

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

CARMEN THOMPSON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN
DEVELOPMENT, *et al.*,

Defendants.

Civil Action No. MJG-95-309

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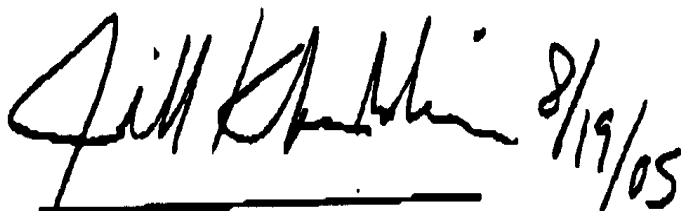
Statement of Qualifications

Rebuttal Expert Report

Expert Report of Jill Khadduri

Thompson v. HUD

August 19, 2005

A handwritten signature in black ink, reading "Jill Khadduri" followed by the date "8/19/05". The signature is written in a cursive style and is positioned above a horizontal line.

Jill Khadduri

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Chapter 1: Overview

This expert report responds to a request to me to:

- a. Describe the processes that HUD follows in deciding significant actions, regulatory changes, and funding decisions that affect or could potentially affect the availability of assisted and public housing opportunities in the Baltimore Metropolitan Region, and
- b. Make suggestions, based upon my knowledge and experience with HUD decision-making, as to how these decision-making processes could be altered to “insure that meaningful and appropriate suggestions regarding possible regional approaches to fair housing in the Baltimore Region would be presented to decision-makers at HUD at the right time and in the right context for full consideration.”

1.1 Basis for My Knowledge and Experience

During the final 17 of my 26 years at HUD, I was Director of the Division of Policy Development. My job was to integrate the results of HUD’s internal and external research, analysis, and program evaluations into the HUD policy processes—that is, the development of HUD’s budgets, legislation, and regulations. The scope of this work included all of the housing assistance, community development, mortgage insurance, and fair housing programs of the Department, but the work of the Division concentrated on HUD’s rental housing subsidy programs. In addition to reviewing budget and legislative proposals and proposed changes to regulations, my staff and I served on working groups that designed new programs, either as legislative proposals or as the regulations that elaborated the details of program implementation. Thus, my opinions are based on deep and broad knowledge of HUD’s decision-making processes and a practical understanding of how decisions are made for each of the programs that could play a role in the desegregation of housing opportunities in the Baltimore Region.

My opinions are also informed by a 30-year body of research on housing assistance for low income households, especially programs that provide rental assistance and below-market, affordable rents. I supervised some of this research during the early part of my career at HUD, and I was intimately familiar with it during my tenure as Director of the Division of Policy Development. During the past five years at Abt Associates, I have been directly responsible for the planning, implementation, and interpretation of research projects on public housing, housing vouchers, and affordable housing programs, including the HOME program and the Low Income Housing Tax Credit. This work often takes my colleagues and me into the field to observe the implementation of HUD programs by HUD field offices, local governments, public housing authorities, and private providers of affordable housing. This has added to my experience at HUD an even richer practical knowledge of the location of decision-making and the way in which

decisions affecting housing opportunities are made. For additional information, see Appendix: Statement of Qualifications.

1.2 Summary of Recommendations

The remedy should consider all of HUD's decisions that affect desegregation of housing opportunities for low-income, minority households in the Baltimore Metropolitan Region, not just HUD decisions that relate to the Housing Choice Voucher and public housing programs. The reason for this opinion is that other programs have more *new* resources and potentially greater ability to create housing opportunities in *new* locations. Furthermore, while vouchers are very important for creating opportunities for low income minority families to live outside racially and economically concentrated areas, it is easier for families to use vouchers if an affordable, subsidized housing stock has been created there. This is especially true for families who need three or more bedrooms.

The remedy should set up a comprehensive internal HUD process for planning and monitoring HUD decisions that affect desegregated housing opportunities in the Baltimore Region. However, the remedy also should include specific directives for certain HUD decisions. Those directives should include performance goals. Without such directives and goals, a plan is at risk of becoming a completely procedural exercise that will have no real effect on the location of housing opportunities in the Baltimore Region.

The specific directives should include:

Altered requirements for review of Consolidated Plans based on Performance Standards Set Forth in the Remedy. The remedy should require HUD to alter its requirements and review standards for the Consolidated Plans that constitute the applications for the HOME and CDBG block grants and that govern the use of funds for the development of rental housing under those programs. The Action Plan forms part of the Consolidated Plan, is updated annually, and describes the activities a jurisdiction will undertake. The Court should require HUD to give the Action Plan a substantive review for whether it will meet performance standards established by the remedy. The review should consider whether past Action Plans that conform to the remedy have been implemented, based on the program's annual performance reporting to HUD. If the Consolidated Plan fails this test, it should be rejected and the jurisdiction's allocation of HOME and CDBG funds either withheld or released subject to conditions that would make the jurisdiction's plans and activities consistent with the remedy.

The performance standards set forth in the remedy should require:

- A minimum number of HOME rental development units with two bedrooms and with three or more bedrooms to be located in communities of opportunity, taking into account various dimensions of opportunity as well as race. The Court should require review and updating of the definition of a community of opportunity, based on census or other appropriate data.

- Activities supported by CDBG funds that have as their explicit purpose affirmatively furthering desegregated housing opportunities in the Baltimore Region. The activities should be action-oriented and not simply analytical in nature.
- For the State of Maryland's Consolidated Plan, an explanation of how Maryland's Qualified Allocation Plan (QAP) for the Low Income Housing Tax Credit will support the development of units of affordable family housing outside areas of poverty or minority concentration.
- For the Consolidated Plans of the local jurisdictions operating in the Baltimore Region, an analysis of how the jurisdiction's Action Plan will further the desegregation of housing opportunities throughout the Baltimore Region, as well as within the jurisdiction preparing the plan.

Altered requirements for HUD decisions about Section 8 projects in the Baltimore Region. The remedy also should require HUD to alter its decision-making processes for the project-based Section 8 program, because the preservation of assisted housing units in communities of opportunity is another way to ensure that minority families have an opportunity to live there.

An explicit process implementing HUD's requirement to affirmatively further fair housing in the Baltimore Region should be added to:

- The review and approval of "Mark to Market" proposals to preserve Section.8 projects by restructuring their FHA mortgages and renegotiating their subsidized rent levels.
- The review and approval of annual proposals for increases to the rents received by owners under their Section 8 contracts with HUD.
- The decision to sell to another entity a mortgage that HUD owns as the result of paying an insurance claim on a multifamily property that has defaulted on mortgage payments or has been declared in technical default—for example, by failing physical inspections—or to arrange for the transfer of the property to a state or local government, a public housing authority, or a non-profit sponsor of housing.
- The development and approval of Disposition Plans for selling multifamily developments that enter HUD's inventory of acquired properties because HUD has paid an FHA insurance claim on a property with a defaulted mortgage and assumed ownership of the property.
- The review and approval of "up-front grant" funding for projects that are sold from HUD's inventory of acquired multifamily properties.

Any decision made within any of these processes for a Section 8 project in the Baltimore Region should require a finding by the Assistant Secretary for Housing explaining the potential effect of that decision on affirmatively further fair housing in the Baltimore Region. The presumption behind that finding is that developments in such communities should be preserved as affordable rental housing, while developments in areas of minority and poverty concentration should not be preserved.

Altered requirements for HUD decisions affecting the Housing Choice Voucher program in the Baltimore Region. The remedy should require HUD to take specific actions in its administration of the Housing Choice Voucher program that:

- Support directly efforts by minority families to move from areas of poverty and minority concentration to desegregated areas through a special allocation of vouchers and associated mobility counseling for the Baltimore Region.
- Facilitate the use of vouchers by minority families to move to housing in desegregated locations by providing funds needed to support moves to higher cost areas (through a portability reimbursement fund for the Baltimore Region) and by approving exception payment standards in higher cost portions of the Baltimore Region when supported by census data.
- Establish region-wide administration of some or all of the vouchers in the Baltimore Metropolitan Region.
- Ensure that the management problems of the Housing Authority of the City of Baltimore (HABC) do not deprive families living in Baltimore of the opportunity to obtain vouchers that have been allocated to Baltimore by formula or as replacement housing. This should be accomplished by allocating vouchers that have been recaptured from HABC to an alternative administrator.
- Refuse to grant waivers to the regulation that prohibits project-basing of vouchers in high poverty areas by HABC or by other public housing authorities (PHAs) in the Baltimore Region.

Altered Requirements for HUD Decisions Affecting Public Housing.

The remedy should require HUD to:

- Reject any new applications for redeveloping or replacing public housing under HOPE VI or a successor program that would have the effect of producing housing (including both public housing and non-public housing components) likely to be occupied predominately (more than 75 percent) by African American residents.

- Reject any applications for the use of Replacement Factor Funds to develop public housing in areas of minority concentration within Baltimore or elsewhere in the region.
- Encourage the use of both HOPE VI and Replacement Factor Funds to develop public housing in communities of opportunity outside the City of Baltimore.
- Reject any plans for demolition or redevelopment of public housing in the Baltimore Region that would have the effect of reducing the number of assisted or affordable housing units in communities of opportunity.
- Permit the entity administering vouchers for the Baltimore Region or on behalf of HABC to apply for replacement vouchers for all units of public housing that have been approved for retirement from the public housing stock and for which vouchers have not yet been allocated.
- Set standards for the relocation plans associated with the redevelopment of public housing or the retirement of units from the public housing stock that encourage and assist families to move to communities of opportunity rather than to racially and economically concentrated areas or to neighborhoods that have rapidly increasing African American populations. Monitor the implementation of those plans.
- Require the entity administering vouchers for the Baltimore Region or on behalf of HABC to give priority on the voucher waiting list to any family that comes to the top of the waiting list for public housing and asks to receive a voucher instead of being assigned to public housing.
- Review local residency preferences for public housing to determine if they constitute an impediment to fair housing.
- Reject any use of the authority recently given by HUD to HABC under a Moving to Work demonstration agreement that is inconsistent with these provisions of the remedy.

Internal Process for Planning and Monitoring HUD Decisions for the Baltimore Region

All of the decisions that HUD makes that affect housing opportunities in the Baltimore should be governed by a Court-mandated HUD Affordable Housing Desegregation Plan. The plan should be based on an analysis by HUD of the location of assisted and affordable housing in the region and should require all HUD decisions directly and indirectly affecting the location of housing opportunities to be supported by an explanation of why that decision increases desegregated housing opportunities or does not reduce such opportunities. The plan should include action steps for implementing the changes in HUD decision-making for specific programs that are spelled out in the remedy.

The Plan should be developed and monitored in such a way that the assistant secretaries administering the HUD programs that affect directly the creation and preservation of affordable housing in the Baltimore Region have responsibility for the Plan. The Plan should not be developed, or the planning and monitoring activity led, by the Office of Fair Housing and Equal Opportunity (FHEO), because this would set up an adversarial dynamic in which the offices responsible for implementing the plan would view it as something to be circumvented or complied with in a minimalist way.

The remedy should require HUD to produce annually a report on the locations of assisted and affordable rental housing in the Baltimore Region and on changes that have occurred during the past year. This would serve both as a progress report on the HUD Affordable Housing Desegregation Plan for the Baltimore Region and as public information available for the development of Consolidated Plans for the jurisdictions in the region and for the State of Maryland's Qualified Allocation Plan (QAP) for choosing rental developments to be subsidized through the Low Income Housing Tax Credit (LIHTC).

More detail on these recommendations and on the basis for them can be found in Chapter 4 of this report.

Chapter 2: HUD Decision-Making Processes

This section provides information on HUD's decision making processes both in general and in the context of specific programs that should be part of a remedy that creates desegregated housing opportunities in the Baltimore Region.

I have read the depositions of several HUD officials taken as part of the discovery process for this litigation, and information in those depositions has served to confirm my knowledge of the HUD decision-making processes and to provide examples of those processes at work for recent decisions affecting housing opportunities in the Baltimore Region.

HUD has very fragmented decision-making processes. Decisions on the funding and location of housing for some of the programs that have the *greatest potential* for creating desegregated housing opportunities in the Baltimore Region have been devolved to state and local levels of government through the HOME and Community Development (CDBG) block grants. This devolution of decision-making is not complete; HUD has significant ability to influence decisions made by local governments and states on the use of block grant funds. However, in recent decades HUD decision-makers have chosen not to exercise that authority to influence decisions made by state and local governments that affect the desegregation of housing opportunities in metropolitan regions.

For other programs, HUD officials make decisions directly through contracts with private owners of housing developments or have substantial influence on decisions through HUD funding and regulatory control of public housing authorities (PHAs) and other administrators of the Housing Choice Voucher program.

HUD decisions and HUD influence over decisions are spread across several sub-cabinet offices within HUD: the Office of Community Planning and Development (CPD), the Office of Housing (OH),¹ and the Office of Public and Indian Housing (PIH). These are the major HUD program or "line" offices with direct responsibility for administering programs: making funding decisions, monitoring expenditures and performance, and providing administrative guidance and technical assistance.

HUD's decision-making processes at times have been highly integrated, with key policy decisions, such as the content of regulations and the annual proposals to Congress for program funding) influenced by four "staff" offices, offices that provide advice and support to the line offices and directly to the Secretary of HUD. These are the Office of General Counsel (OGC) through legal advice, the Office of Policy Development and Research (PD&R) through information and economic analysis, the Office of Fair Housing and Equal Opportunity (FHEO) through review of the fair housing implications

¹ The Office of Housing is sometimes called FHA, because the Assistant Secretary for Housing is also the FHA Commissioner.

of decisions, and the Office of Budget through review of proposed funding levels.² However, the level of integration of the key decision-making processes waxes and wanes over time at the discretion of the current HUD Secretary.

