

COMMENT

GAINING ADMISSION TO LOW-RENT PUBLIC HOUSING

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I. INTRODUCTION

Gaining admission to low rent public housing¹ has become a complex, dehumanizing, and, more often than not, unsuccessful endeavor.² A major cause of this difficulty is clearly a lack of adequate housing in both the public and private sectors of our society.³ However, even when housing is available, applicants must overcome the procedural obstacles raised by confusing and complex admissions criteria.

There are few sources of information available to prospective applicants.⁴ Yet, without such aids, these persons generally are not in a position to comprehend the maze of federal and state statutory requirements for admission;⁵ nor can they be expected to be aware of or to understand the appropriate case law. Because so little information of an explanatory nature is available, an applicant must generally consult an attorney. Unfortunately, many attorneys are also unaware of current statutes, cases and practices concerning admission to public housing.⁶ This article will attempt to answer some of the questions

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¹ 42 U.S.C. § 1402(1) (1970) provides, in part:

The term "low-rent housing" means decent, safe and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto. The dwellings in low-rent housing shall be available solely for families of low income.

² See M. Rosen, *Tenant's Rights in Public Housing*, Project on Social Welfare Law, at 24-25, 31 (1967) (unpublished paper in N.Y.U. School of Law Library).

³ See Report of the National Advisory Commission on Civil Disorders (1968).

⁴ One example of the few informational guides that are available is the "Philadelphia Handbook on Tenants' Rights," prepared by community leaders and legal services attorneys in that city. However, the pamphlet, as effective as it is, does not provide extensive analysis of the application procedure for public housing.

⁵ Little literature is available from state- or federally-financed housing authorities. The Department of Housing and Urban Development has not followed the pattern set by state and federal welfare authorities who have produced "how to" pamphlets in areas such as Medicaid. Federally-funded local housing authorities are, however, required to post their "Rules and Regulations for Admission" in a "conspicuous" place in their office, according to the HUD Low-Rent Housing Income Limits, Rents, and Occupancy Handbook—RHA 7465.1 § 5 (issued June, 1969) (hereinafter cited as HUD Handbook, RHA). Unfortunately, this is rarely done.

⁶ Public housing applicants usually deal with legal services attorneys or lay advocates, rather than with private practitioners. Paraprofessionals in "poverty law" such as community organizers, VISTA volunteers and community action agency personnel provide an

that arise in this area of the law.⁷ Specifically, it will analyze those factors which have a direct bearing on an applicant's success in gaining admission: (1) admission standards based on income, residency, desirability and discrimination; and (2) management practices and the applicant's right to a hearing.⁸

II. ADMISSION STANDARDS

Admission standards for public housing derive from either federal or state statutes. The United States Housing Act of 1937⁹ is the enabling statute from which all federal standards emanate. It also serves as the basis for the structure of all the federal housing authorities which administer federally-funded housing projects. State standards arise from similar enabling legislation. The New York and Massachusetts public housing laws, chosen for analysis here, are representative of most state laws as regards admission standards. Both clearly reveal the threshold problems encountered by applicants for low-income housing. The New York law, despite the specificity of its language, has been the subject of extensive litigation.¹⁰ On the other hand, the Massachusetts statute,¹¹ which is less clear, has been the subject of no litigation with reference to its admission standards.

A. Federal Standards

Within the entire scheme of federal legislation, there is no precise statement of admission standards for low-rent public housing.¹² Ap-

alternative mode of practical assistance. Perhaps the most successful example of paraprofessional activity, as viewed by those receiving the assistance, is in the area of welfare rights.

⁷ For a discussion of the moral and philosophical responsibility for housing people, a topic not treated in this article, see Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 207 (1970).

⁸ For discussions of other problems in the area of low-rent housing, see Comment, *The Housing and Urban Development Act of 1968: Private Enterprise and Low-Income Housing*, 10 Wm. & Mary L. Rev. 936 (1969) (discussing the planning and building of public housing); Report of the National Commission on Urban Problems to the Congress and to the President of the United States, U.S. Government Printing Office (1968) (concerning cost and efficiency of public housing); Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 Colum. L. Rev. 1254 (1966) (concerning codes, evictions and leases); and Comment, *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 Yale L.J. 988 (1968).

⁹ 42 U.S.C. §§ 1401 et seq. (1970).

