous lead paint in dwelling units rented to Section 8 families with children (testimony at December 1990 public hearing).

3. Involvement of Organizations Representing Protected Class Constituencies

While it is important that the BFHC coordinate its enforcement efforts with other public and private civil rights agencies, the BFHC should also engage organizations representing protected class communities in its enforcement efforts. The importance of this policy is exemplified in the current battle to amend its ordinance. Bob Terrell of the BFHC's Programs unit believes that if the City Council chambers had been filled with people representing, among others, the gay community, the veterans, the African-American, Latino and Asian communities, the petition would not have taken so long to get through Council since there would have been grass-roots political pressure to approve it the first time it went for review (interview). The need to engage organizations representing protected class communities in the BFHC enforcement effort is echoed in a statement by the Frank Jones, ex-BFHC Commissioner,

The Commission must do a better job of enlisting community-based organizations in neighborhoods all over the city to: (a) help them better understand that fair housing is not a threat to neighborhood stability; and (b) enlist their support and assistance in the enforcement of fair housing...Our job is to put fair housing on neighborhood agendas...²⁷

The question has been how? I suggest that the BFHC engage organizations serving the complainant community in the enforcement process through its systemic testing program and the compliance monitoring process. Whereas now the real estate agency found guilty of discrimination only has to pay a one-time monetary settlement or offer one housing unit and can put the entire matter quickly aside, in the new scenario, an advocacy agency serving a protected class community monitors the compliance of the real estate agencies to their consent decrees thereby forcing the two parties into a long-term relationship. The organizational linkages is a way for the predominantly white real estate industry to get to know first-hand the economic and non-economic factors constraining protected classes in their housing search. For organizations serving new immigrant groups, establishing a working relationship with members of the real estate community is an opportunity to learn about real estate laws and the housing finance system of the U.S..

In considering such a strategy, it is important to differentiate the two categories of advocacy groups serving the BFHC protected classes in order to measure the potential support they will give to fair housing law enforcement. The first category of organizations are social service/advocacy agencies like Oficina Hispana de la Comunidad and My Sister's

²⁷ Rose Wright, "Meet the Commissioner," The Boston Fair Housing Quarterly, Summer 1988, p.3.

Place (a women's shelter/homeless advocacy organization) which presently act as housing providers for particular protected class constituency groups on a city-wide level. The second category of organizations serving protected classes are place-based groups, such as the Dudley Street Neighborhood Initiative. Its main concern is the development of a community in a specific geographical area. The social service/advocacy agencies in the first category are more likely to place fair housing as part of their agenda because their programs already center on city-wide housing access. Place-based organizations may be more difficult to convince since they are mainly concerned with attending to the needs of the existing population in a small geographic area. Fair housing may seem like an agenda item that is disruptive of their efforts to build communities since enforcing anti-discrimination in housing may result in the outflow of community members. For example, why would the Roxbury Neighborhood Council be interested in breaking barriers so that African-Americans, which form their basis for existence, can leave Roxbury?

While it may be difficult to engage place-based groups, tenant advocacy and social service organizations located in racially integrated areas such as City Life in Jamaica Plain and United South End Settlements in the South End would benefit in the enforcement of fair housing laws because it would open housing opportunities in the neighborhoods and for the minority low-income population they serve. As the systemic tests and BFHC case files show, discrimination has barred many homeseekers from housing in racially-mixed areas of Boston such as Jamaica Plain, the South End and Allston-Brighton. By dealing with discriminatory practices of real estate agents in racially integrated neighborhoods, agencies serving communities of color will enhance housing access to the very neighborhoods they work in.

Models for creating organizational linkages between the complainant population and the real estate industry already exist at MCAD. For instance, a homeless advocacy organization who originally alerted the MCAD of possible discrimination against Section 8 holders on Cape Cod, is now in charge of monitoring the compliance of a real estate agency to house ten homeless families as part of a consent decree in a systemic testing program. As a result of another MCAD test in the multi-racial town of Framingham, fines totalling \$50,000 was used to hire a person at a local CAP agency to monitor the compliance of six real estate agencies to give their best faith effort to house Hispanic, African-American, Section 8 and state Section 707 certificate holders. Laurie Rubin, the coordinator of that test said she was very satisfied with the agreement because MCAD could give the monetary settlement back to the Framingham community (interview).