HUD decision-making is also decentralized, with routine decisions (those without national policy implications—or perceived not to have such implications) made by the HUD field offices that exist in each state rather than by the program offices at HUD headquarters. However, the level of decentralization of HUD decisions varies from program to program, based on availability of staff and on the priority given a particular program. (For example, note the centralization of decisions on HOPE VI grants described in the Deposition of Milan M. Ozdinec, May 26, 2005, pp.64-73). In theory, decisions made at the field office about individual HUD programs are coordinated by the field office director, but in practice this coordination often is weak. (For example, see the Deposition of William D. Tamburrino, May 16, 2005, pp.61-73.)

In addition, “retail” decisions that affect individual HUD grantees or projects often are elevated to a higher-level decision maker at HUD headquarters if they are controversial, and especially if a mayor, county executive, or Member of Congress becomes involved in the controversy. Thus, the most controversial “retail” decisions often are made directly by a program assistant secretary or even by the secretary of HUD. As an example, based on research I conducted on the decision-making process for the Kingsley Park Section 8 project in Baltimore County, decisions on the future of that development were removed from the usual processes and made directly by political level officials at HUD. HUD assistant secretaries spend a surprising amount of their time on such “retail” decisions.

In order to be effective, the remedy proposed by the Court will need to be tailored to this complex reality. First, it will not be possible to create a process that guides the decisions of a single set of HUD decision makers at a single point in the decision-making process, but instead the remedy will have to be made specific to the individual HUD programs that can play a role in desegregation of housing opportunities in the Baltimore Metropolitan Region. Second, a remedy will be most effective if it is quite prescriptive, so that HUD senior decision-makers can more easily resist undue political pressure.

Finally, it is important to understand that the current processes at HUD for monitoring the fair housing implications of decisions are not effective. The remedy will have to step outside those processes and create direct responsibilities for the HUD program assistant secretaries who implement the programs that create assisted and affordable rental housing.

2.1 Decisions made by state and local governments and influenced by HUD

The State of Maryland and the political jurisdictions that make up the Baltimore Metropolitan Region make decisions to provide funds for the development of units of

² FHEO is both a staff office and a line office, since it administers the Fair Housing Assistance (FHAP) and Fair Housing Initiatives (FHIP) programs. PD&R is also a line office in that it administers the University Partnerships grant programs.

affordable rental housing through the HOME Investment Partnerships and Community Development Block Grant programs. (HOME grantees are called participating jurisdictions; CDBG grantees are called grantees.) Thus it is state and local decision-makers who determine the locations of the housing opportunities created by these major HUD programs, *including some of the housing units that might be available for households using Housing Choice Vouchers in the Baltimore Region.*

The State of Maryland also controls the allocations of subsidies for the development of affordable multifamily rental housing under the largest current program that produces new affordable rental housing developments, the Low Income Housing Tax Credit (LIHTC). LIHTC units might also be available for families using vouchers. LIHTC is not under HUD's control: it is administered at the federal level by the IRS. However, LIHTC is frequently used in developments that also have HUD subsidies, and this gives HUD an opportunity to influence its use. In addition, Executive Order 12892, issued on January 17, 1994, made HUD the lead agency for affirmatively furthering fair housing. Thus, HUD has authority to influence the administration of the LIHTC program, particularly when fair housing is at issue.

HUD decision-makers can influence the location of housing opportunities created by programs administered by state and local governments in two ways:

- Through review and approval or disapproval of the plans and strategies local and state governments must submit in order to receive their formula-based allocations of HUD funds. Responsibility for this review belongs to the Office of Community Planning and Development (CPD) in the HUD field offices and headquarters.
- Through making information available to the mandated planning processes for HOME, CDBG, and LIHTC, so that government officials and policy advocates can make decisions about those programs in the context of information about the implications of the decisions for desegregated housing opportunities. This information is produced in large part by the Office of Policy Development and Research (PD&R) in HUD headquarters. It includes census-based information on housing needs and information from administrative data sets and surveys on the locations of assisted and affordable rental housing units.

To some extent, the way in which HUD relates to state and local governments under the "devolved" programs is compelled by enabling legislation. However, the regulations published by HUD that implement the legislation have had a profound effect on the extent to which HUD exercises leverage over the decisions made by state and local government grantees. The current regulations take a minimalist approach to HUD review of plans and strategies. This means that HUD has lost the opportunity to use this review and approval process to affirmatively further fair housing. These regulations could be changed--or exceptions could be made--as part of a remedy for the Baltimore Metropolitan Region.

Furthermore, the deployment of HUD staff and the way in which staff members carry out their responsibilities for monitoring state and local grantees have an effect independent of both law and regulations, and this also is something a remedial order could affect. For example, review and monitoring responsibilities for the HOME participating jurisdictions and CDBG grantees operating in the Baltimore Region could be assigned to a special team at the Baltimore field office or in the headquarters Office of Community Planning and Development in order to provide adequate staff time and to make it clear that implementing a HUD Affordable Housing Desegregation Plan for the Baltimore Region is not business as usual.

2.2 Decisions made directly by HUD

For some HUD programs, which for convenience can be described as a single program--project-based Section 8 assisted housing--HUD contracts directly with private owners to provide housing at rents set at 30 percent of the actual incomes of the low-income households the owner promises to select as tenants.³ For the Section 8 project-based program, HUD headquarters and field staff make direct decisions that affect the location of assisted housing developments and the types of households that have an opportunity to live there. While these programs are not producing additional units of housing, HUD's decisions are very important for determining whether developments that provide desegregated housing opportunities continue to exist and to serve households with low incomes and, conversely, whether developments in areas of poverty and minority concentration are retired from the housing stock and replaced by subsidies that can be used outside such areas.

The decisions that are made about the terms of the contracts between HUD and private owners of Section 8 projects and about the fate of projects when those contracts are terminated or when owners of multifamily properties default on FHA-insured mortgages are made by the Office of Housing. Some decisions are made by field staff, some are made by the Office of Housing in HUD headquarters, and some are made by a separate office within the Office of Housing--the Office of Multifamily Housing Assistance Restructuring (OMHAR)--that administers a process called "Mark to Market."

2.3 Decisions made through HUD funding and regulatory control of Public Housing Authorities

For the public housing and Housing Choice Voucher programs, HUD's agents are public housing authorities (PHAs) that are legally are creatures of state governments and have a variety of legal and structural relationships to local governments. Generally the same PHAs that own and manage public housing developments also administer the voucher

³ The project-based Section 8 programs include Section 8 New Construction, Section 8 Substantial Rehabilitation, Section 8 Moderate Rehabilitation, and Section 8 Loan Management. Many of the projects produced under this family of programs also have mortgages with FHA insurance. I am not including in the "Section 8 project-based program" the authority administrators of the Housing Choice Voucher program have to "project base" a percentage of their vouchers.

program, but this is not always the case. HUD has the discretion under law to exercise substantial control over the choices made by PHAs and other voucher administrators and has exercised that control to a substantial extent. For example, HUD currently:

- Rates the performance of PHAs for the Housing Choice Voucher program under a Section Eight Management Assessment Program (SEMAP). HUD sometimes makes decisions on allocations of new funding or withdrawal of current funding based on those ratings;
- Controls through regulation and other guidance the administrative practices used in the voucher program. For example program regulations and handbooks include detailed directives on how to arrange for the “portability” of vouchers across jurisdictional lines and on how to determine if the rents charged by owners of housing occupied by voucher holders are reasonable;
- Publishes data series (Fair Market Rents) that control the maximum subsidies that can be provided by the voucher;
- Approves exceptions to those maxima (exception payment standards) when requested by a PHA and supported by data;
- Reviews and approves proposals by PHAs to demolish public housing developments or otherwise dispose of them;
- Requires PHAs to retire from the public housing stock developments that fail cost-effectiveness tests known as “viability assessments” or, more recently, “mandatory conversion” tests;
- Through a competitive process administered at HUD headquarters, selects PHAs and public housing developments to receive HOPE VI funding for the redevelopment of distressed public housing;
- Reviews and approves proposals by PHAs to use the funds currently available to some PHAs to build new public housing developments from within their formula-based allocations of Capital Grant funds; and
- Uses leverage provided by HUD control over funding for the public housing program to require specific management practices for public housing.

These decisions are made at HUD by the Office of Public and Indian Housing (PIH) headquarters and field office staffs. The Fair Market Rents are published by HUD’s Office of Policy Development and Research (PD&R).

Current legislation proposed by HUD would reduce substantially HUD’s control over PHA decision-making. In addition, some PHAs, including the Housing Authority of the City of Baltimore (HABC), already have been given the authority to operate outside some

regular statutory provisions and regulations under a demonstration called Moving to Work (MTW). For example, a PHA with MTW authority may alter the structure of a public housing or voucher subsidy or impose time limits on the subsidy. MTW PHAs also may merge funding for the public housing and Housing Choice Voucher programs, as long as they serve in total the same number of households they did before they became part of the demonstration.

Because of these uncertainties about the future regulatory environment for the public housing and voucher programs, the remedy needs to be crafted in a way that will survive further devolution of HUD control over decisions affecting these programs.

Chapter 3: Assisted and Affordable Housing Programs

This section of the report provides salient information about the design and implementation of the assisted and affordable housing programs that should be part of a remedy for creating desegregated housing opportunities in the Baltimore Region. Section 3.1 provides an overview of the assisted and affordable housing programs, including their relative size, their potential for serving households at different income levels, and whether they are growing or shrinking. Section 3.2 provides background information on HOME and CDBG, the HUD block grant programs administered by state governments and local political jurisdictions. Section 3.3 provides information on the project-based Section 8 program that provides assisted housing through direct contracts between HUD and private owners of rental housing. Section 3.4 provides information about the Housing Choice Voucher program administered by public housing authorities (PHAs) or other entities. Section 3.5 provides information about the public housing program administered by PHAs. Section 3.6 provides information on the Low Income Housing Tax Credit program administered by state governments.

3.1 Assisted and affordable housing programs

The purpose of this section is to present some information about HUD's assisted and affordable housing programs so that the Court can understand the relative importance of decisions that affect different programs in the Baltimore Region.

It is important to distinguish between two general types of rental housing subsidy programs: assisted housing programs and affordable housing programs. The key distinction is the system for determining the rent paid by the resident family.

In *assisted housing* programs, the family pays for rent 30 percent of actual income, regardless of how low that income is. The major assisted housing programs are public housing, project-based Section 8, and Housing Choice Vouchers. The nominal income limits for assisted housing programs are quite high—80 percent of the local median income, which is about twice the federal poverty level. However, for two reasons, the assisted housing programs heavily serve poor families—those with incomes below 30 percent of area median income, which on average is about at the poverty level. The first reason is that, because the subsidy varies with the actual income of the household, it is most valuable for the poorest households, who are the most likely to get on the waiting lists for the programs and to accept assistance when it is offered. The second reason is that federal law requires that a certain percentage of the families and individuals chosen from the waiting list for each program have incomes below 30 percent of area median income (also known as “extremely low income”).

In *affordable housing* programs, all families within an income range (for example, up to 50 percent of area median income) who occupy a certain size unit pay the same “flat” rent for that unit. The rent has been set at an “affordable” level by the owner of the

housing development. The rules of the federal funding program establish the maximum rent the owner may charge at 30 percent of the income that is the *upper limit* of the income range for the size household expected to occupy the unit—for example, 30 percent of 50 percent of area median income (i.e., 15 percent of area median income) for a three person family. The major affordable housing programs are the Low Income Housing Tax Credit (LIHTC) program and the HOME program.

Exhibit 1 describes the numbers of housing units subsidized as of 2004 by the major assisted and affordable housing programs that serve families with children.⁴ The exhibit also provides an estimate of the number of units that are being added to the program each year as of 2005.

Exhibit 1: Housing Subsidy Programs

	Total national units, 2004	Growing or shrinking	Estimated annual change as of 2005
<i>Assisted Housing</i>			
Public Housing	1,200,000	Shrinking slightly	-10,000 units
Housing Choice Vouchers	1,900,000	Growing slightly	+20,000 units
Section 8 Projects	1,400,000	Shrinking slightly	-10,000 units
<i>Affordable Housing</i>			
HOME Investment Partnerships Program	340,000*	Growing	+30,000
Low Income Housing Tax Credits	1,200,000**	Growing rapidly	+90,000 units

*Includes 120,000 units under development but not yet completed as of June 2005.

**Estimated completions as of 2004.

Sources: HUD administrative databases, budget estimates, and performance reports available on www.hud.gov and www.huduser.org; For LIHTC, Climaco *et al.*, 2004; Khadduri, Buron, and Lam, 2004.

The assisted housing programs are basically static. The changes taking place as of 2005 are that, for the nation as a whole, a modest number of units are being retired each year from the public housing and project-based Section 8 stocks and a roughly equivalent number of vouchers are being added as replacement housing.

The affordable housing programs are not static. HOME has an appropriation of about \$1.9 billion per year to be used at the discretion of the participating jurisdiction for development of rental housing, tenant-based rental assistance, assistance to homebuyers, or assistance to current homeowners. The estimate of 30,000 additional units in HOME rental developments included in the exhibit is based on the choices that participating jurisdictions have made across the nation in recent years, but any jurisdiction is free to devote a large portion—or even all—of its HOME dollars to rental housing.

⁴ The exhibit does not include the relatively small programs that serve only elderly tenants or only special needs populations such as people with disabilities and those leaving homelessness.

LIHTC tax credit authority has a budgetary equivalent of about \$5 billion per year to be used exclusively for the development of affordable rental housing, and at least 90,000 LIHTC rental units are placed in service each year. Maryland's allocation of LIHTC authority for 2004 is about \$9.9 million, and the State allocated credits that year for 1456 rental units.⁵ To illustrate the size and importance of the LIHTC program, *during the 1995-2002 period, Maryland Placed in service 180 LIHTC developments with 17,849 units* (Climaco *et al.*).