¹⁰ N.Y. Public Housing Law §§ 1 et seq. (McKinney, 1955), as amended, (Supp. 1970); see *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970). Doubtless, part of the reason why so much litigation has taken place in New York is the presence of the New York City Housing Authority, which receives its financing from federal, state and municipal sources and which operates the nation's largest housing program involving over 144,000 families.

¹¹ Mass. Gen. Laws Ann. ch. 121B, § 32 (Supp. 1971).

¹² 42 U.S.C. § 1410(g)(2) (1970) states that:

the public housing agency shall adopt and promulgate regulations establishing

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parently, the only requirement is that applicants be "families of low income."¹³ Nothing within the statute elucidates or amplifies that phrase.

While the Housing Act is perhaps necessarily vague, one might expect that the public housing regulations of the Department of Housing and Urban Development (HUD), which administers federal housing policies, would provide more specific standards. HUD has set out its guidelines in what is known as the HUD Unified Issuances System.¹⁴ Unfortunately, these guidelines do little more than reiterate the language found in the federal statute. For example, in the Low-Rent Administration of Program Handbook, a section within the Unified Issuances System, there appears a requirement that there be posted and distributed statements that low-rent housing is provided on a non-discriminatory basis. Although this requirement makes the Civil Rights Act of 1964 applicable to federally-financed low-rent public housing, it is devoid of a definition concerning admissibility.¹⁵ All the prospective applicant learns from such a statement is that there is to be no discrimination. Without a definition of admissibility, the regulation lacks force and the prospective applicant cannot know whether he has grounds to challenge a denial of admission.

A second reference to admission is found within the Unified Issuances System in the Low-Rent Housing Income Limits, Rents, and Occupancy Handbook:

The Local Authority shall formally adopt and promulgate, by publication or posting in a conspicuous place for examination by prospective tenants, regulations establishing its admissions policies, and all revisions thereof. Such regulations must be reasonable and must give full consideration to the Local Authority's public responsibility for rehousing displaced families; to the applicant's status as a serviceman or

admission policies which shall give full consideration to its responsibility for the rehousing of displaced families, to the applicant's status as a serviceman or veteran or relationship to a serviceman or veteran or to a disabled serviceman or veteran, and to the applicant's age or disability, housing conditions, urgency of housing need and source of income: *Provided*, That in establishing such admission policies the public housing agency shall accord to families of low income such priority over single persons as it determines to be necessary to avoid undue hardship.

Thus, it is evident that the agencies exercise considerable discretion in implementing the few existing statutory guidelines.

¹³ 42 U.S.C. § 1402(1) (1970).

¹⁴ The complete name is the HUD Unified Issuances System of Low Rent Housing Handbooks. As of June, 1969, HUD revised its system for the promulgation of policies, procedures, and instructions, so as to include almost everything within this unified system. A document cited in the past as the Low Rent Management Manual has been incorporated into the unified system as one of the several handbooks. In addition to handbooks, the system includes guides, circulars and notices.

¹⁵ HUD Handbook, RHA 7401.1 ch. 9, § 1, appendix 1, 2, g.

a veteran or relationship to a serviceman or veteran or to a disabled serviceman or veteran; and to the applicant's age or disability, housing conditions, urgency of housing need, and source of income; and shall accord to families consisting of two or more persons such priority over families consisting of single persons as the Local Authority determines to be necessary to avoid undue hardship.¹⁶

Again, the provision makes no detailed explanation of admission policies. It merely notes, in a statement taken almost verbatim from the National Housing Act,¹⁷ that certain preferences must be recognized.

The third and final reference in the HUD regulations is found in the "Annual Contributions Contract," the document of agreement between HUD and the local housing authority (LHA). The statement found therein is precisely the same as that found in the Low-Rent Housing Limits, Rents, and Occupancy Handbook.¹⁸ Thus, there is a lack of both substantive federal legislation and explanatory regulations to guide applicants and attorneys in the litigation of issues. Resort, therefore, must usually be made to the constitutional principles of due process and equal protection of the law in determining whether actual regulations truly conform to the purposes of the enabling legislation.