The BFHC could in the future require real estate agencies who were found to discriminate against Southeast Asians in Allston-Brighton for example, to translate rental

applications into various Asian languages, and have a social service agency serving the Southeast Asian community to assist and monitor in their compliance. If the BFHC gains the power to impose civil penalties from \$10,000 to \$50,000, the BFHC can provide larger subsidies to advocacy organizations willing to participate in the BFHC's enforcement activities.

By involving protected class advocate organizations in the enforcement process, both the I and E and Programs units may be adding more work for themselves. But at the same time, the BFHC is developing the support of its constituency which it desperately needs to maintain pressure for the passage of the pending ordinance. In a time when civil rights is under attack from a conservative federal administration, the BFHC cannot wait for HUD to act as it did ten years ago. The fact that HUD had to be forced by a court to withhold funding from a municipality which did not fairly distribute its CDBG funds indicates the current reluctance of HUD to take a proactive stance on civil rights. State and local agencies cannot look to federal-level leadership to strengthen fair housing laws, but instead should turn to organizations representing the interest groups it serves. The BFHC has a constituency which is potentially as large as the thirteen protected classes covered under the fair housing ordinance. The thirteen protected classes gives the BFHC natural grass-roots constituencies from which it can build popular support in its current battle to amend the ordinance as well as raising controversy and opposition to recent attempts by the Flynn administration to reduce the autonomy of the BFHC. To build up community support for the agency's fair housing mandate, the BFHC should start today to build up its political clout for future battles in the state legislature and City Hall.

Appendix A: The Residential Racial Pattern in Boston, 1980-85

Racial discrimination in housing is partially a result of long-standing patterns of racially segregated neighborhoods. Boston clearly contains racially and ethnically homogeneous neighborhoods such as the famous Italian neighborhood of the North End, the Irish community of South Boston, and the African American areas of Roxbury and Mattapan.

As indicated in the Boston Redevelopment Authority's 1985 household survey*, Boston's total population is 38% people of color (Latinos, Asians and African-Americans). The largest people of color is African-Americans who constitute 25% of the total population, with Latinos constituting 7%, and Asians 5%. The study predicts that the proportion of people of color in the future will increase because people of color represent a higher proportion of young age people than whites. The BRA survey illustrates that the city contains both racially homogeneous and integrated neighborhoods. The racially homogeneous neighborhoods show little change in racial composition when compared with some racially-mixed areas. The neighborhoods of East Boston, Charlestown, South Boston, Back Bay-Beacon Hill, Roslindale, and West Roxbury have remained over 90% white when comparing 1980 Census data and the 1985 BRA survey. The predominantly African-American neighborhoods of Roxbury and Mattapan show little change in racial composition between 1980 and 1985 (see tables below).

White Neighborhoods -- Change in White Population (in percent)			
	1980	1985	Change
East Boston	97	92	-5
Charlestown	98	97	-1
South Boston	96	97	+1
Back Bay-Beacon Hill	94	91	-3
Roslindale	97	91	-6
West Roxbury	100	96	-4

Source: BRA, Boston at Mid-Decade: Results of the 1985 Household Survey. Summary Report, January 1989, Table 2: "Race and Hispanic Origin of Household Population within Neighborhoods in Boston, 1980 and 1985".

* Margaret O'Brien and Deborah Oriola, Boston at Mid-Decade: Results of the 1985 Household Survey. Summary Report, BRA, January 1989. Table 2: "Race and Hispanic Origin of Household Population within Neighborhoods in Boston, 1980 and 1985", Boston Redevelopment Authority and Neighborhood Development and Employment Agency Household Survey, conducted by Center for Survey Research, UMass- Boston, 1985 and 1980.

African-American Neighborhoods -- Change in African-American Population (in percent)			
	1980	1985	Change
Roxbury	78	75	-3
Mattapan	81	84	+3

Source: BRA, Boston at Mid-Decade: Results of the 1985 Household Survey, Summary Report, January 1989, Table 2: "Race and Hispanic Origin of Household Population within Neighborhoods in Boston, 1980 and 1985".