Affordable housing programs often have flat rents that are affordable only for households with incomes that are low but above the poverty line. However, many LIHTC developments have rents set at lower levels than the maximum, often as a result of combining LIHTC with HOME or with other subsidies. Furthermore, both HOME and LIHTC rental developments can be among the private rental units chosen by families using housing vouchers. HOME rents must be below the Fair Market Rents that control the subsidy levels for vouchers. Rental developments produced under either program must accept families with vouchers, as long as those families meet the developments' regular screening criteria (e.g., for histories of eviction from rental housing or for criminal histories).

3.2 HOME and CDBG

HOME and CDBG funds are allocated to cities, large counties within metropolitan areas, and States on the basis of a formula that determines how much of the annual appropriation of funds for the program goes to each jurisdiction. A State's share of CDBG funds must be used in non-metropolitan portions of the state. In contrast, States are permitted to use their formula allocations of HOME funds anywhere in the state.

Exhibit 2 shows the allocations of HOME dollars to the Maryland state program and to the jurisdictions that make up the Baltimore Region. The exhibit also shows CDBG dollars. CDBG funds can be used to develop new housing⁶ or for rehabilitation of existing housing. In addition, CDBG often is used indirectly to support housing developments--for example, by paying for site work, for improvements to infrastructure near the development, or for social services associated with the development. Furthermore, CDBG funds are subject to the Consolidated Plan requirement that requires grantees to assess needs and set forth strategies and action plans for affordable housing produced by the HOME program as well as by CDBG.

⁵ "Housing Credit Utilization Charts," accessed July 19, 2005 on the website of the National Council of State Housing Agencies, www.nchsa.org.

⁶ Limited to housing developed by non-profit sub-recipients.

Exhibit 2: HOME and CDBG Formula Allocations, 2005

Jurisdiction	HOME	CDBG
State of Maryland	\$7,814,492	\$8,944,527*
Baltimore City	\$7,176,949	\$27,004,139
Baltimore County	\$2,644,831	\$4,824,337
Anne Arundel County	\$945,479	\$2,438,423
Howard County	\$541,890	\$1,338,880
Harford County	\$532,606	\$1,208,519
Annapolis	**	\$392,153

*CDBG state funds can only be used in non-metropolitan areas, but are subject to the Consolidated Plan requirement

**Annapolis is below the *de minimis* grant threshold for HOME

In order to receive its allocation of HOME and/or CDBG funds, a local or state government must submit a Consolidated Plan every three or five years and must submit annually an update to the Action Plan that forms part of its Consolidated Plan. The Consolidated Plan and Annual Action Plans serve as the application for funds. By approving the Consolidated Plan and Actions Plans (or by taking no action for 45 days), HUD agrees to release a jurisdiction's formula-determined funding.

Content of the Consolidated Plan

The Consolidated Plan includes an Analysis of Needs, a Strategic Plan, and an Action Plan. It also includes several certifications, including a certification that the jurisdiction has completed an Analysis of Impediments to Fair Housing (AI), "is taking appropriate actions to overcome the effects of any impediments identified through that analysis, and maintains records reflecting the analysis and actions."⁷

The Action Plan must include numeric goals and a description of programs or projects, estimating the number and type of families that will benefit, target dates for completion, and "geographic areas of the jurisdiction (including areas of minority concentration) in which it will direct assistance during due program year."⁸

Review Requirements

HUD field staff review Consolidated Plans for completeness, using a checklist that serves as a reminder of the required contents of the plan.⁹ They do not question the substance of the jurisdiction's plan or strategy, rejecting the plan only if it is inconsistent with the purposes of the National Affordable Housing Act (the checklist provides no guidance on this), if it is "substantially incomplete," or if HUD staff has seen evidence questioning the accuracy of the certifications included in the plan (24CFR Part 570, sec.91.500). For the

⁷ U.S. Department of Housing and Urban Development, Office of Community Planning and Development, "Guidelines for Preparing a Consolidated Plan Submission for Local Jurisdictions," accessed at www.hud.gov, July 17, 2005.

⁸ *Idem*.

⁹ U.S. Department of Housing and Urban Development, Office of Community Planning and Development, "Consolidated Plan Review Guidance," accessed at www.hud.gov, July 17, 2005.

Analysis of Impediments (AI), the field staff simply looks for the certification that the jurisdiction has completed such an analysis at some time, which may be several years earlier. Attempts by FHEO field staff to make the review of the AI more demanding have been ineffective. (For example, see the Deposition of Laverne L. Brooks, July 12, 2005, pp. 22-42 and 64-69).

CPD field staff may approve a Consolidated Plan without further review. A recommendation for disapproval is referred to HUD headquarters. It is very rare that a Consolidated Plan is disapproved at the field office staff level and even rarer that the disapproval is sustained by higher-level HUD decision-makers and a jurisdiction is denied its funding allocations.

It appears that both the essentially procedural review and the practice of rarely challenging a Consolidated Plan are not compelled by the statutes that created the HOME and CDBG programs, but instead represent current HUD policy and practice. During the Carter Administration (1977-1981), HUD used the leverage provided by a predecessor to the Consolidated Plan (the Housing Assistance Plan) to induce CDBG grantees, particularly those with suburban jurisdictions, to build housing for families rather than for the elderly (Walker *et al.*, 1995; Struyk and Khadduri, 1980). That policy and practice stopped with the Reagan Administration's decision to "deregulate" the CDBG program during in the early 1980s. It would be feasible for the Court to override that policy and practice as part of a remedy for the Baltimore Metropolitan Region and to recapture the lost opportunity for HUD review and approval of plans for the use of block grant funds to affirmatively further fair housing. (See William D. Tamburrino's view of HUD's potential leverage through these planning processes in his Deposition, May 16, 2005, p.83.).

Reporting Requirements

The Consolidated Annual Performance Evaluation Report (CAPER) is the vehicle through which HOME participating jurisdictions, CDBG grantees, and state and local government recipients of other HUD formula grants report on funds spent and activities accomplished. The CAPER narrative must describe how the activities undertaken during a program year address "pertinent Strategic Plan objectives and areas of high priority identified in their three- to- five year Consolidated Plan." The narrative must also describe "actions taken to overcome the effects of impediments identified" through the Analysis of Impediments to Fair Housing.¹⁰

In addition to the CAPER, HOME participating jurisdictions and CDBG grantees must report detailed information to a project-level electronic reporting system, the Integrated Disbursement and Information System (IDIS). In particular, the module of IDIS for the HOME program provides information on the locations of HOME rental developments and on the incomes and race/ethnicity of the first households to occupy the project when its development or redevelopment under the HOME program was completed.

¹⁰ Saul N. Ramirez, Jr., Memorandum to CPD Field Office Directors and Consolidated Plan Entitlement Grantees, February 18, 1998, accessed at www.hud.gov, July 17, 2005

HUD uses CAPER and IDIS reporting to confirm that participating jurisdictions and grantees are complying with program rules—for example, serving eligible households—and to report to Congress on program accomplishments. HUD staff rarely review activities reported to these systems for consistency with Consolidated Plans and Annual Action Plans. However, these reporting systems contain a level of detail that would make it possible to use them as monitoring tools for Action Plans with specific features required by a remedy.

3.3 The Project-based Section 8 Program

The project-based Section 8 program has not produced additional units of assisted housing for many years. Most additions to this stock occurred in the 1970s and 1980s, although a few units were produced by the Section 8 Moderate Rehabilitation component of Section 8 as recently as the early 1990s. Thus, this stock is not growing, but instead is shrinking at a moderate rate and in ways that can affect the desegregation of housing opportunities in the Baltimore Region. Several current processes effect whether each of these project-based assisted housing developments is preserved as assisted housing or leaves the assisted housing program to become market rate housing or to be redeveloped for another use.

First, those Section 8 projects that also have mortgages with FHA insurance can be “marked to market” if an appraisal finds that the rents that HUD has been subsidizing under the Section 8 program exceed rents for comparable housing in the same location. The Mark to Market (M2M) program is administered by the Office of Multifamily Housing Assistance Restructuring (OMHAR), which for several years was a quasi-independent office reporting directly to the Secretary of HUD and now is a separate office within the Office of Housing. Under M2M, HUD’s agent (called a Participating Administrative Entity or PAE) negotiates a deal with an owner under which part (or all) of the property’s FHA-insured mortgage is forgiven and the Section 8 subsidy is reduced to a market comparable level. HUD has authority to approve higher exception rents for a specified fraction of all units that go through the M2M process, after determining that market conditions make the project-based assisted housing necessary.

Neither the determination to provide an exception rent nor the basic approval of an M2M deal includes an assessment of the fair housing implications of preserving a property or retiring it from the stock. For example, in the M2M process I observed for Kingsley Park in Baltimore County as part of an evaluation of the M2M program (Hilton *et al.*, 2004), there was no consideration by HUD or its agents of whether Kingsley Park was providing an opportunity for minorities to live in a predominately non-minority part of the Baltimore Region or, conversely, whether the use in the Baltimore Region of a number of Housing Choice Vouchers comparable to the number of Section 8 units at Kingsley Park would have a potentially greater positive effect on the desegregation of housing in the region.

Second, the owner of any property that reaches the end of the original term of its Section 8 contract with HUD can elect to take the property out of the program. This process, called “opting out,” requires advance notice to HUD and the tenants, creating a period of time during which interested parties may attempt to preserve the property—for example, through arranging the sale of the property to an ownership entity that will use an allocation of Low Income Housing Tax Credits to preserve the property as affordable housing. In some places, HUD multifamily field staff have played an active role in attempts to prevent opt outs, but without an explicit assessment of whether preserving a property would maintain a pattern of racial segregation or, conversely, maintain a desegregated housing opportunity.

An owner’s decision to opt out of the Section 8 program or to stay in the program obviously is influenced by the level of rent that HUD agrees to subsidize at the property. In the late 1990s, HUD created an internal process called “Mark up to Market,” giving HUD multifamily housing field staff the authority to increase Section 8 rents to the market-comparable level determined by an appraisal. Mark up to Market was perceived by HUD policy-makers as important for preserving Section 8 projects in relatively high-rent neighborhoods. This clearly has an important fair housing implication, but it is highly unlikely that HUD’s multifamily field staff was given instructions to consider the fair housing implications of their decision on the market comparable rent for a Section 8 property.

In response to reductions in the number of HUD employees during the 1990s, HUD has contracted out the administration of a large portion of all of its Section 8 contracts with private owners to public or private entities called contract administrators. This has implications for the way in which the provisions of a remedy for the Baltimore Region would have to be implemented, as HUD would have to instruct its contractors to comply with the remedy.

Finally, a certain percentage of Section 8 projects leave the program because the property has failed financially or has repeatedly failed to pass a housing quality inspection. During the late 1990s, HUD stepped up its enforcement of the non-financial terms of Section 8 contracts, creating a Real Estate Assessment Office (REAC) that administers a systematic inspection protocol each year (or less often for those properties that have scored well on a prior inspection). Properties that are failing either physically or financially are sent to an Enforcement Center charged with working out a solution with the current owner or arranging a transfer to another owner.

When a Section 8 property that also has FHA insurance defaults on its mortgage--either because it could not cover its costs with the Section 8 subsidy or because it has lost the Section 8 subsidy as the result of a HUD enforcement action--ownership of the mortgage passes to HUD as the mortgage insurer. HUD then makes a number of decisions that affect the future of the property and, therefore, whether properties located in communities of opportunity continue to provide assisted housing. Conversely, these decisions also affect whether properties that are in areas of minority and poverty concentration are retired from the assisted housing stock and replaced by housing vouchers able to be used

in less concentrated locations. *However, there is no assessment of the fair housing implications of these decisions.* (See Deposition of Mary Ann Henderson, July 11, 2005, pp. 62-70.)

When an FHA-insured property defaults on its mortgage, HUD pays an insurance claim and takes over ownership of the mortgage. HUD can sell the mortgage to another entity in order to recover part of the loss to the FHA insurance fund, can arrange for transfer of the property to a state or local government, a public housing authority, or a non-profit, or can take over ownership of the real estate. Selling a mortgage generally takes HUD out of any further decision-making for the future of the property. Acquiring the property gives HUD the responsibility for “disposing” of the property, usually by selling it and using the proceeds of the sale to reimburse the FHA insurance fund. HUD creates a Disposition Plan for an acquired multifamily property, and that plan can include the transfer or sale of the property that will continue to operate it as affordable housing with income and rent restrictions. HUD also has the ability to make an “up-front” grant to the new owner in order to repair the property.

3.4 The Housing Choice Voucher Program

The Housing Choice Voucher program is the demand-side or tenant-based component of HUD’s family of housing assistance programs. Families and individuals who come to the top of a waiting list maintained by the program administrator receive a subsidy that permits them to afford private market housing units with rents at about the middle of the housing market. The subsidy is equal to a payment standard that varies with the size unit needed by the household and by location minus 30 percent of the household’s income.

The administrators of the voucher program often are the same PHAs that own and operate public housing, but this is not always the case and is not inherent in the program design or legislative provisions. Some vouchers are administered by state housing agencies, and some are administered by a variety of other public or private entities. Vouchers may not be used in public housing developments, but they may and often are used in affordable housing units subsidized by the HOME and Low Income Housing Tax Credit programs.

Because they can be used in any location, vouchers have been used together with mobility counseling in special efforts to help low income, minority families move to low poverty parts of metropolitan areas. The standards used by HUD to measure the performance of voucher program administrators under the Section Eight Management Assessment Program (SEMAP) include measures of the extent to which voucher users live in low poverty areas. However, without special mobility counseling efforts, most voucher users find housing in the same types of neighborhoods as other low-income families and often live in neighborhoods with moderate levels of poverty (10-30 percent). This occurs despite the fact that the voucher subsidy should make housing available in neighborhoods with very low poverty rates (less than 10 percent). Unlike public housing, however, the voucher program has not had the effect of concentrating families in the highest poverty locations (Khadduri, Shroder, and Steffen 2004; Devine *et al.*, 2003).