B. *State Standards*

The New York law parallels the federal law in that it also has an enabling statute and an agency-enacted set of rules and regulations. The Public Housing Law, which governs operations of the housing authorities in New York State, provides with regard to admissions only that prospective tenants be "families of low income."¹⁹ As with the federal statute, it articulates no other standards. However, Title 9-C of the Official Compilation, Codes, Rules and Regulations of the State of New York²⁰ (hereinafter referred to as Title 9-C NYCRR) does provide admission criteria and procedures for processing applications for low-rent housing. The pertinent section of Title 9-C NYCRR is approximately twenty-three pages in length and describes in detail the application procedure, commencing with the submission of a

¹⁶ Id. at 7465.1, ¶ 5, Admission Policy.

¹⁷ 42 U.S.C. § 1410(g) (2) (1970): Compare with the language cited in note 12 supra.

¹⁸ Consolidated Annual Contributions Contract, issued by Department of Housing and Urban Development HUD-53011 (November, 1969).

¹⁹ N.Y. Public Housing Law § 156 (McKinney, Supp. 1970).

²⁰ Official Compilation Codes, Rules and Regulations of the State of New York, Title 9-C, §§ 1627-1 et seq., as authorized by N.Y. Public Housing Law §§ 14, 19 (McKinney, 1955), as amended, (Supp. 1970) (hereinafter cited as NYCRR).

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"Preliminary Application for Apartment" by the applicant and concluding with notification to the prospective tenant "upon availability of apartment."²¹ It also outlines several admission standards in depth, although not precisely enough to avoid a substantial amount of litigation over their meaning.²² Despite this shortcoming, the New York law is somewhat more specific than the HUD Unified Issuances System with regard to admission standards.

Massachusetts, which recently updated its public housing law, has an expansive enabling statute, but lacks a body of rules and regulations like those of New York and the federal government. The Massachusetts law contains an admission procedure and standards of eligibility for public housing which are more extensive than its federal counterpart but less so than the New York law.²³ This difference among the three jurisdictions with regard to kind and degree of eligibility standards becomes more apparent upon examination of the relevant criteria.

C. *Income Requirements*

The only federal standard,²⁴ and the primary state standard, to determine eligibility for admission to low-rent housing is "level of income." Under federal law, both the specific income level to be used and its method of determination have been left to the local authority: "the public housing agency shall determine, and so certify to the [local] Authority, that each family in the project was admitted in accordance with duly adopted regulations and approved income limits . . ."²⁵ This statement appears in the Annual Contributions Contract, which by its terms leaves both the criteria for adoption of income levels and the means for determining the income of the applicant wholly within the discretion of the LHA.²⁶ It does not appear that local housing authorities abuse this discretion. They tend,

²¹ *Id.* § 1627-1.1(a) and (j).

²² See *Manigo v. New York City Housing Authority*, 51 Misc. 2d 829, 273 N.Y.S.2d 1003 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 803, 279 N.Y.S.2d 1014, cert. denied, 389 U.S. 1008 (1967) (issue of desirability and criminal record); *Complaint, Pry v. Port Chester Housing Authority*, Civil No. 71-1708 (S.D.N.Y. 1971) (issue of desirability and applicant's failure to obtain divorce decree).

²³ Mass. Gen. Laws Ann. ch. 121B, § 32 (Supp. 1971).

²⁴ 42 U.S.C. § 1402.1 (1970).

²⁵ 42 U.S.C. § 1410(g)(3) (1970).

²⁶ HUD Handbook, RHA 7465.1 ¶ 2, General Requirements for Income Limits and Rents. The Handbook states:

(a) Income limits designed to limit occupancy to families of low income, and rents within the financial reach of such families, shall be fixed by the Local Authority and approved by HAO after taking into consideration: (1) the family size, composition, age, physical handicaps, and other factors which might affect the rent-paying ability of the family, and (2) the economic factors which affect the financial stability and solvency of the project.

at least in the case of LHA's in New York and Massachusetts, to simply adopt the state income regulations. Nonetheless, they could adopt their own formulae without violating their federal contract.