Racially-Mixed Neighborhoods, Listed From Greatest to Lowest White Population, 1985 (in percent)				
	White	African-American	Asian	Latino
Central	83	0	14	3
Allston-Brighton	81	2	12	4
Hyde Park	70	23	2	6
North Dorchester	66	18	1	13
Fenway-Kenmore	52	15	25	8
South Dorchester	51	35	2	7
Jamaica Plain	51	25	4	8
South End	34	46	11	8

Note: I omitted "Other" race column from BRA study. Thus some totals equal less than 100%.
Source: BRA, Boston at Mid-Decade: Results of the 1985 Household Survey, Summary Report, January 1989, Table 2: "Race and Hispanic Origin of Household Population within Neighborhoods in Boston, 1980 and 1985".

The most significant changes in racial composition of neighborhoods have occurred in the racially-mixed areas of Boston. Between 1980 and 1985, the South End, South Dorchester, Hyde Park and Jamaica Plain have experienced a significant increase in the proportion of African-American residents, while African-Americans were found in decreasing proportions in Fenway-Kenmore and North Dorchester (see table below). Whites have declined in significant proportions in South Dorchester, Hyde Park, and Fenway-Kenmore (see table below).

Racially-Mixed Neighborhoods with Significant Change in African-American Population, Listed From Greatest to Lowest Change, 1980 and 1985 (in percent)			
	1980	1985	Change
South End	25	46	+21
Fenway-Kenmore	34	15	-19
South Dorchester	18	35	+17
Hyde Park	7	23	+16
Allston-Brighton	13	2	-11
Jamaica Plain	17	25	+8
North Dorchester	18	26	+8

Source: BRA, Boston at Mid-Decade: Results of the 1985 Household Survey, Summary Report, January 1989, Table 2: "Race and Hispanic Origin of Household Population within Neighborhoods in Boston, 1980 and 1985".

Racially-Mixed Neighborhoods with Significant Change in African-American Population, Listed From Greatest to Lowest Change, 1980 and 1985 (in percent)			
	1980	1985	Change
South Dorchester	75	51	-24
Hyde Park	98	70	-18
Fenway- Kenmore	65	52	-13
North Dorchester	58	66	+8
South End	40	34	-6

Source: BRA, Boston at Mid-Decade: Results of the 1985 Household Survey, Summary Report, January 1989, Table 2: "Race and Hispanic Origin of Household Population within Neighborhoods in Boston, 1980 and 1985".

The Latino population was found in significant proportions in Jamaica Plain, Roxbury and North Dorchester in both 1980 and 1985. However, the Latino population grew in a significant proportion in the Fenway-Kenmore area while declining in the South End (see table below). Asians constituted a much larger proportion of the Fenway-Kenmore area in 1985 than in 1980. The significant increase in the proportion of Asians in East Boston is a result of the recent influx of Southeast Asians. The area called "Central" contains the Chinatown neighborhood which experienced a decline in the Asian population between 1980 and 1985 (see table below). Asians are the largest minority group in Allston-Brighton at 12% of the total population in 1985, The area at the same time experienced an out migration of African-Americans.

Racially-Mixed Neighborhoods with Significant Change in Latino Population, Listed From Greatest to
Lowest Change, 1980 and 1985 (in percent)

	1980	1985	Change
Fenway-Kenmore	0	8	+8
South End	14	8	-6

Source: BRA, Boston at Mid-Decade: Results of the 1985 Household Survey, Summary Report, January 1989, Table 2: "Race and Hispanic Origin of Household Population within Neighborhoods in Boston, 1980 and 1985".

Racially-Mixed Neighborhoods with Significant Change in Asian Population, Listed From Greatest to
Lowest Change, 1980 and 1985 (in percent)

	1980	1985	Change
Fenway-Kenmore	2	25	+23
South End	21	11	-10
East Boston	0	5	+5
Central	18	14	-4

Source: BRA, Boston at Mid-Decade: Results of the 1985 Household Survey, Summary Report, January 1989, Table 2: "Race and Hispanic Origin of Household Population within Neighborhoods in Boston, 1980 and 1985".

In the Fenway-Kenmore area, the population of African-Americans and whites have declined while the population of Asians and Latinos have increased. In the South End, the population of Asians greatly decreased alongwith slight decreases in whites and Latinos and a significant increase in African-Americans.