Fair Market Rents. Each year HUD's Office of Policy Development and Research (PD&R) publishes Fair Market Rents (FMRs) for each metropolitan area in the U.S. and for groups of non-metropolitan areas. The FMRs are a policy standard that determines the maximum level of subsidy that can be provided by the Housing Choice Voucher program. Without HUD's approval, a PHA may set a payment standard for the vouchers it administers that is no less than 90 percent and no more than 110 percent of the published FMRs. (The FMRs are also used as standards affecting other HUD programs: for example, HOME rents must be the lesser of standards set by reference to local median incomes *or* the FMR; a multiple of the FMR sets the limit on rents HUD may pay private owners of Section 8 projects.)

The current policy level for the FMRs is the 40th percentile of rents of standard quality private market units that have recently been occupied by new tenants. Separate FMRs are set for each unit size, based on the number of bedrooms. A variety of sources are used for estimating FMRs, including the decennial census, the American Housing Survey (for the largest metropolitan areas), and a Department of Labor data series on annual changes in rents. Because these sources of information become dated and to enhance the accuracy of the FMRs, HUD each year conducts "random digit dialing" (RDD) surveys of private market rents in selected metropolitan areas.

Exception Payment Standards. FMRs are published on a metropolitan-wide basis. A PHA may request HUD to approve exception payment standards that are greater than 110 percent of the published FMR for particular portions of a metropolitan area—for example, for the PHA's entire jurisdiction or for a group of census tracts within the PHA's jurisdiction. Exception payment standards may be requested only for some sized units (e.g., units with 3 bedrooms) or for all unit sizes.

Exception payment standards can be an important dimension of efforts to help minority families move from racially and economically concentrated areas to communities of opportunity. Within a metropolitan region, rent levels vary a great deal by jurisdiction and by neighborhood; without exception rents families seeking to use vouchers with the help of mobility counseling and search assistance may be excluded from many areas.

Exception payment standards are approved by Public and Indian Housing field staff, after consultation with the field economists (HUD field economists receive substantive guidance from the Office of Policy Development and Research). In the mid 1990s, the standard for approving exception payment standards was streamlined. Previously the field staff, PIH and economists, had to determine whether rent survey information provided by the PHA requesting the exception payment standard met certain standards for reliability. The new standard permitted HUD staff to look at the ratio between the median rent in the census tract(s) for which the exception was requested and the median rent in the entire metropolitan area, based only on the most recent decennial census information on rents. If the ratio between the median rent for the exception area and the median rent for the metropolitan area was greater than 1.0, field staff could approve an exception payment standard based on the higher rents found in the exception area. This simpler standard had the effect of encouraging PHAs to submit more requests for

exception payment standards and of encouraging HUD field staff to approve a larger number of exception standards and to approve them more quickly.

In September 2003, Assistant Secretary for Public and Indian Housing Michael Liu revoked the authority of the HUD field staff to approve exception payment standards, making it much more difficult (or even impossible) to get an exception payment standard approved. (See Deposition of William D. Tamburrino, May 16, 2005, pp. 8, 193, and 251-265.)

Portability. For the voucher program, the term “portability” does not mean that the holder of a voucher can choose among private market housing units (sometimes called the “choice-based” or “finders keepers” feature of the program), but rather that a voucher may be used outside the jurisdiction of the PHA administering the program that issued the voucher to the household. If a household finds a housing unit in another PHA’s jurisdiction, the “receiving” PHA can agree to absorb that household into its own allocation of vouchers and budget authority. Alternatively, the “receiving” PHA can bill the “sending” PHA for the amount of subsidy needed to support the voucher. When many households take their vouchers to another PHA’s jurisdiction and that jurisdiction has higher rents,¹¹ this can place stress on the budget of a PHA billed for subsidy funds for its “out-porting” households.

Portability is an important feature of the voucher program for encouraging and enabling desegregated housing opportunities within a metropolitan area.¹² In guidance to PHAs explaining how they could live within the constraints of reduced funding for the voucher program, Assistant Secretary Michael Liu instructed PHAs that they could stop permitting families to exercise portability. (See the Depositions of William D. Tamburrino, May 16, 2005, pp.224-226, and David Vargas, June 1, 2005, pp.40, pp. 89-96.)

The system for providing funding for the current allocations of vouchers—i.e., for maintaining the current size of the voucher program—is in flux. In recent years, following a negotiated rulemaking on voucher renewal funding in the late 1990s, PHAs have been funded on the basis of the actual costs of subsidizing the number of units for which allocations of vouchers had been made in prior years, as long as a certain percentage of those units were placed under lease. HUD could (and sometimes did) recapture and reallocate funds from PHAs placing fewer units under lease and “underutilizing” their funds.

The Appropriations Act for FY2005 changed the funding of the voucher program from a unit basis to a budget basis. PHAs were allocated a share of the voucher appropriation

¹¹ This can happen within a metropolitan area because the receiving PHA uses a higher payment standard or simply because the rents of units actually leased under the program are closer to the payment standard in the jurisdiction of the receiving PHA.

¹² This feature of the tenant-based certificate and voucher programs was created in the 1980s by the Reagan Administration’s Secretary of HUD, Samuel Pierce. His explicit purpose was desegregation of housing opportunities (author’s knowledge from participating in meetings about this decision and its implementation through regulations).

based on their prior year use of funds, rather than on the number of units in the PHA's voucher program. This resulted in the further recapture of unused vouchers from some PHAs, including the Housing Authority of Baltimore City (HABC). As of this writing (August 2005), it is not clear what the level of funding or the funding system will be for FY2006.

The effect of recaptures from HABC (both in 2005 and earlier) has been to move some 4000 vouchers away from the Baltimore Region, thereby sharply reducing the opportunities for minority families in Baltimore to use vouchers to move away from areas of poverty and minority concentration.

Assistance in Finding Housing Units. Among the functions of the PHAs or other entities that administer housing vouchers is assistance to families in searching for units in which to use their vouchers. Most PHAs limit this assistance to providing lists of owners of rental housing who are willing to rent to voucher-holders. At times there has been special funding for mobility counseling programs that provide more active support for the search process, as well as information for families on the advantages of living in neighborhoods in which a voucher family (especially a member of a minority group) might not otherwise consider searching for housing. Sometimes these mobility counseling programs have received special allocations of funds (for example, from the CDBG program or the Fair Housing Initiatives or FHIP program), and sometimes voucher administrators have been permitted to use a portion of voucher subsidy funds for this purpose.

Project Basing of Vouchers. PHAs are permitted to make an exception to the tenant-based or choice-based character of the Housing Choice Voucher program for up to 20 percent of the units in their programs, attaching the voucher to a particular housing unit subject to the following constraints: unless the housing is for the elderly or for people with disabilities, no more than 25 percent of the units in the development can have vouchers and the development must be in a census tract with a poverty rate of 20 percent or less. The requirement for a low poverty location is regulatory, can be waived by HUD, and often is waived.

3.5 Public Housing

Public housing is the oldest HUD program. Started in 1937, the program at its peak had produced about 1.3 million units of housing owned and operated by public non-profit entities called housing authorities (PHAs). For a variety of reasons—the housing segregation that was legal during the first decades of the program, the use of the program in connection with urban renewal of decayed urban areas, and the changing demographics of many central cities of US metropolitan areas—public housing often is both racially concentrated within developments and located in racially concentrated neighborhoods with high poverty rates.

The public housing program has dropped in size in recent years, to about 1.2 million units, as some public housing has been redeveloped as mixed income housing under the

HOPE VI program, while other developments or portions of developments have been withdrawn from the housing stock. HUD policy is to match any reduction in units of public housing with an allocation of the same number of units to a PHA on behalf of the households in the same jurisdiction that need housing assistance. However, this policy has not always been followed consistently. Sometimes PHAs have requested, and HUD has allocated, only the number of vouchers needed by families and individuals who must relocate from public housing. This often is a smaller number of vouchers than the number needed to replace the public housing, as the public housing development has become substantially vacant.

At other times, HUD has refused to allocate all of the needed replacement vouchers (or has recaptured them) because the PHA serving the jurisdiction in which the public housing was located has management problems that prevent it from using all of its allocated vouchers. For example, the 4000 vouchers that HUD has recaptured from HABC include vouchers that were intended to replace public housing. HUD has the option to allocate replacement vouchers to an alternative administrator, but has rarely used that option¹³ and so far has not done so for vouchers associated with reductions in public housing in the City of Baltimore.

Mandatory Conversion of Public Housing. A very gradual process for retiring or transforming distressed public housing developments continues. Any public housing development that has not been awarded a HOPE VI grant and has not already gone through a “viability assessment” of its cost effectiveness may be subject to a new process called Mandatory Conversion for which HUD has not yet issued regulations. The HABC family high-rise public housing developments all have been redeveloped under HOPE VI or, in one case, demolished without redevelopment. However, the new Mandatory Conversion requirement will apply to the several remaining Baltimore public housing developments that are large, low-rise developments serving families.

Moving to Work Demonstration. In March 2005 HUD authorized HABC to participate in the Moving to Work (MTW) Demonstration program for a seven-year period.¹⁴ Designating HABC as an MTW PHA moved oversight of key decisions about HABC’s public housing and voucher programs from the Baltimore field office to headquarters. (See Deposition of William D. Tamburrino, May 16, 2005, pp. 8-9.)

Under its MTW agreement with HUD, “HABC is authorized to determine what percentage of its rental/leased housing is project-based” and to use project-based vouchers in property owned by HABC. For both project-based vouchers and any future use of public housing development funds, the agreement replaces the site and neighborhood standards in HUD regulations with a standard that *permits* units to be

¹³ That option was used in Chicago. One of the reasons HUD’s appointed Executive Director of the Chicago Housing Authority, Joseph Shuldiner, decided to contract out the administration of Chicago’s voucher program was the key role of a well-administered voucher program in supporting the demolition or transformation of Chicago’s distressed public housing developments. (Author’s knowledge from participating in the implementation of this decision.)

¹⁴ “Moving to Work Demonstration Agreement,” March 31, 2005, accessed at www.hud.gov on July 19, 2005.

located in city-designated revitalization areas, former public housing sites, HOPE VI sites, or “a racially or economically impacted area where HABC plans to preserve existing affordable housing.”

Only 9.5 percent of all public housing units in the Baltimore metropolitan area were in census tracts with poverty rates less than 10 percent as of 2000, while almost 60 percent (59.1) were in census tracts with concentrations of poverty considered extreme: more than 40 percent poor (Devine, *et al.*, 2003). Thus, the remedy should encourage the further shrinkage of the public housing stock in high poverty, high minority locations and discourage and prohibit development of replacement housing in those locations. This almost certainly means that the remedy will have to override the purported waiver of Site and Neighborhood Standards under HABC’s MTW agreement.

Other authority in the MTW agreement will permit HABC will support the continued operation of racially impacted public housing developments rather than retiring them from the public housing stock. This includes authority to implement site-based waiting lists, to create special occupancy restrictions for certain public housing buildings, to adopt local policies on income mixing and local preferences for admission to public housing, and to provide incentives to attract residents to developments that have been difficult to market.

In addition, the agreement appears to exempt HABC from the potential effect of the new Mandatory Conversion requirements by permitting the housing authority “to develop local procedures and policies regarding the viability, best use and/or conversion of public housing developments in relation to current and projected site and market conditions.”

3.6 The Low Income Housing Tax Credit

The Low Income Housing Tax Credit is a provision of the Internal Revenue Code, administered by the Internal Revenue Service (IRS). Unlike most tax provisions, it cannot be used by any taxpayer meeting specific criteria, but instead is allocated on a rationed basis in order to control the associated loss of tax revenues. The IRS allocates LIHTC authority on a per capita basis to each state. States then allocate their quota of tax credit dollars to developers of rental housing, who raise equity for the development of the housing (through either rehabilitating older housing or through constructing new housing) by selling tax credit authority to investors.

State allocations of the LIHTC to developers must be based on a Qualified Allocation Plan (QAP) developed with public comment and published. There are some statutory requirements for issues that must be addressed in the QAP, but these requirements are not sufficiently detailed to effectively constrain state choices on how to use the LIHTC (Gustafson and Walker, 2002).

Under Executive Order 12892, issued on January 17, 1994, HUD has been given lead responsibility for affirmatively furthering fair housing in all federal programs. So far,

however, HUD has not asked the Treasury Department to build this objective into the requirements for the QAP.

States vary a great deal in whether they use LIHTC to create housing opportunities in low poverty areas without racial concentrations. Maryland is about in the middle of state performance. Analysis my colleagues and I conducted of the locations of LIHTC units completed between 1995 and 2001 and that have two or more bedrooms (i.e., that might serve families with children) suggests that the State of Maryland is using the LIHTC program to create some housing opportunities in low poverty parts of the Baltimore Metropolitan Region, but not to nearly as great an extent as it might. We compared the locations of LIHTC units in the Baltimore metropolitan area with the locations of housing rented by families with children using vouchers. We found that while 50.7 percent of family vouchers in the region are in census tracts with poverty rates of 10 percent or less, only 41.9 percent of LIHTC units are in these low poverty locations (Khadduri, Buron, and Lam 2004). While half of all units may appear to be a large number, about the same percentage of all low income families nationally live in such low poverty locations.

Furthermore, even though there are some LIHTC developments with units large enough for families in low poverty locations in the Baltimore Region, we do not know some very important things about those developments. We do not know whether they have rents low enough to permit low income families to live there, either with or without vouchers, and we do not know the racial characteristics of the families who actually live in the LIHTC developments.

Chapter 4: Recommendations for Altering HUD Decision-making Processes

This section of the report describes in detail my recommendations for altering HUD's decision-making processes for the Baltimore Metropolitan Region. I have read key portions of Judge Garbis' Ruling on Liability, Revised Remedial Procedural Order, and Supplement dated April 14, 2005. I believe that the suggestions that I make in this Expert Report are consistent with the ruling and will support the approach that is under consideration by the Court.