State law does not always leave the income determination solely in the hands of the LHA. The New York law, for example, while giving abundant discretion to the local authorities, states:

The dwellings in the project shall be available solely for persons or families of low income whose probable aggregate annual income during the period of occupancy does not exceed six times the rental (including the value or cost to them of heat, light, water and cooking fuel) of the dwellings to be furnished such persons or families²⁷

Under the New York statute, within certain specified limits, the LHA may modify the income schedules as, for example, in the case of veterans and welfare recipients.²⁸ In addition, the determination and control of the rental cost for an apartment remain in the discretion of the LHA, subject only to the statutory ceiling noted and the contract between the LHA and the state.²⁹ The method for determining level of income is outlined in Title 9-C NYCRR, and the resulting dollar figure is referred to as "aggregate annual income."³⁰ The computation procedure is extensive: income is broken down into fixed and nonfixed income, and provisions are made for such wide-ranging factors as tips for taxicab drivers and Christmas bonuses.³¹

While not as detailed in its income determination procedure as the New York law, the Massachusetts statute is still extensive in this regard. It states that an authority

shall not accept as a tenant any person or persons whose net annual income at the time of admission, less an exemption of one hundred dollars for each minor member of the family other than the head of the family and his spouse, exceeds five times the annual rental, including the value or cost to them of water, electricity, gas, other heating and cooking fuels and other utilities, of the dwellings to be furnished such person or persons.³²

²⁷ N.Y. Public Housing Law, § 156(1)(a) (McKinney, Supp. 1970).

²⁸ Id. § 156(1)-(6); NYCRR §§ 1627-5.1(1) and 1627-2.6(c)(5).

²⁹ *New York City Housing Authority v. Stern*, 3 Misc. 2d 1007, 159 N.Y.S.2d 500 (Sup. Ct. 1956); N.Y. Public Housing Law § 154 (McKinney, 1955); NYCRR § 1627-5.1(b) (1), (2).

³⁰ NYCRR § 1627-2.1 et seq.

³¹ Id. § 1627-2.6(b) and (e). For example, the value of tips and other considerations will be included in income. Taxicab drivers are assessed at 45% of commissions. NYCRR also contains a procedure for verifying income, § 1627-2.6 (c) (2) (i).

³² Mass. Gen. Laws Ann. ch. 121B, § 32(c) (Supp. 1971).

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The statutes differ in two ways. First, the Massachusetts law leaves less discretion to the LHA in computing an applicant's income. Local housing authorities in Massachusetts may not manipulate income schedules so as to alter income-rent proportions⁸³ as may be done in New York. Second, the Massachusetts statute, unlike that of New York, fails to provide a description of the manner in which the local authorities should determine a prospective tenant's income. However, as in New York, determination and control of the rental charge for an apartment is left to the discretion of the local authority.⁸⁴

Although there are few reported cases and even fewer articles concerning income determination, it would be unwise to conclude that this criteria is not a problematic admission standard. At least two other factors are probably more responsible for this lack of discussion and litigation. Applicants who are denied admission because of "over income," when confronted with the extensive income determination system, are likely to accept the agency's computation without question. Furthermore, since federal and state laws in New York and Massachusetts require extensive documentation of income determinations for admission to public housing, it may be that authorities disregard income levels as an admission criterion and resort to alternative standards to justify denial of admission.

Despite the difficulties of computation and documentation that have been alluded to, it appears that the three statutes analyzed seem adequate to prevent manipulation by local housing authorities. In general, income is a comparatively objective standard which, unlike the residency requirement, is well suited as a criterion for determining admission eligibility.

D. *Residency Requirements*

As is the case with income, local residency is a frequently utilized standard for admission to public housing. It is not difficult for local authorities to find out how long an applicant has been living in a city. The LHA may check voter registration, school enrollment, public assistance records or rent receipts. On the surface, the purposes of a residency requirement appear to be valid. The arguments in favor of residency requirements are that they allow a community to care for its own low-income families, discourage outsiders from migrating to that locality for the purpose of gaining access to its facilities, and permit the efficient operation of public housing projects. It is also argued that residency requirements, by keeping out non-resident needy families, and thus limiting housing needs, make it more likely

⁸³ *Id.*

⁸⁴ *Id.*

that a community will disregard tax burdens and real estate losses and vote for at least minimal low-rent public housing.³⁵

Although most local housing authorities have no residency rules except that the applicant be a resident of the city at the time he makes out his application, a few require that he have resided in the city for a certain period of time.³⁶ It is true that there is no federal statutory residency standard; however, because HUD allows local authorities to set policies for admission, local standards may be applied to federally-financed projects in a particular city so as to create "federal" residency requirements.³⁷