Appendix B: The Law Enforcement Tool of Testing

Types of Testing

In general, testing is a method used to detect discrimination and build evidence for challenging an alleged violation of the fair housing law. In a test, a white tester and a black tester visit the same real estate agent to seek identical types of housing at carefully planned intervals. The two testers are similar in their socio-economic profiles except for the variable that is being tested, which in this example is race. Each tester documents the treatment given by the real estate agent in a prescribed report format which is compared by a testing coordinator. The goal of the test is to develop evidence that the differential treatment is attributed to race, color, national origin, sex or whatever class is alleged to be the basis of discrimination. In other words, the test verifies that the rental agent or landlord provided different information or service to the black and white testers.

As outlined in the Guide to Fair Housing Law Enforcement prepared by the National Committee Against Discrimination in Housing, there are at least five types of testing and each is described below.

(1) Investigative or Individual Testing: This type of test is conducted immediately in response to a complaint filed by a *bona fide* homeseeker. The purpose of an investigative test is to verify the claim of discrimination and document evidence for conciliation or litigation. Law enforcement agencies must have the capacity to respond quickly to housing complaints for investigative testing to be successful in providing corroborative evidence of discrimination.

(2) Exploratory or "Scout" Testing: The purpose of exploratory testing is to isolate targets for a series of more systematic targeted testing. Law enforcement agencies may begin to see patterns of discrimination in particular neighborhoods or by certain rental agencies handling properties in various areas. However, these agencies cannot pursue every lead to patterns of discrimination. The scattered and random "scout" tests narrow the targets for the comprehensive targeted testing programs.

(3) Targeted or "Systemic" Testing: The target of this type of testing is a single firm or group of firms in a given geographical area that has a record of repeated violations of the fair housing laws. The findings of the targeted tests may be used to bring a class action or a pattern and practice action suit. The defendant classes may include apartment complexes, rental agencies, or all the apartment complexes managed by a single firm. The tests are conducted for discrimination against a group of plaintiffs who belong to a protected class or a combination of classes, such as female Hispanics. They should be conducted repeatedly over ten or fifteen years to show the change in discriminatory practice.

(4) Monitoring: The objective of this type of testing is to monitor a given or group of firms who have agreed to comply with a conciliation agreement, settlement, or consent order. At the local level, this type of testing is conducted to monitor the compliance of local affiliates of national real estate associations such as the National Association of Realtors to Voluntary Affirmative Marketing Agreements. The local members who have voluntarily signed the agreements pledge to not discriminate in the rental or sale of housing and to advertise and market affirmatively.

(5) Research and Information Test or "Audit": These tests are conducted for the sole purposes of informing the public and the real estate industry of the nature and extent of discrimination in housing in particular metropolitan areas. The information audit may be used to educate the real estate industry on the requirements of the Federal, state and local fair housing laws. Furthermore, the findings of a research audit may be used as preliminary evidence in an enforcement program of systemic testing.

Legal Basis of Testing

Private fair housing groups were the first to use testing as a means to collect evidence for discrimination against individual homeseekers. The standard of proof for the use of testing evidence was established in 1969 in the case of *Bush v. Kaim*. A black couple had been denied housing which was offered to white tester couple with similar qualifications. The court found that the disparate treatment between the two couples provided proof of discrimination. The disparate treatment resulted in the black couple losing the desired housing unit. To establish a prima facie case of housing discrimination, four conditions must be met:

1. The plaintiff is a member of a protected class.
2. The plaintiff applied for and was qualified to rent desired housing.
3. The plaintiff was denied the housing.
4. The housing opportunity remained available or was transferred to an applicant who is not a member of a protected class.

Testing evidence is used to establish that the plaintiff was qualified to rent the desired housing and that the housing opportunity remained available. The plaintiff has already established that s/he is a minority applicant who was denied the housing. If a white tester with equal or inferior qualifications is offered the unit which was denied to the minority homeseeker, then the plaintiff has established her/his prima facie case of housing discrimination. The burden of proof shifts to the defendant who must now prove that the

discriminatory action was justified on grounds that were non-discriminatory. Often a defendant will assert that the complainant could not afford the unit for which s/he applied. However, if the white tester who had been offered the unit had the same income as the black applicant, the defendant's assertion has been contradicted.