My strong opinion is that the remedy should consider all of HUD's decisions that affect desegregation of housing opportunities for low-income, minority households in the Baltimore Metropolitan Region, not just HUD decisions that relate to the Housing Choice Voucher and public housing programs. The reason for this opinion is that other programs have more *new* resources and potentially greater ability to create housing opportunities in *new* locations.

The remedy should set up a comprehensive internal HUD process for planning and monitoring HUD decisions that affect desegregated housing opportunities in the Baltimore Region. However, the remedy also should include specific directives and performance goals for certain HUD decisions. Without such directives and goals, a plan is at risk of becoming a completely procedural exercise that will have no real effect on the location of housing opportunities in the Baltimore Region.

Section 4.1 provides recommendations for altered requirements for review of Consolidated Plans. Section 4.2 provides recommendations for altered requirements for HUD decisions affecting Section 8 projects. Section 4.3 provides recommendations for HUD decisions affecting the Housing Choice Voucher program. Section 4.4 provides recommendations for HUD's decisions affecting the public housing program. Finally, Section 4.5 describes the planning and monitoring processes that should be set up for HUD implementation of the remedy, based on a HUD Affordable Housing Desegregation Plan for the Baltimore Region.

4.1 Altered requirements for review of Consolidated Plans Affecting the Baltimore Region

The remedy should require HUD to alter its requirements and review standards for the Consolidated Plans that govern the use of funds for the development of rental housing under the HOME and CDBG programs. The Consolidated Plan must be developed with public comment and submitted to HUD by the political jurisdictions administering these programs. The most important feature of the Consolidated Plan is the Action Plan that must be updated annually, as it is the Action Plan that describes the specific programs and projects to be implemented and not simply broad strategies and statements of priority.

HUD has not elected to use its discretion to conduct a substantive review of these plans. However, the Court could direct HUD to do so as part of a remedy. Based on the Court's finding that HUD failed to affirmatively further fair housing in the Baltimore Region, HUD would be required to return, for that region, to using the leverage provided by review and approval of plans to encourage the development of family housing outside areas of minority and poverty concentration. Potential requirements for the Consolidated Plans of jurisdictions that administer these programs in the Baltimore Region, including the State of Maryland, should include the following:

- Each jurisdiction's Annual Action Plan must include a minimum number of HOME or LIHTC affordable rental development units *with two or more bedrooms and with three or more bedrooms* to be located in communities of opportunity, taking into account various dimensions of opportunity as well as race. The Court should require review and updating of the definition of a community of opportunity, based on census or other appropriate data.

The minimum number established by the remedy as the performance goal for each community should be proportional to the relative amounts of the HOME formula grant received by each HOME participating jurisdiction. (Because the State's program also operates outside the Baltimore Region, the minimum number of units specified for the State of Maryland should also be proportional to the fraction of Maryland's formula-based HOME grant attributable to the Baltimore Region.) The reason for the specification that all units must have two or more bedrooms is to prevent satisfaction of the requirement through the development of housing for the elderly.

While housing vouchers can be a key part of a strategy for achieving desegregated housing, it is important to also have a dimension to a remedy that creates "hard" units of affordable housing. Families who need three or more bedrooms have a difficult time using vouchers, relative to smaller households.¹⁵ Because the advantages of living in racially integrated and economically diverse neighborhoods are particularly important for children, the remedy should include housing opportunities for families with more than two children. In addition, while vouchers combined with mobility counseling have proved effective in helping minority families move to communities of opportunity, it is much easier to achieve such moves when affordable rental housing units have been created in those communities.

Another reason that creating hard units (those with long-term commitments to provide affordable rental housing) is important is that housing markets change. Some low poverty, low minority portions of the Baltimore Metropolitan Region may not have difficult housing markets for families trying to use vouchers now, but housing values in good neighborhoods that currently are within the reach of voucher users could rise to the point at which owners of rental developments convert them to luxury rental housing or redevelop the property for other use.

¹⁵ See Khadduri, Burnett, and Rodda (2003) for the various circumstances in which rental production subsidies are appropriate, rather than relying solely on a demand-side (voucher) approach for providing housing assistance.

- Because the Low Income Housing Tax Credit is the largest producer of hard units of affordable housing in new locations, the Court should require HUD to use its influence over the State of Maryland's LIHTC allocations as part of the effort to create desegregated housing opportunities in the Baltimore Region. Although LIHTC developments with rents set at the maximum permitted levels may not be affordable for poor households, the ability to serve households with incomes somewhat above poverty *in places outside areas of minority concentration* can be important for creating desegregated housing opportunities. Furthermore, both HOME and LIHTC rental developments can create opportunities for poor families who have Housing Choice Vouchers to use their vouchers outside areas of poverty or minority concentration.

As an example of indirect leverage, HUD could use its control over the disposition of HUD-acquired Section 8 projects for which the State wants to allocate tax credits to negotiate with the State about the locations of other LIHTC developments. For example, HUD might ask the State to balance the preservation of a family assisted housing project in a high minority area in the City of Baltimore with the development of a larger number of tax credit units with two or more bedrooms in a low minority area of the Baltimore Region.

HUD should also use the leverage it has through the Consolidated Plan that Maryland must produce in order to access its allocations of CDBG and HOME to seek the cooperation of the state in implementing an Affordable Housing Desegregation Plan for the Baltimore Region. The State of Maryland's Annual Action Plan should include an explanation of how Maryland's Qualified Allocation Plan (QAP) for the Low Income Housing Tax Credit supports the development of units of affordable family housing outside areas of poverty or minority concentration. For example, Maryland could alter its QAP to favor LIHTC developments that produce two-bedroom, three-bedroom, or larger units in low poverty and low minority areas of the Baltimore Region and that have rents below the FMRs.

HUD should also encourage and assist the state to conduct a survey of owners and managers of LIHTC developments already placed in service in low poverty and low minority areas of the Baltimore Metropolitan Region to determine the race/ethnicity and the income levels of the residents and the extent to which Housing Choice Vouchers are used in the developments.

For all jurisdictions affecting the Baltimore Region and required to produce Consolidated Plans, HUD's review standards should include the following provisions related directly to the use of HOME and CDBG funds (and indirectly to the use of LIHTC):

- Each jurisdiction's action plan must contain a minimum number of HOME rental development units with two bedrooms and with three or more bedrooms to be located in communities of opportunity, taking into account various dimensions of opportunity as well as race. The Court should require review and updating of the

definition of a community of opportunity, based on census or other appropriate data.

- Each jurisdiction's Annual Action Plan must include an activity supported by CDBG funds that has as its explicit purpose affirmatively furthering desegregated housing opportunities in the Baltimore Region. This activity should be action-oriented and not simply funding support for the Analysis of Impediments to Fair Housing that jurisdictions must certify they have carried out.
- Each jurisdiction's Annual Action Plan must include guidelines for the investment of HOME and CDBG dollars in rental developments that also are supported by the Low Income Housing Tax Credit. These guidelines should discourage the location of developments combining LIHTC with HOME or CDBG in areas of poverty or minority concentration.
- Each jurisdiction's Consolidated Plan must include an analysis of how the jurisdiction's Annual Plan will support the desegregation of housing opportunities throughout the Baltimore Region (as well as within the jurisdiction preparing the plan).
- Annual updates of the Action Plans must report on the numbers of units of affordable housing developed by the jurisdiction outside areas of minority concentration and on the results of activities supported by CDBG to affirmatively further desegregated housing opportunities.
- HUD must reject any Consolidated Plan or annual Action Plan that does not satisfy these requirements—based on information included in the Consolidated Plan or Annual Action Plan, in the Consolidated Annual Performance Evaluation Report (CAPER), and in HUD's administrative data systems--thereby refusing to release the jurisdiction's annual allocations of HOME and CDBG funds.

4.2 Altered requirements for HUD decisions about Section 8 projects in the Baltimore Region.

The remedy also should require HUD to alter its decision-making processes for the project-based Section 8 program, because the preservation of assisted housing units in communities of opportunity is another way to ensure that minority families have an opportunity to live there. This stock of housing often is located outside areas of poverty and minority concentration.

Analysis of current locations of subsidized housing developments confirms the importance of having the remedy reach the project-based Section 8 program. A HUD staff paper (Devine, *et al.*, 2002) shows that 37.8 percent of families with children living in project-based assisted units in the Baltimore metropolitan area were in census tracts with poverty rates less than 10 percent as of 2000. This compares unfavorably with the percentage of voucher families in low poverty locations (50.7 percent), but the point here

is that the Section 8 units at greatest risk of being lost from the assisted housing stock are precisely the 37.8 percent that are in low poverty locations in the Baltimore Region.

An explicit process supporting HUD's requirement to affirmatively further fair housing in the Baltimore Region should be added to:

- The review and approval of "Mark to Market" proposals to preserve SECTION 8 projects by restructuring their FHA mortgages and renegotiating their subsidized rent levels.
- The review and approval of annual proposals for increases to the rents received by owners under their Section 8 contracts with HUD. Given the contracting out of HUD's monitoring responsibilities for much of the project-based Section 8 housing stock, it will be important to develop review standards for decisions made by contractors on rent increases for these developments—both to ensure that rents are high enough to preserve housing in communities of opportunity and to ensure the preservation of housing in concentrated areas is not facilitated by above-market rents.

The deals made by HUD for multifamily property disposition are another decision process that should be controlled by the remedy. A decision to preserve a property as affordable housing should consider explicitly the fair housing implications of that preservation. Therefore, the remedy should also require consideration of affirmatively furthering fair housing in:

- The decision to sell to another entity a mortgage that HUD owns as the result of paying an insurance claim on a multifamily property with a defaulted mortgage or to arrange for the transfer of the property to a state or local government, a public housing authority, or a non-profit sponsor of housing.
- The development and approval of Disposition Plans for selling those multifamily developments that enter HUD's inventory of acquired properties because HUD has paid an FHA insurance claim on a property with a defaulted mortgage and assumed ownership of the property.
- The review and approval of "up-front grant" funding for projects that are sold from HUD's inventory of acquired multifamily properties.

A HUD Affordable Housing Desegregation Plan should include identification of Section 8 projects that have two or more bedrooms and are located in communities of opportunity in the Baltimore Region. Any decision made within any of the processes that affect the future of a Section 8 project in the Baltimore Region should require a finding by the Assistant Secretary for Housing, explaining the potential effect of that decision on affirmatively furthering fair housing in the Baltimore Region. The presumption behind that finding is that developments in such communities should be preserved as affordable rental housing, while developments in areas of minority and poverty concentration should not be preserved.

4.3 Altered requirements for HUD decisions affecting the Housing Choice Voucher program in the Baltimore Region

There are several approaches the remedy could take to ensure a more effective use of housing vouchers for increasing access to housing opportunities for minority families outside high poverty or high minority areas. These approaches are proposed in the context of the recent history of the administration of Housing Choice Vouchers in the Baltimore Region, including the poor performance of HABC in administering vouchers over the past decade¹⁶ and the apparent lack of cooperation with the portability of vouchers from Baltimore City on the part of the administrator of the voucher program in Baltimore County. (For detail on these points, see the Deposition of William Tamburrino, May 16, 2005, pp.98-140, pp.173-174, and pp.189-191.) Other relevant facts are HUD's recent decision to make HABC a Moving to Work (MTW) PHA and the changes to the funding system for vouchers that have occurred during the past two years.

Some of the proposed approaches are alternative ways of meeting the same objective, and the remedy might ask HUD to choose among them.

Objective # 1: Support directly efforts by minority families to move from areas of poverty and minority concentration to desegregated areas. *Alternative ways of achieving this objective are:*

- 1) HUD requests from Congress a special appropriation for a specified number of incremental vouchers for the Baltimore Region, along with mobility counseling funds in the same appropriation to be used in connection with the vouchers.
- 2) HUD allocates to the Baltimore Region funding for a specified number of vouchers and associated mobility counseling from voucher funds that become available as the result of recaptures from PHAs with underutilized voucher funds elsewhere in the nation.

Objective #2: Facilitate the use of vouchers by minority families to move to housing in desegregated locations. *Complementary ways of achieving this objective are:*

- 1) From annual appropriations for the Housing Choice Voucher program (and with Congressional approval, if needed), HUD establishes a reserve account to be used to support the portability of vouchers throughout the Baltimore Region. HUD would direct the PHAs in the region to absorb into their own voucher programs any minority households using vouchers to move from Baltimore City to the jurisdiction of another PHA in the region. HUD would use the reserve account to add an amount equivalent to the cost of the "in-ported" voucher to the "receiving" PHA's voucher funds.

¹⁶ US Department of Housing and Urban Development, Office of Inspector General, *Housing Authority of Baltimore City, Section 8 Certificate and Voucher Programs, Baltimore, Maryland*, March 28, 2001.

- 2) HUD approves requests for exception payment standards when supported by data under the standard for review and approval of such requests that was in effect as of 2003. In order to ensure that exception payment standards are used as part of the remedy for the Baltimore Region, it would not be necessary to impose a review to determine if such a standard is needed to encourage the desegregation of housing opportunities. All that is needed is a return to the standard for approving exception payment standards that was in effect before September 2003 and permitted virtually automatic approval of requests supported by census data.

Objective #3: Establish region-wide administration of vouchers. Options for achieving this objective could be modest or far reaching. Beginning with the most modest alternative, the possibilities include:

- 1) HUD selects competitively an entity to administer on a region-wide basis the special allocation of vouchers and associated mobility counseling. That entity could include a PHA currently operating a voucher program within the region or elsewhere in Maryland or another public or private entity. The competitive solicitation would require a description of how the proposed region wide administrator would ensure that the vouchers are used in a way that creates desegregated housing opportunities in the Baltimore Region.
- 2) HUD selects competitively an entity to administer the 4000 housing vouchers that have been recaptured from HABC in recent years and the additional vouchers that may be needed replace public housing and Section 8 developments in the future. Those vouchers would be administered on a region-wide basis, and families living in the City of Baltimore would have preferential access to those vouchers.
- 3) HUD selects competitively an entity to administer all vouchers currently under contract to HABC and any that are added to the ACC during the period of the remedy and directs that entity to administer those vouchers on a region-wide basis, as is permitted by Maryland state law. (See Deposition of William D. Tamburrino, May 16, 2005, pp.203-204.)
- 4) HUD selects competitively an entity to administer *all* Housing Choice Vouchers in the Baltimore Region. The remedy would establish that the failure of the voucher programs in the Baltimore Region to create sufficient desegregated housing opportunities in the region provides adequate grounds for HUD to cancel its annual contributions contracts (ACCs) for voucher funding with the PHAs in the region.