Unlike the income standard, however, residency requirements have recently come under legal attack as being violative of the applicant's constitutional rights. In *Shapiro v. Thompson*,³⁸ a case involving the denial of assistance to welfare applicants, the United States Supreme Court held that a one year residency requirement, in order to qualify for welfare benefits in Connecticut, Pennsylvania, and the District of Columbia, was a form of invidious discrimination against persons who were merely exercising their constitutionally guaranteed right to travel.³⁹ The Court held that only a compelling governmental interest, which it did not find present, could validate such a requirement.⁴⁰

³⁵ The constitutional question of a local referendum to approve or reject low-rent housing projects was recently decided in *James v. Valtierra*, 402 U.S. 137 (1971). The district court had held Article XXXIV of the California Constitution unconstitutional because it denied low income people, those who would be the beneficiaries of such projects, equal protection of the laws. The Supreme Court reversed, holding that "the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." 402 U.S. at 141. However, the dissenting opinion of Justice Marshall argued that such a referendum imposed a "substantial burden" on the poor. The California provision was viewed by the dissent as violating the Fourteenth Amendment by making "an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny." 402 U.S. at 144-45. In these days of rising costs and diluted revenues, one need not be cynical to suggest that the fiscally-conscious voter might relegate low-income projects to the bottom of municipal priorities.

³⁶ See Comment, Public Housing, 22 Vand. L. Rev. 875, 915 (1969).

³⁷ HUD Handbook, RHA 7401.1, ch. 9, § 1, appendix 2; contra, the district court decision in *Cole v. Housing Authority of City of Newport*, 312 F. Supp. 692, 696 (D.R.I. 1970).

There is no statutory residency requirement in the State of New York. However, as in other jurisdictions which have no local statutory residency requirement, state-funded local authorities in New York may promulgate such a requirement under their grant of power to formulate internal regulations. NYCRR § 1627-3.1(a). In Massachusetts, a six-month residency requirement was revoked recently by the legislature. The statute now reads, "[n]o inhabitant of the city or town or no person employed in the city or town in which the project is located shall be refused eligibility to a waiting list or occupancy based solely upon the grounds of a residency prerequisite." Mass. Gen. Laws Ann. ch. 121B, § 32(e) (Supp. 1971).

³⁸ 394 U.S. 618 (1969).

³⁹ Id. at 629-31.

⁴⁰ Id. at 634.

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In *Cole v. Housing Authority of the City of Newport*,⁴¹ a case involving federal low-rent public housing, the First Circuit struck down a two year residency requirement.⁴² In finding that the durational residency requirement violated the right to travel as set out in *Shapiro*, the court interpreted the Supreme Court's definition of the right to travel to include "the sense of migration with intent to settle and abide."⁴³ As was the case in *Shapiro*, a compelling state interest in the requirement was found to be lacking. "Even by a standard of rational relationship to a permissible goal, we doubt that the justifications put forth by the Authority could withstand judicial scrutiny."⁴⁴ Thus, it would appear that the initially expansive discretion given the local housing authorities has been curtailed by successful constitutional challenges. Yet, the underlying problem of inadequate and confusing guidelines for housing authorities remains, with the sole prospect of relief resting in costly litigation.

In *Lane v. McGarry*,⁴⁵ a federal district court upheld the one year residency requirement of the state-funded Syracuse Housing Authority, holding that the requirement was a "valid and enforceable regulation."⁴⁶ The decision seems to have been based primarily upon the court's determination that the requirement did not curtail the plaintiff's right to travel.⁴⁷ Having found that there was no violation, the court determined that it did not have to reach the question of whether there existed a compelling state interest in maintaining the residency requirement.⁴⁸

The impact of *Lane*, however, was vitiated by the Second Circuit in *King v. New Rochelle Municipal Housing Authority*.⁴⁹ In that case, a state-aided housing authority had required that at least one member of an applicant family have been a local resident for five consecutive years before that family was eligible for admission to public housing. The plaintiff, who had resided in the city for four years and eight months prior to seeking admission, was twice denied a housing authority

⁴¹ 435 F.2d 807 (1st Cir. 1970).

⁴² *Id.* at 813.

⁴³ *Id.* at 811.