The establishment of legal standing for parties who are not *bona fide* homeseekers was needed to allow private fair housing and civil rights organizations to sue for discrimination and collect damages. In *Havens Realty Corp. v. Coleman* (1982), the U.S. Supreme Court ruled that not only did private fair housing centers and testers have legal standing to sue for a violation of Title VIII but they were also allowed to receive remedies. The plaintiff, an active private fair housing group in Richmond, Virginia called H.O.M.E. (Housing Opportunities Made Equal) argued that the practice of racial steering interfered with the organizations' mission to provide housing counseling and placement services. Both black and white testers were given standing because they were denied the benefit of interracial association by the defendants' racial steering practices. The black tester was provided standing on the grounds that she had been misinformed by the defendant about the availability of a unit, a clear violation of the provisions in Title VIII.

Bibliography

- Archibald, Russell J., Annual Performance Evaluation of the Boston Fair Housing Commission 1988-89, U.S. Department of Housing and Urban Development, September 1989.
- Boston Fair Housing Commission, Final Report on BFHC HUD Type II Program Year II (1988-89): Summary of Findings of Targeted Education and Outreach to Southeast Asian and Hispanic Residents of the City of Boston, Submitted to HUD, 1989.
- Boston Fair Housing Commission, Type II FHAP Testing Program Final Report, Submitted to HUD, 1989.
- Calmore, John O., "Fair Housing and the Black Poor: An Advocacy Guide." Clearinghouse Review. 18: 609-62, Nov. 1984.
- Calmore, John O., "Exploring the Significance of Race and Class in Representing the Black Poor." Oregon Law Review 61:201-244, Spr. 1984.
- Citizens Commission on Civil Rights, "The Federal Government and Equal Housing Opportunity: A Continuing Failure," in Critical Perspectives on Housing edited by Rachel G. Bratt, et. al., (Philadelphia: Temple University Press), 1986, pp.296-324.
- Claiborne, Ron C., "Institutional Reform and the enforcement of fair housing laws," Black Scholar, 17: 42-8, My/Je 1986.
- Congressional Digest, "The Fair Housing Act: Pro and Con," vol. 67, June-July 1988.
- Cohodas, Nadine, "Backed by Reagan, Senate Oks Fair Housing Law," Congressional Quarterly, August 1988, p.2203-4.
- Eley, Lynn W. and Thomas W. Casstevens, eds., The Politics of Fair-Housing Legislation, State and Local Case Studies, (San Fransisco: Chandler Publishing Company), 1974.
- Feagan, Joe R. and Clairece Booher Feagin, Discrimination American Style, Insitutional Racism and Sexism, (Englewood Cliffs, NJ: Prentice-Hall), 1978.
- Feins, Judith D. and William L. Holshouser, Jr., The Multiple Uses of Audit-Based Research: Evidence from Boston, presented at the HUD Conference on Fair Housing Testing, 1985.
- Galster, George, Federal Fair Housing Policy in the 1980s: The Great Misapprehension, (Boston: MIT Center for Real Estate Development), March 1988.
- Goering, John M., "Race, Housing and Public Policies: A Strategy for Social Science Research," Urban Affairs Quarterly, 17: 463-490, June 1982.
- Heintz, Kathleen G., HUD Conference on Fair Housing Testing Final Summary Report, (Washington, D.C.: The Urban Institute for HUD), 1985.