Objective #4: Ensure that families in the City of Baltimore have access to all vouchers that have been allocated to the Housing Authority of Baltimore City (HABC) either by formula or as replacement housing. For this objective, as well, there is a more comprehensive and a less comprehensive alternative.

- 1) HUD selects competitively an entity to administer vouchers that are recaptured from HABC because of HABC's inability to use them and restores to that entity vouchers recaptured during the 10 year period prior to the remedy (the less comprehensive option).
- 2) HUD selects competitively an entity to administer all vouchers currently under contract to HABC and any that are added to the ACC during the period of the remedy (the more comprehensive option).

Objective #5: Avoid the use of vouchers in a way that limits opportunities to choose desegregated housing

- 1) HUD rejects any requests from a housing authority within the Baltimore Region for a waiver to the rule that vouchers can be "project-based" (attached to units) only outside high poverty locations. This would require the remedy to override the purported waiver of Site and Neighborhood Standards in the Moving to Work agreement between HUD and HABC.

4.4 Altered Requirements for HUD Decisions Affecting Public Housing in the Baltimore Region

The context for these recommended approaches for decisions affecting the public housing program is that all of the high rise family public housing developments in Baltimore City either have been redeveloped with HOPE VI grants or, in one case, failed a "viability assessment" and been retired from the public housing stock. Relocation of families from these developments has already occurred.

However, in addition to the developments that already have been redeveloped or retired from the public housing stock, HABC continues to own and operate several large, low-rise family public housing developments, in addition to more than 2800 units of scattered site public housing. This housing is virtually all occupied by African Americans. Many of the remaining HABC family developments may be subject to a new cost-effectiveness test implementing the Mandatory Conversion statutory requirement, resulting in a reduction of additional public housing units in Baltimore. HABC estimates that as many as 6000 additional public housing and "FHA" units may leave the Baltimore housing stock over the next few years.¹⁷

¹⁷ Letter from Paul T. Graziano to Michael Liu, August 12, 2003. "FHA" units presumably are project-based Section 8 units. For HABC disposition plans for specific developments, see Housing Authority of Baltimore City, 5 Year Plan for Fiscal Years 2004-2008, Approved by the US Department of Housing and Urban Development, July 30, 2004.

The formula-based Capital Grants made to HABC through 2003 include approximately \$40 million in “Replacement Factor Funds” that could be used to replace about 15 percent of the lost public housing units with new public housing outside racially impacted areas. In addition, according to HUD policy, all public housing units retired from the stock should be replaced by an equivalent number of vouchers.

The reduction of public housing units that are racially concentrated and in high poverty locations should create a major opportunity for the housing desegregation in the Baltimore Region. However, HUD declared HABC ineligible to apply for replacement vouchers for some of the public housing units withdrawn from the public housing stock. HUD has also recaptured from HABC funding that could have supported vouchers for more than 4000 additional families, including vouchers allocated to HABC by formula in past years, vouchers that were intended to be used in support of the Partial Consent Decree, and vouchers that were intended as replacement housing for reductions in public housing units as part of the HOPE VI redevelopments.¹⁸ *These actions have reduced substantially the number of African-American families who might have had the opportunity to come to the top of HABC’s voucher waiting list and to use their vouchers to leave racially and economically concentrated areas.*

The explanation given by the leadership of HABC for the housing authority’s inability to use its allocated vouchers makes no mention of efforts to help families use their vouchers outside the City of Baltimore and instead asks for authority to use a larger number of vouchers for project-based developments in the city.¹⁹

Furthermore, the way in which HABC has implemented the relocation of families from the HOPE VI redevelopments in Baltimore sometimes has resulted in increased racial concentration at the remaining family public housing developments and sometimes has resulted in families using vouchers in nearby neighborhoods with increasing poverty rates and growing African-American populations, rather than in communities of opportunity (Khadduri 2001).

Given this background, the remedy should require HUD to:

- Reject any new applications for HOPE VI or for a future program for redeveloping or replacing public housing that would have the effect of producing housing (including both public housing and non-public housing components) likely to be occupied predominately (75 percent or more) by African American residents. Base the assessment of the likely racial composition of a proposed

¹⁸ According to HUD’s Office of Inspector General, as of 2004 HABC had funds for 14,609 vouchers and only 10,373 vouchers under lease. US Department of Housing and Urban Development, Office of Inspector General, Audit Report to William D. Tamburrino from Daniel G. Temme, December 21, 2004. According to an HABC statistical report, the total number of vouchers authorized historically as of July 2005 was 14,733 and the number under lease as of that date was 10,504. Baltimore CITISTAT, Volume 4, Number 7, July 8, 2005. For the recapture of funds in 2005, see the Deposition of William Tamburrino, May 16, 2005, pp.236-237.)

¹⁹ Letter from Paul T. Graziano to Michael Liu, August 12, 2003.

development on an analysis of 1) the racial composition of similar HOPE VI developments already in occupancy in Baltimore and 2) the racial composition of the census tract in which the development is located and the immediately adjacent census tracts.

- Reject any applications for the use of Replacement Factor Funds to develop public housing in areas of minority concentration within Baltimore or elsewhere in the region.
- Encourage the use of both HOPE VI and Replacement Factor Funds to develop public housing in communities of opportunity outside the City of Baltimore.
- Reject any plans for demolition or redevelopment of public housing in the Baltimore Region that would have the effect of reducing the number of assisted or affordable housing units in communities of opportunity.
- Permit the entity administering vouchers for the Baltimore Region or on behalf of HABC to apply for replacement vouchers for all units of public housing that have been approved for retirement from the public housing stock and for which vouchers have not yet been allocated.
- Set standards for the relocation plans associated with the redevelopment of public housing or the retirement of units from the public housing stock that encourage and assist families to move to communities of opportunity rather than to racially and economically concentrated areas or to neighborhoods that have rapidly increasing African American populations. Monitor the implementation of those plans.
- Require the entity administering vouchers for the Baltimore Region or on behalf of HABC to give priority on the voucher waiting list to any family that comes to the top of the waiting list for public housing and asks to receive a voucher instead of being assigned to public housing.
- Review local residency preferences for public housing to determine if they constitute an impediment to fair housing.
- Reject any use by Baltimore of its Moving to Work authority that is inconsistent with these provisions of the remedy.

4.5 HUD Affordable Housing Desegregation Plan for the Baltimore Region

All of the decisions that HUD makes that affect housing opportunities in the Baltimore Regions should be governed by a Court-mandated HUD Affordable Housing Desegregation Plan for the Baltimore Region. The plan should be based on an analysis by HUD of the location of assisted and affordable housing in the region and should require all HUD decisions directly and indirectly affecting the location of housing opportunities to be supported by an explanation of why that decision increases desegregated housing opportunities or does not reduce such opportunities. The plan should include action steps for implementing the changes in HUD decision-making for specific programs that are spelled out in the remedy.

In order to ensure its effectiveness, the plan should be developed by a working group led by the Office of the Secretary or the Office of General Counsel (OGC) and should include representatives from the offices of Housing (OH), Public and Indian Housing (PIH), Community Planning and Development (CPD), Fair Housing and Equal Opportunity (FHEO), Policy Development and Research (PD&R), and the Budget Office. The plan should not be developed, or the planning activity led, by the Office of Fair Housing and Equal Opportunity, because this would set up an adversarial dynamic in which the line offices making decisions on HUD programs would view the plan as something to be circumvented or complied with in a minimalist way. See the Depositions of Pamela Doong Walsh (May 27, 2005, pp.131-141), William D. Tamburrino (May 16, 2004, p.226-227), and David Vargas (June 1, 2005, pp.37-41 and pp.83-89) for the pattern of excluding FHEO from important decisions.

The remedy should require HUD to produce annually a report on the locations of assisted and affordable rental housing in the Baltimore Region and on changes that have occurred during the past year. This would serve both as a progress report on the HUD Affordable Housing Desegregation Plan for the Baltimore Region and as public information available for the development of Consolidated Plans for the jurisdictions in the region and for the State of Maryland's Qualified Allocation Plan for choosing rental developments to be subsidized through the Low Income Housing Tax Credit (LIHTC). This report should include information on the locations of LIHTC rental developments in Maryland. To the extent consistent with privacy protections for assisted households, the report also should include information on the locations of minority households using Housing Choice vouchers, including whether LIHTC developments outside areas of poverty and minority concentration are serving minority families with children.

Most of the data needed for producing this report is readily available to HUD. Following the decennial censuses of 1990 and 2000, HUD had the Census Bureau produce special extracts of census data on the housing conditions of households by racial and ethnic group and by income categories that follow HUD's definitions (i.e., income categories are defined relative to local median incomes). These data (known as the CHAS data) are available at the census tract level for each jurisdiction administering the HOME and CDBG programs. HUD also has household-level administrative data sets for the public housing, voucher, and Section 8 project-based assisted housing programs that include information on the location of units and on the income and racial characteristics of the

household assisted in each unit. Devine *et al.* (2003) is a HUD staff analysis of the locations of assisted housing in the 50 largest metropolitan areas based on that administrative data.

HUD also has administrative data on the locations of HOME rental developments and on the characteristics of the households that occupied the developments when they first were placed in service.

Finally, HUD also produces each year a public use dataset on the locations of rental housing units produced under the Low Income Housing Tax Credit. This dataset includes some information on the housing, including the size of the development, the number of bedrooms in each unit in the development, and whether the development was newly constructed. It does not include information on the occupants of LIHTC developments. This information would have to be based on a combination of administrative data available to the Maryland State Housing Finance Agency and a survey of the owners of LIHTC developments.

References

Baltimore CITISTAT. Volume 4, Number 7, July 8, 2005.

Brooks, LaVerne L. Deposition. February 6, 2003.

Brooks, LaVerne L. Deposition. July 12, 2005.

Churchill, Sarah, Mary Joel Holin, Jill Khadduri and Jennifer Turnham. *Strategies That Enhance Community Relations in Tenant-Based Section 8 Programs*. Prepared for the U.S. Department of Housing and Urban Development, March 30, 2001.

Climaco, Carissa, Meryl Finkel, Sandra Nolden, and Karen Rich. *Updating the Low Income Housing Tax Credit Database: Projects Placed in Service through 2002*. Cambridge MA: Abt Associates, Inc., 2004.

Devine, Deborah J., Robert W. Gray, Lester Rubin, and Lydia B. Taghavi. *Housing Choice Voucher Location Patterns; Implications for Participant and Neighborhood Welfare*. US Department of Housing and Urban Development, Office of Policy Development and Research, 2003.

Executive Order 12892, issued January 17, 1994, accessed at www.hud.gov.

Graziano, Paul T. Letter to Michael Liu. August 12, 2003.

Gustafson, Jeremy, and Christopher Walker, *Analysis of State Qualified Allocation Plans for the Low-Income Housing Tax Credit Program*. Washington DC: The Urban Institute, 2002.

Halm, Charles. Deposition. July 11, 2005.

Henderson, Mary Ann. Deposition. February 14, 2003.

Henderson, Mary Ann. Deposition. February 26, 2003.

Henderson, Mary Ann. Deposition. July 11, 2005.

Hilton, Richard, Charles Hanson, Joanne Anderson, Meryl Finkel, Ken Lam, Jill Khadduri, and Michelle Wood. *Evaluation of the Mark to Market Program*. Bethesda MD: Econometrica, Inc., and Cambridge MA: Abt Associates Inc., 2004.

Housing Authority of Baltimore City, 5 Year Plan for Fiscal Years 2004-2008, Approved by the US Department of Housing and Urban Development, July 30, 2004.

Khadduri, Jill, Larry Buron, and Ken Lam. "LIHTC and Mixed-Income Housing: Enabling Families with Children to Live in Low Poverty Neighborhoods?" Paper presented at Association of Public Policy and Management Annual Research Conference, Atlanta GA, October 30, 2004.

Khadduri, Jill, "Deconcentration: What Do We Mean? What Do We Want?" *Cityscape* 5:2 (2001), pp.69-84.

Khadduri, Jill, Kimberly Burnett, and David Rodda, *Targeting Housing Production Subsidies: Literature Review*. Cambridge MA: Abt Associates, 2003.

Khadduri, Jill, Mark D. Shroder, and Barry Steffen, "Can Housing Assistance Support Welfare Reform?" in Amy Bogdon and Barbara Sard, eds. *A Place to Live, A Means to Work: How Housing Assistance Can Strengthen Welfare Policy*. Washington DC: The Fannie Mae Foundation, 2004.

National Council of State Housing Agencies. "Housing Credit Utilization Charts," accessed at www.nchsa.org, July 19, 2005.

O'Connor, Joseph. Deposition. January 22, 2003.

O'Connor, Joseph. Deposition. February 14, 2003.

Ozdinec, Milan M. Deposition. May 26, 2005.

Ramirez, Saul N. Memorandum to CPD Field Office Directors and Consolidated Plan Entitlement Grantees, February 18, 1998, accessed at www.hud.gov, July 17, 2005.

Struyk, Raymond J., and Jill Khadduri. "Saving the Housing Assistance Plan," *Journal of the American Association of Planning*, October 1980, pp. 387-397.

Tamburrino, William D. Deposition. May 16, 2005.

Tauber, Karl. "Public Housing and Racial Segregation in Baltimore." April 29, 2000.