- Holshouser, William, Final Report of a Study of Racial Discrimination in Two Boston Housing Markets, submitted to the Boston Fair Housing Commission, March 1984.
- Housing Opportunities Made Equal and the National Committee Against Discrimination in Housing, Fair Housing Law Manual, (Richmond, VA: Virginia Department of Commerce), 1986.
- Howe, Peter J., and Brian C. Mooney, "Reshuffle hits panel arguing with Flynn," The Boston Globe, November 23, 1989, p.33.
- Jacobs, Barry, The New Fair Housing Law: Impact and Analysis, (Washington, D.C.: BNA), 1988.
- James, Franklin, et. al., Minorities in the Sunbelt, (Trenton, NJ: Rutgers University Housing Policy Research), 1984.
- Kushner, James A., "The Fair Housing Amendments Act of 1988: the Second Generation of Fair Housing," Vanderbilt Law Review 42: 1049-1120 May 1989.
- Marantz, Steve, "Fair housing resurfacing as problem for Flynn," The Boston Globe, February 2, 1990, p. 29.
- Mayhew, Leon, Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination, (Cambridge, MA: Harvard University Press), 1968.
- Missouri Advisory Committee, Fair Housing in America: Fair Housing Enforcement in St. Louis, Volume II, (Washington, D.C.: U.S. Commission on Civil Rights), February 1982.
- Mooney, Brian C., "Saltonstall undecided on Job," The Boston Globe, November 30, 1989, p. 30.
- National Center for Housing Management, Fair Housing and the Real Estate Industry, (Washington, D.C.: National Center for Housing Management), 1975.
- National Committee Against Discrimination in Housing and The Urban Land Institute, Fair Housing & Exclusionary Land Use, (Washington D.C.: Urban Land Institute), 1973.
- Newburger, H., Recent Evidence on Discrimination in Housing, (Washington, D.C.: HUD), 1984.
- O'Brien, Margaret and Deborah Oriola, Boston at Mid-Decade: Results of the 1985 Household Survey, Summary Report, Boston Redevelopment Authority, January 1989.
- Orfield, Gary, "Federal Agencies and Urban Segregation: Steps Toward Coordinated Action," in Racial Segregation: Two Policy Views, (New York: Ford Foundation), 1979.
- Pearce, D. M., "Gatekeepers and homeseekers: institutional patterns in racial steering," Social Problems, 26: 325-342, 1979.

- Pettigrew T., "Race, class, in the 1980s: an interactive view," Daedalus 110: 233-255, Spring 1981.
- Rose-Ackerman, S. "The political economy of a racist housing market," Journal of Urban Economics, 4:150-169, April 1979.
- Rubin, Laurie F., Housing Discrimination Against Female-Headed Households and Rental Subsidy Recipients: A Report on the Rental Practices of Real Estate Agencies in Cape Cod, (MCAD: Boston, MA), April 1986.
- Saltman, Juliet, Open Housing: Dynamics of a Social Movement, (New York: Praeger Publishers), 1974.
- Saltman, Juliet, "Housing discrimination: policy research, methods and results," Annals of the American Academy of Political and Social Science, 441: 186-96, Jan 1979.
- Schwemm, Robert G., Housing Discrimination Law, (Washington, D.C.: Bureau of National Affairs), 1983.
- Schwemm, Robert G., "Private Enforcement and the Fair Housing Act." Yale Law and Policy Review 6: 375-384, Spr-Summer 1988.
- U.S. Commission on Civil Rights, A Sheltered Crisis: The State of Fair Housing in the Eighties, (Washington, D.C.: USGPO), 1983.
- U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort, 1974, To Provide for Fair Housing, Volume II, December 1974.
- U.S. Department of Housing and Urban Development, The Fair Housing Enforcement Demonstration, (Washington, D.C.: HUD), August 1983.
- U.S. Department of Housing and Urban Development, Community Development Block Grant Grantee Performance Report, City of Boston, 1984, 1985, 1986, 1987, 1988, 1989.
- U.S. Government Accounting Office, Comptroller General of the United States, Stronger Federal Enforcement Needed to Uphold Fair Housing Laws, (Washington D.C.: USGPO), 1978.
- U.S. House Committee in Banking, Finance, and Urban Affairs. Subcom. on Housing and Community Development, Issues Relating to Fair Housing: Hearings: January 27 and February 4, 1988. Series 100th Congress, 2d session; serial no. 100-46.
- U.S. House Committee in Banking, Finance, and Urban Affairs. Subcom. on Housing and Community Development, Fair Housing Initiatives Program. Proposed Guidelines for Fair Housing Testing: Hearings: June 1986. Series 99th Congress; serial no. 99-787.
- Waldrop, Alex, "Enforcement of the Fair Housing Act: What Role Should the Federal Government Play?" Kentucky Law Journal, 74: 201-230, 1985-86.
- Wallace, James E., et. al., The Fair Housing Assistance Program Evaluation, (Cambridge, MA: Abt Associates for HUD), 1985.

Wallace, James E. and Terry Saunders Lane, HUD Processing of Title VIII Fair Housing Complaints, (Cambridge, MA: Abt Associates for HUD), June 1985.

Wasby, Stephen L. "Civil Rights Litigation by Organizations: Constraints and Choices," Judicature. 68: 337-52, Ap/My 1985.