Thompson v. HUD, 348 F. Supp. 2d 398 (D. Md. 2005).

Thompson v. HUD, Revised Remedial Procedural Order. April 14 2005.

U.S. Department of Housing and Urban Development, "Voucher Management System. Housing Authority of Baltimore City," accessed at www.hud.gov, May 9, 2005.

U.S. Department of Housing and Urban Development, Office of Community Planning and Development. "Guidelines for Preparing a Consolidated Plan Submission for Local Jurisdictions," accessed at www.hud.gov, July 17, 2005.

U.S. Department of Housing and Urban Development, Office of Community Planning and Development. "Consolidated Plan Review Guidance," accessed at www.hud.gov, July 17, 2005.

U.S. Department of Housing and Urban Development, Office of Inspector General. *Housing Authority of Baltimore City, Section 8 Certificate and Voucher Programs, Baltimore, Maryland*, March 28, 2001.

U.S. Department of Housing and Urban Development, Office of Inspector General. *Audit Report to William D. Tamburrino from Daniel G. Temme*, December 21, 2004.

U.S. Department of Housing and Urban Development, Office of Inspector General. "Moving to Work Demonstration Agreement," March 31, 2005, accessed at www.hud.gov, July 19, 2005.

Vargas, David. Deposition. June 1, 2005.

Walker, Chris, Paul Dommel, Harry Hatry, Amy Bodgon, Patrick Boxall, Alan Abramson, Robin Smith, and Joshua Silver. *Federal Funds, Local Choices: An Evaluation of the Community Development Block Grant Program*. Washington, DC: The Urban Institute, 1995.

Walsh, Pamela Doong. Deposition. May 27, 2005.

Statement of Qualifications

My name is Jill Khadduri. I am a Principal Associate at Abt Associates, Inc., a consulting firm that has conducted research and program evaluations on housing policy topics since the 1970s. From 1973 to 2000 I was an employee of the US Department of Housing and Urban Development, in the Office of Policy Development and Research. I have a Ph.D. from The Johns Hopkins University.

I have never before provided expert testimony.

I am being reimbursed at the rate of \$200/hr. for this expert testimony, as an independent contractor and not as an employee of Abt Associates, Inc.

Following is a list of my publications during the past 10 years.

Jill Khadduri, "Comment: Does Mobility Matter? An Analysis of Housing Voucher Holders' Neighborhood Conditions by Race and Ethnicity," forthcoming in *Housing Policy Debate*, volume 16, number 2, 2005.

Jill Khadduri, "Permanent Housing for Homeless Families: A Review of Opportunities and Impediments," Paper prepared for an Expert Panel Meeting on Developing a Typology of Homeless Families, July 25, 2005.

Jill Khadduri, Larry Buron, and Ken Lam, "LIHTC and Mixed-Income Housing: Enabling Families with Children to Live in Low Poverty Neighborhoods?" Paper presented at Association of Public Policy and Management Annual Research Conference, Atlanta GA, October 30, 2004.

Jill Khadduri, "Should the Housing Voucher Program Become a Block Grant?" *Housing Policy Debate*, 14:3 (2003).

Jill Khadduri, Mark D. Shroder, and Barry Steffen, "Can Housing Assistance Support Welfare Reform?" in Amy Bogdon and Barbara Sard, eds., *A Place to Live, A Means to Work: How Housing Assistance Can Strengthen Welfare Policy*. Washington DC: The Fannie Mae Foundation, 2004.

Jill Khadduri, Austin Kelly, and Laura Talley, "Low Income Homeownership Through Tax Credits: A Review of Design Choices." January 2002.

Jennifer Turnham and Jill Khadduri, "Issues and Options for HUD's Tenant-based Assistance Program." Prepared for the Millennial Housing Commission, September 2001.

Jill Khadduri, Marge Martin, and Larry Buron, "Split Subsidy: The Future of Rental Housing Policy?" 2001.

Jill Khadduri, "Deconcentration: What Do We Mean? What Do We Want?" *Cityscape*, 5:2 (2001), pp.69-84.

Katherine P. Nelson, Jill Khadduri, Marge Martin, Mark D. Shroder, and Barry Steffen. *Rental Housing Assistance: The Crisis Continues: The 1997 Report to Congress on Worst Case Housing Needs*. With. Washington, D.C.: U.S. Department of Housing and Urban Development, 1998.

Jill Khadduri and Marge Martin, "Mixed Income Housing in the HUD Multifamily Stock," *Cityscape*, 3:2 (1997), pp.33-69.

Rebuttal Expert Report of Jill Khadduri

Thompson v. HUD

January 6, 2005

Jill Khadduri 1/6/06

Jill Khadduri

Thompson v. HUD
 Plaintiff Expert Witness Jill Khadduri
 Rebuttal to Defendants' Expert Witness Reports
 January 6, 2005

Following are challenges to my expert witness report dated August 19, 2005 made explicitly or implicitly by the defendant's expert witnesses in their written reports. The numbered items that follow summarize each argument, name the witness or witnesses making the argument, and provide my rebuttal.

1. William Rohe argues that there should be a fixed number of units of subsidized housing in the Remedial Order. He puts the number at 113 units per year, arguing that it should be small enough to be undetectable by citizen groups in suburban communities in the Baltimore Region and thereby avoid opposition.

Rebuttal: While I agree that there should be a fixed number of units in the Remedial Order, that number should be linked to the injury suffered by the plaintiff class—that is, the missed opportunities to live in low-poverty, low-minority neighborhoods in the Baltimore Region as a result of HUD's failure to affirmatively further fair housing by taking a regional approach to the administration of its programs.

As of 1995, there were 17,030 family public housing units in the Baltimore Region, not including Queen Anne County.¹ Of those, 15,631 (91.8 percent) were in the City of Baltimore and only 8.2 percent were in the suburbs. Similarly, across the Baltimore Region as of 2000, only 9.5 percent of family public housing units were in census tracts with 1990 poverty rates below 10 percent.²

By contrast, in the Baltimore Region, 60.2 percent of all *unassisted* rental units occupied by family households *with incomes below 80 percent of area median income* were in the suburbs as of 2000.³ By including only renters with low-incomes, this analysis avoids making the assumption that public housing (or families using vouchers) could have been located in neighborhoods with unrealistically high housing costs.

¹ Includes scattered-site public housing, virtually all of which (99.5 percent) is in the City.

² Devine, Deborah J., Robert W. Gray, Lester Rubin, and Lydia B. Taghavi, *Housing Choice Voucher Location Patterns; Implications for Participant and Neighborhood Welfare*. US Department of Housing and Urban Development, Office of Policy Development and Research, 2003. These estimates include Queen Anne County and are based on 1990 poverty rates.

³ Numbers of unassisted renters are derived by subtracting family public housing, project-based Section 8, and voucher units from 2000 Census estimates of renter households with incomes below 80 percent of area median income. Sources for public and assisted housing units are Devine, *op.cit.*, the Pictures of Subsidized Households database found at huduser.org, and analysis of HUD data in Gerald R. Webster, *The Geography of Public and Assisted Housing Facilities in Baltimore*, Shelley Lapkoff, *Demographic Analysis of Baltimore and Its Federally Assisted Housing*, October 1, 2003, and Karl Taeuber, *Public Housing and Racial Segregation in Baltimore*, April 29, 2003. Numbers for all renter families with incomes below 80 percent of area median income are from the Comprehensive Housing Affordability Strategy (CHAS) data found at huduser.org.

Instead of building (and retaining) public housing in high-poverty, high-minority locations, HUD policies, *at the very least*, should have created housing opportunities in the suburbs to the same extent that unassisted low-income renter families live there. This would have meant that, in addition to the 8.2 percent of public housing located in the suburbs, another 52 (60.2-8.2) percent of the 17,030 public housing units (or other assisted housing units) would have been there: 8,856 more units (52% of 17,030).

Therefore, I propose that the Remedial Order include numerical outcome goals for HUD to create 900 units per year in communities of opportunity over a ten-year period. These housing opportunities should be created through a combination of incremental housing vouchers associated with the Remedy and affordable hard units produced through the Low Income Housing Tax Credit, HOME, HOPE VI or a successor program, Replacement Factor Housing, and other housing production subsidies that may be available in the region. At the end of the period, new housing available to plaintiffs in communities of opportunity would total 9,000 units created by a combination of Thompson vouchers in use and hard units (without double counting Thompson vouchers used in some of the hard units).

HUD's Affordable Housing Desegregation Plan would detail the specific strategy to be followed—for example, numbers of Thompson vouchers for which appropriations could be requested and anticipated numbers of hard units based on HOME, LIHTC, and other resources expected to be available to state and local jurisdictions and public housing authorities over the ten-year period.

Nine hundred units per year is not the tiny number of units proposed by Rohe, but neither is it a large number compared to the scale of the housing market in the Baltimore Region, which has just over a million housing units.⁴ Community opposition to vouchers, if any, can be handled by counseling and search assistance that is sensitive to the need to avoid placing too many voucher families in the same building or immediate neighborhood. The participation of the Consolidated Plan jurisdictions in the Region in planning the locations of hard units and reviewing their design, financing, and occupancy rules can prevent or mitigate any community opposition to the development of those units.

2. Peter Shuck asserts that the many policy changes for HUD programs that I suggest may not be legally authorized and could draw the Court into an inappropriate level of specific policy design and management.

Rebuttal: HUD has current statutory authority for all of the suggestions for a Thompson Remedy that I made in my expert report. Nothing in the authorizing legislation that creates the legal framework for the regulations and other directives that govern HUD programs would bar HUD from following the recommendations I made.

The complexity of federal housing programs, including their administration by a variety of public and private agents and levels of government and with very prescriptive laws and regulations, means that a Remedy cannot avoid addressing the detailed rules and decision

⁴ Not including Queen Anne County.

processes of individual HUD programs. Therefore, I recommend that the Court charge HUD with developing an Affordable Housing Desegregation Plan that spells out the actions HUD will take to implement the Remedial Order and the benchmarks that will be used to assess progress in implementing the Plan. The Court will neither design the Plan nor manage its implementation, but instead will review the initial Plan against outcome measures and other standards set forth in the Remedial Order. The Court then will review subsequent mandated reports on the Plan's implementation and outcomes.

3. Mark Shroder and Edgar Olsen both assert that tenant-based housing vouchers are always superior to project-based rental housing subsidies that develop new rental housing in fixed locations. They argue that project-based assisted housing costs more than tenant-based and has led to concentrations of poor, minority families. Therefore, they consider that the Remedy should include no "hard" units, but only housing vouchers.

Rebuttal: The Remedy will be carried out in a housing policy world in which *both* tenant-based vouchers *and* project-based subsidies for rental housing through the Low Income Housing Tax Credit and HOME programs exist. In the current budgetary environment, funding for additional units of LIHTC and HOME housing is more certain than funding for additional vouchers, although clearly the Remedial Order should urge HUD to request additional vouchers to be used as part of HUD's Affordable Housing Desegregation Plan for the Baltimore Region.

At the same time that it relies heavily on tenant-based vouchers, the Remedy also should take advantage of all resources available to affirmatively further fair housing and to disestablish the vestiges of segregation of public housing in the Baltimore Region. These resources include LIHTC, HOME, and any housing development funds, such as Replacement Factor Funds, that become available to public housing authorities. It should ensure that those federal housing production funds that are already available and allocated to the Baltimore Region are used to support the Remedy by expanding housing opportunities outside areas of minority and poverty concentrations and to which low-income, minority families in Baltimore will have access.

There are some advantages to producing units in fixed locations with guaranteed long-term use as affordable rental housing *in the context of the resolution of a fair housing lawsuit*. Because HUD's Affordable Housing Desegregation Plan for the Baltimore Region will identify the low-poverty, low-minority neighborhoods in which new subsidized rental units should be located, carefully avoiding neighborhoods that may have low poverty rates now but show signs of fragility, this housing will not create poverty concentrations. The hard units produced will support the use of vouchers as part of the Remedy by being located in areas that have been difficult for voucher holders to access because of high rents, lack of rental housing, or discrimination.

4. Willam Rohe and Mark Shroder argue that it will be impossible to locate hard units in suburban jurisdictions in the Baltimore Region because of zoning restrictions and regulatory barriers to producing affordable housing and because of likely resistance from residents of those areas to accepting low-income, minority families. Rohe asserts that the experience of Moving to Opportunity in Baltimore demonstrates that any substantial effort to locate members of the Thompson plaintiff class in the Baltimore suburbs through either vouchers or hard units is doomed to failure.

Rebuttal: Shroder and Rohe's arguments ignore the fact that the HOME and LIHTC programs, as well as the Partial Consent Decree in this case, have already been creating *some* affordable rental housing in the Baltimore suburbs. Contemporary housing production programs do not meet the same level of resistance as the older public housing and Section 8 programs, because their income and rent rules do not target them only to the poor. At the same time, they make rental housing available to poor families when those families use housing vouchers. LIHTC and HOME developments can also affirmatively further fair housing by making housing outside areas of minority concentration available to other low-income, minority families who can afford the developments' rents without vouchers.

My suggestion is that the Court should encourage HUD to base its Affordable Housing Desegregation Plan both on vouchers and on the complementary development of hard units in low-poverty, low-minority portions of the Baltimore Region. HUD would use its leverage to induce the State of Maryland and the local jurisdictions in the Baltimore Region to *increase* the number of LIHTC and HOME family rental units produced in low-poverty, low-minority portions of the Baltimore suburbs over the numbers already being produced there.

Shroder's characterization of regulatory barriers to affordable housing is overstated. LIHTC units typically are developed in the same parts of metropolitan areas in which other new housing is being built and thus are less likely to encounter community opposition than new infill construction in established neighborhoods. In addition, some of the units developed under plans worked out by the HOME participating jurisdictions in the Baltimore Region and the State of Maryland are likely to involve rehabilitation of existing units rather than new construction and thus not face zoning and land use barriers. While development of affordable housing as part of an Affordable Housing Desegregation Plan should avoid those older neighborhoods that already have concentrations of assisted housing or otherwise are fragile, other established neighborhoods are stable, low-poverty, low-minority areas in which small scale redevelopment of affordable housing will not harm the neighborhood and need not be perceived by neighborhood residents as doing so.