List of Interviewees

Inga Bernstein, Boston Fair Housing Commission, November 1989 and March 1990.
Christopher Burke, Boston Fair Housing Commission, February 1990.
Richard DeWolfe, DeWolfe New England, March 1990.
Richard Ellen, Suburban Maryland Fair Housing Inc., March 1990.
Steve Fahrner, City Life, Jamaica Plain, February 1990.
Joe Feagin, University of Texas, Austin, February 1990.
John Goering, Research Division, U.S. Department of Housing and Urban Development,
Washington, D.C., January 1990.
William Holshouser, Cambridge Housing Authority, March 1990.
Frank Jones, Real Property Commission, City of Boston, March 1990.
Barbara Rabin, Boston Lawyers' Committee for Civil Rights, October 1989.
Regina Mitchell-Rodriguez, Boston Fair Housing Commission, November 1989.
Laurie Rubin, Massachusetts Commission Against Discrimination, October 1989 and
February 1990.
Robert Terrell, Boston Fair Housing Commission, October 1989 and February 1990.
Diane Wilkerson, NAACP, Boston Chapter, March 1990.

CITY OF BOSTON

IN CITY COUNCIL

ORDER FOR A PETITION FOR A SPECIAL LAW TO EMPOWER THE BOSTON FAIR HOUSING COMMISSION TO ENFORCE BY JUDICIAL POWER THE PROVISIONS OF TITLE VIII AND IMPOSE CIVIL PENALTIES (SUBSTANTIAL EQUIVALENCY)

ORDERED:- That a petition to the General Court, accompanied by a bill for a special law relating to the City of Boston to be filed with an attested copy of this order be, and hereby is, approved under Clause (1) of Section eight of Article two, as amended, of the Amendments to the Constitution of the Commonwealth of Massachusetts, to the end that legislation be adopted providing precisely as follows, except for clerical or editorial changes of form only:—

1. SECTION ONE. Definitions
2. (A) "Housing Accomodations" shall be defined as any building,
3. structure or portion thereof which is used or occupied or is
4. intended, arranged or designed to be used or occupied as the home,
5. residence or sleeping place of one or more human beings and any
6. vacant land which is offered for sale or lease for the construction
7. or location thereon of any such building, structure or portion
8. thereof.
9. (B) "Aggrieved Person" shall be defined as any person who claims to
10. have been injured by a discriminatory housing practice or believes
11. such person will be injured by a discriminatory housing practice
12. that is about to occur.
13. (C) "Person" shall be defined as one or more individuals,
14. partnerships, associations, corporations, legal representatives,
15. trustees, trustees in bankruptcy, receivers, and the Commonwealth
16. and all political subdivisions and boards or commissions thereof.
17. SECTION TWO. Classes protected by this act include race, color,
18. religious creed, marital status, handicap, military status,
19. children, national origin, sex, age, ancestry, sexual preference and
20. source of income.

HOME RULE PETITION

1. SECTION THREE.

2. (a) All housing accommodations in the City of Boston are subject to
3. this act, except as hereinafter provided.

4. (b) Nothing in this act shall apply to housing accommodations which
5. are specifically exempted from coverage by this Act.

6. (c) Nothing in this act shall apply to the leasing or rental to two
7. or fewer roomers, boarders, or lodgers who rent a unit in a licensed
8. lodging house.

9. SECTION FOUR. Nothing in this act shall prohibit a religious
10. organization, association or society, or any nonprofit institution
11. or organization operated, supervised, or controlled by or in
12. conjunction with a religious organization, association, or society,
13. from limiting the sale, rental or occupancy of housing accommodations
14. which it owns or operates for other than a commercial purpose to
15. persons of the same religion, or from giving preference to such
16. persons, unless membership in such religion is restricted on account
17. of race, color, marital status, handicap, military status, children,
18. national origin, sex, age, ancestry, sexual preference or source of
19. income.

20.

HOME RULE PETITION

1. SECTION FIVE. In the City of Boston, discriminatory housing
2. practices are prohibited, provided, however, that no practice shall
3. be prohibited hereunder unless such practice is also prohibited by
4. the federal Fair Housing Act or Chapter 151B of the Massachusetts
5. General Laws.
6. SECTION SIX. Any person who violates the provision of this act as to
7. discriminatory housing practices shall, pursuant to the provisions
8. of Section Seven of this act, be subject to orders, temporary,
9. equitable and legal, including compensatory damages, punitive
10. damages or civil penalties and attorneys' fees and costs.
11. SECTION SEVEN. There shall be a Boston Fair Housing Commission (the
12. "Commission") established pursuant to Chapter 10 of the City of
13. Boston Ordinances of 1982. The Commission shall have jurisdiction
14. of all housing accommodations subject to this act and shall have the
15. following powers and duties as to such housing accommodations, except
16. as to those housing accommodations in any building or structure
17. containing one, two, three or four dwelling units, one of which is
18. occupied by the owner thereof as his/her permanent residence;
19. provided, that no building or structure shall be considered occupied
20. by the owner thereof unless all beneficial owners occupy one or more

HOME RULE PETITION

1. dwellings therein as their permanent residence:
2. (A) Seek judicial action for temporary or preliminary relief
3. pending final disposition of a complaint; and upon issuance of a
4. final order:
5. (B) Grant compensatory damages or arrange to have adjudicated in
6. court at the Commission's expense the award of compensatory damages
7. to an aggrieved person;
8. (C) Grant injunctive or other equitable relief, or seek such relief
9. in a court of competent jurisdiction;
10. (D) Assess a civil penalty against any such person found to have
11. violated this Act:
12. (1) in an amount not to exceed ten thousand dollars if the
13. person has not been adjudged to have committed prior
14. discriminatory housing practice;
15. (2) in an amount not to exceed twenty-five thousand dollars
16. if the person has been adjudged to have committed one other
17. discriminatory housing practice during the five year period
18. ending on the date of the filing of the complaint; and
- 19.
- 20.

HOME RULE PETITION

1. (3) in an amount not to exceed fifty thousand dollars if
2. the person has been adjudged to have committed two or more
3. discriminatory housing practices during the seven year
4. period ending on the date of the filing of the complaint;

5. (E) Arrange to have adjudicated in court at the Commission's
6. expense the award of punitive damages against such person;

7. (F) Award reasonable attorney's fees and costs to any prevailing
8. complainant; and

9. (G) Adopt rules and regulations to carry out the provisions of this
10. Act and the powers and duties of the Commission in connection
11. therewith.

12. SECTION EIGHT.

13. (A) The actions of the Commission shall be subject to judicial
14. review upon application by any party aggrieved by a final agency
15. order;

16. (B) Judicial review of a final Commission order shall be in a court
17. of competent jurisdiction with authority to grant to any party, such
18. temporary relief, restraining order, or other order as the court
19. determines is just and proper; affirm, modify, or set aside, in
20.

HOME RULE PETITION

1. whole or in part, the order, or remand the order for further
2. proceedings; and enforce the order to the extent that the order is
3. affirmed or modified.
4. SECTION NINE. An aggrieved person, with or without filing a
5. complaint at the Commission and without regard to the status of such
6. complaint, may commence a civil action in a court of competent
7. jurisdiction no later than two years after the occurrence or
8. termination of a discriminatory housing practice, or the breach of a
9. conciliation agreement entered into with the Commission, whichever
10. occurs last, to obtain appropriate relief with respect to such
11. discriminatory housing practice or breach; provided, however, that
12. if an aggrieved person has consented to a conciliation agreement,
13. such aggrieved person may not file a civil action with respect to
14. the alleged discriminatory housing practice which forms the basis
15. for such complaint except for the purpose of enforcing such
16. agreement; and provided, further, that an aggrieved person may not
17. commence a civil action with respect to an alleged discriminatory
18. housing practice if a hearing commissioner determines that probable
19. cause exists and a hearing has commenced before the Commission. The
- 20.

HOME RULE PETITION

1. computation of such two-year period as to an alleged discriminatory
2. housing practice, but not as to a breach of a conciliation
3. agreement, shall not include any time during which an administrative
4. proceeding is pending with respect to a complaint based upon such
5. discriminatory housing practice. If the court finds that a
6. discriminatory housing practice has occurred or is about to occur,
7. an aggrieved person shall have available any and all remedies
8. pursuant to Sections Six and Seven of this act. This section does
9. not preclude the right of any aggrieved person to seek relief under
10. M.G.L. c. 151B.

11. SECTION TEN. This act shall take effect upon its passage.

- 12.
- 13.
- 14.
- 15.
- 16.
- 17.
- 18.
- 19.
- 20.