The MTO experience, in which a second allocation of MTO vouchers was cancelled, is not relevant to the use of LIHTC and HOME as part of the Thompson Remedy or even to the use of vouchers as part of the Remedy. MTO was a demonstration program that involved the relocation of families from notoriously distressed Baltimore public housing

developments. (MTO was not part of the resolution of a fair housing case, but instead a research project intended to measure the effect of large changes in the living environments of individual families.)

The Thompson Remedy--like Gautreaux and the Partial Consent Decree in the Thompson Case and unlike MTO--should not focus exclusively on current residents of distressed public housing, who correctly or incorrectly, tend to be viewed much more negatively by suburban residents than are other low-income, minority families. Families offered vouchers under the Partial Consent Decree include former public housing residents, current public housing residents, and families on the waiting lists for both public housing and vouchers.

5. William Rohe argues that HUD has no ability to require Baltimore suburban jurisdictions to accept subsidized rental housing in areas of low poverty or minority concentration. "Government officials, developers, and other members of the receiving communities will need to cooperate to create the 'hard units' called for by the Plaintiff's experts." If that cooperation is not forthcoming, "there will be little that HUD can do about it." Somewhat inconsistently, Rohe also characterizes my suggestion as follows: "In her report Khadduri suggests that HUD should employ a variety of coercive means to force suburban jurisdictions to accept a remedy crafted without their involvement."

Rohe's argument amounts to an assertion that suburban jurisdictions are free to flaunt the obligations already imposed upon them by federal law as a condition for their receipt of federal block grant funds and that HUD is impotent to do anything about it. To the contrary, HUD has the ability to induce (not coerce) suburban jurisdictions *to cooperate* in planning and implementing the creation of hard units in low-poverty, low-minority areas.

HUD's ability to reject Consolidated Plans is grounded in federal law. Such a rejection would have the effect of withholding federal block grant funds that have budgetary importance for local governments and, therefore, it is likely to induce local governments to cooperate with HUD in implementing a Thompson Remedial Order through the Consolidated Planning process. What HUD has not had is the political will to use the leverage afforded by block grant planning requirements. A court-ordered Remedy can help to create political will both at HUD and among the local officials asked to participate in implementing an Affordable Housing Desegregation Plan.

Furthermore, an important feature of early 21st century housing policy is the control of the largest resource for producing additional units of affordable rental housing, the Low Income Housing Tax Credit, by state rather than local governments. Through its review of the Consolidated Plans that govern the State of Maryland's HOME and CDBG allocations and through a cooperative planning process with Maryland's Housing Finance Agency, HUD should be able to induce the State of Maryland to play a leadership role in implementing a Remedial Order.

6. Edgar Olsen argues that locating housing developments in areas with small African American populations will decrease the overall number of African Americans receiving housing subsidies. He points out that developments in low-minority neighborhoods are more likely to be chosen by some non-minorities, thus reducing the number of housing units available to African Americans.

Rebuttal: Some form of this argument has been used over decades to perpetuate racially segregated housing patterns. At its most extreme, legally segregated public housing built before the 1960s in Baltimore and other places was thought to guarantee a certain amount of housing assistance to African Americans.

Racially segregated housing patterns have deleterious social effects that go beyond the housing opportunities provided to particular families. Minority concentrations have led to stark inequality in the quality of public services and, most importantly, schools. Poor quality public education has hurt the life chances of African American children and perpetuated income inequality by race across generations. Therefore, the Court should be willing to accept the trade-off posited by Olsen—a relatively smaller total number of housing subsidies for African American families in exchange for housing desegregation.

7. William Rohe states that withholding CDBG and HOME funds would “negatively affect the low and moderate income households in the affected jurisdiction.”

Rebuttal: This is similar to the argument that HUD should never withhold funds from poorly performing public housing authorities, because “it will just hurt the tenants.” It ignores HUD’s responsibilities to administer housing programs in conformance with the law, and it ignores the longer-term interests of HUD’s low-income clients.

8. Peter Schuck and Edgar Olsen both argue that Congress budgets a fixed amount of money for the voucher program. Therefore, any increase in the cost of individual voucher units used as part of the remedy (for example, through exception payment standards) will come at the expense of subsidies for other families. Olsen points out that African Americans are heavily represented among eligible but unsubsidized families.

Rebuttal: This trade-off is inherent in the design of the voucher program, which does not simply take a fixed pot of money and allocate it across *all* eligible households. Instead, the voucher subsidy is set at a point that makes it possible for the smaller number of families that are assisted to live in housing that passes an inspection for physical quality and that is located in good quality neighborhoods. Whether exception payment standards will be needed to comply with the Remedial Order—i.e., where to set the trade-off point between the per unit cost of the subsidy and the quality of the neighborhoods accessed—should be worked out as part of the plan for implementing the Thompson Remedial Order on the basis of an analysis of demographic patterns and housing costs in different neighborhoods across the Baltimore Region.

Furthermore, a trade-off within the use of a fixed pot of money may not exist for many of the vouchers used to implement the Thompson Remedial Order. As has been the case for other situations in which there has been a Remedial Order by a court in a fair housing case, HUD has the option of requesting an appropriation of funds for additional vouchers to be used in the Baltimore Region as part of the Remedy. HUD has done this in past. Historically, Congress has granted such requests, even in years when there was no appropriation of funds for additional vouchers to be allocated nationally.

9. Robert Fishman provides a review of the history of HUD's housing assistance policies since the 1970s, noting those policy changes or initiatives that have had among their objectives the racial desegregation and income deconcentration of housing opportunities for low-income renters. These policies include, for example, the increased use of portable housing vouchers that began in the mid 1970s and the replacement and redevelopment of distressed public housing that began in the mid 1990s.

Rebuttal: Fishman's generalization that HUD's policies have had racial desegregation and income deconcentration among their objectives is accurate, although his account of the history of HUD programs is inaccurate in many of the historical details cited. However, Fishman's survey does not acknowledge the elevation of other objectives over fair housing goals, the failures of implementation, and the limited results of HUD policies.

An example of a failure of implementation is HUD's failure to insist that the Housing Authority of Baltimore City carry out the relocation of families from HOPE VI developments in a way that created opportunities for those families to live outside areas of racial concentration and HABC's failure even to use all of the vouchers that were intended to replace demolished public housing units. In his deposition of May 26, 2005, the Deputy Assistant Secretary for Public Housing Investments acknowledged that HUD has implemented the HOPE VI program with minimal attention to fair housing considerations.

Another example of a failure of implementation relates to the portability of vouchers across the jurisdictional boundaries of public housing authorities, a feature of the program that Fishman points out has existed since the 1980s. PHA practices—such as limited information and processing delays—have limited the number of families that use their voucher in a different jurisdiction from that of the PHA issuing the voucher. As often pointed out by voucher program experts, a way of overcoming PHA reluctance to encourage portability would be the establishment of a headquarters reserve fund to reimburse PHAs into which voucher users move, freeing those families' voucher subsidies for continued use by the issuing PHA. HUD has continually failed to propose the establishment of such a reserve account as part of its request for appropriations of voucher funds.

Furthermore, Fishman describes initiatives that were small and of limited duration as though they represent fundamental and enduring HUD policy changes. For example, he

gives the false impression that the small, one-time MTO and ROC initiatives amounted to regional administration of the vouchers program in general in the Baltimore Region, which is far from the case.

10. William Rohe argues that if the Remedy provides opportunities to move to low-poverty, low-minority neighborhoods to a substantial number of members of the plaintiff class, the result is likely to be reconcentration of low-income, African American families in the “receiving” communities. Mark Shroder argues that the production of hard units in fixed locations will lead inevitably to concentrations of poverty.

Rebuttal: Baltimore is a vast metropolitan region, with more than a million housing units. The numbers of low-poverty, low-minority neighborhoods in the region and the numbers of housing units in those neighborhoods are very large compared to the number of families likely to be affected by any conceivable implementation of a Remedial Order, including one that over time creates thousands of housing opportunities through a combination of vouchers and hard units.

The dispersed nature of voucher subsidies means that, even without special mobility counseling, families using vouchers are unlikely to concentrate in certain small areas, so long as the administration of vouchers does not encourage such concentration—for example, by giving voucher holders the impression that they must use a list of landlords provided by the PHA, as sometimes happens.

Vouchers used by HUD as part of an Affordable Housing Desegregation Plan will be combined with counseling and search assistance that ensures their use in a wide range of communities of opportunity and not in a small number of buildings or neighborhoods.

The hard units proposed as part of the Remedy will not be the large public and assisted housing developments of the past, as Shroder assumes, but the small developments (50 units or less), scattered site housing, or mixed income developments (partly subsidized or with a broad range of incomes among subsidized households) produced by the HOME and Low Income Housing Tax Credit programs.

11. William Rohe argues that in a tight housing market such as Baltimore, with limited affordable housing, an influx of voucher families may cause an increase in rents for unassisted families in receiving communities. Mark Shroder argues that in a loose housing market such as Baltimore [notice the apparent disagreement about the nature of the regional housing market], the production of additional hard units may lead to deterioration and abandonment of existing rental units, even in the suburbs.

Both of these arguments about the potential market influence of housing programs ignore the size of the Baltimore Region and its housing market. The region has a very large market--more than 300,000 rental units--and any conceivable implementation of a

Remedial Order will have little effect on rents, positive or negative, in the communities of opportunity that will be affected by the Remedy.

12. Mark Shroder asserts that adding a review for affirmatively furthering fair housing to the multifamily property disposition process, as I suggest, is not needed because these properties usually are not in communities of opportunity. Shroder states that such a review might threaten the viability of properties by delaying the decision process.

Rebuttal: Many properties that have defaulted on their mortgages are not in communities of opportunity, but some are, and it is those properties with which the Remedy should be concerned. If the Remedy has a clear definition of communities of opportunity, it will be easy to determine that a particular property is not in such a location at the outset of the process. Multifamily property disposition decisions very often become “retail” decision made by political appointees in any case, because of the political clout of owners or because of attention from neighbors, politicians, and advocacy groups. A review of the effect of the decision on affirmatively furthering fair housing will not delay the decision but instead change its dynamic by adding important information.

13. William Rohe and Mark Shroder argue that the most likely result of my recommendation to reject HOPE VI or successor program proposals that would produce housing more than 75 percent occupied by African Americans would be to preclude any new HOPE VI developments in Baltimore City. They argue that requiring HOPE VI developments to be located outside areas of poverty and minority concentration would have the same effect.

Rebuttal: There is nothing wrong with replacing distressed public housing with portable housing vouchers, if the alternative is to develop housing that perpetuates patterns of racial segregation. HOPE VI developments in high-poverty, high-minority neighborhoods are highly unlikely to bring about fundamental change in the character of such neighborhoods, turning them into communities of opportunity.

There is no requirement that HOPE VI (or similar) subsidies be used in the same racially concentrated neighborhoods in which distressed public housing is being retired from the housing stock. HOPE VI development subsidies could be used as part of mixed-income, mixed-race developments within the City of Baltimore or elsewhere in the region. Such development would pose some challenges, but building subsidized housing in the easiest locations was what led to concentrations of poor people and minorities in the first place.

My proposals should be seen in the broader context of my recommendation that the Remedial Order require HUD to use all of the powers available to it to induce suburban jurisdictions to agree to the development of affordable housing. Such housing could be mixed-income, mixed-finance developments using HOPE VI together with LIHTC or HOME funds.

14. William Rohe argues that a remedy that results in the relocation of families currently living in distressed Baltimore public housing will have the effect of further concentrating the neediest families with the largest number of problems in public housing, because those families will not want to move to low-poverty, low-minority neighborhoods or will be precluded from doing so by screening criteria.

Rebuttal: Rohe's argument ignores some basic facts. First, Baltimore's distressed high-rise public housing buildings have already been redeveloped. Second, many of the large, family low-rise projects are highly likely to be torn down or redeveloped, under provisions of federal law that will force that to happen. So the need for relocation policies sensitive to the special needs of some public housing residents will be there, regardless of the Thompson Remedy.

Third, Rohe's assumption that only the neediest families will remain in public housing ignores the fact that new households move into public housing all the time and also the fact that households change over time. The screening criteria imposed by owners of rental housing and cited by Rohe—a history of lease compliance (e.g., paying rent and not destroying property) and absence of recent criminal activity by household members—are not related to immutable attributes of households. Over time and with appropriate counseling and social services, most current residents of public housing can qualify for privately owned rental housing otherwise available to voucher users or located in privately owned affordable housing developments.

Finally, Rohe misconstrues the plaintiff class, which includes former as well as current residents of Baltimore public housing and also includes families eligible to live in Baltimore public housing in the future. Thus, the Remedy need not focus exclusively on families currently living in Baltimore family public housing.

15. William Rohe asserts that regional administration of housing vouchers would "usurp" local government authority.

Rebuttal: Ever since the enactment in 1974 of the predecessor to the current housing voucher program, HUD has had the authority to choose for the tenant-based program any administrator that has authority under state law to operate a housing program. The voucher program has been operated by a variety of state and local government agencies, public and private non-profits, and private contractors hired by those with appropriate authority. The most common administrator of the voucher program is a local public housing authority, but PHAs are HUD's agents operating under annual contracts.

16. Mark Shroder states that the annual report on affordable housing locations that I propose HUD develop as part of the Remedy is not feasible, because it would require annual updating of data on private market rents.

Rebuttal: By affordable housing, I mean housing produced under the LIHTC and HOME programs. HUD has databases that include information on the locations of this housing, including the additional units that are placed in service each year. This

information will be important for monitoring the implementation of a Thompson Remedy.