⁴⁴ *Id.* at 813. The Authority argued before the First Circuit that a durational residency requirement made the advent of more housing in the community possible because the electorate would vote for it, not fearing a great influx of prospective low-income tenants. The Authority had dropped the two principal arguments offered in support of the residency requirement—namely, that "the residency requirement is useful in planning" for future growth of the community, and that there is an obligation to house one's own residents before accepting outsiders.

⁴⁵ 320 F. Supp. 562 (N.D.N.Y. 1970).

⁴⁶ *Id.* at 565.

⁴⁷ *Id.* at 564. The court specifically stated that it disagreed with the district court decision in *Cole v. Housing Authority of the City of Newport*.

⁴⁸ *Id.* at 563.

⁴⁹ 442 F.2d 646 (2d Cir.), cert. denied, — U.S. — (1971).

application form during the spring of 1970 because she had not been a resident for the required period. The Second Circuit held that, in light of *Shapiro*, a durational residency requirement in public housing is violative of equal protection of the laws.⁵⁰ In contrast to the decision in *Lane*, the *King* court held, with regard to the right to travel, that "we do find that the residency requirement penalizes respondents by adding an additional period of as much as five years to the time they must wait for public housing and that this penalty is imposed solely because they have recently exercised their right to travel."⁵¹

The court also dismissed the housing authority's argument that "intrastate" travel was to be distinguished from "interstate" travel.⁵² It stated that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."⁵³ Finally, the court found no compelling governmental interest upon which to predicate a residency requirement. The attempt by the appellant housing authority to "care for its own first," lacking any other rationale, was rejected as violative of equal protection of the laws.⁵⁴ Thus, the prevailing trend in constitutional law appears to favor striking down residency requirements. The abolition of such requirements will certainly benefit prospective public housing tenants. However, the latter must still confront the subtle, yet effective, policies of discrimination practiced in many areas.

E. Discrimination

In attempting to determine valid criteria for housing applicants, public housing authorities may legitimately establish preferences based upon non-racial categories. The controlling statute allows authorities to give preference to persons with low income, victims of disasters and veterans.⁵⁵ Authorities may even exclude potentially undesirable tenants, such as persons who have extensive criminal records or drug problems, although, as shall be seen, the entire area of applicant desirability is currently undergoing judicial scrutiny.⁵⁶ In *Gautreaux v. Chicago*

⁵⁰ Id. at 649.

⁵¹ Id. at 648.

⁵² Id.

⁵³ Id. See *Valenciano v. Bateman*, 323 F. Supp. 600 (D. Ariz. 1971), which further enforces this view. It was held in this welfare case that a one year residency requirement, in order to receive non-emergency medical care provided by a county, violates the Equal Protection Clause of the Fourteenth Amendment by infringing upon the right to travel. The court held that "[we] can see no distinction between the constitutional right to travel interstate . . . as held by *Shapiro*, and a constitutional right to travel intrastate." Id. at 603.

⁵⁴ 422 F.2d at 649.

⁵⁵ 42 U.S.C. § 1410(g)(1)-(3) (1970).

⁵⁶ See discussion at p. 47 *infra*.

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Housing Authority,⁵⁷ a federal district court enjoined the city housing authority, financed by federal grants, from applying discriminatory tenant assignment practices and site selection procedures. The court found that the authority had fixed a quota for the number of Blacks who could reside in certain of its projects: "[t]he disparity between the low number of Negro families in these projects and the high number of Negro applicants for all projects indicates that CHA [Chicago Housing Authority] has imposed a Negro quota."⁵⁸ In other words, the authority had carefully controlled the number of Black applications that it accepted.⁵⁹ In approving the CHA's Tenant Assignment Plan, the court did allow a "benign quota" to remain; that is, it allowed the authority to deny admission to eligible Blacks and members of other minority groups to certain projects in order to maintain a predetermined racial mix in these locations.⁶⁰ The quota does not specifically deny eligibility for public housing to these persons in the manner which arguably occurred previously, although it makes the waiting list period

⁵⁷ 296 F. Supp. 907 (N.D. Ill. 1969).

⁵⁸ *Id.* at 909.

⁵⁹ The Seventh Circuit rejected an appeal by the Chicago Housing Authority that the specific timetable established subsequent to the district court's order (in 304 F. Supp. 736 (N.D. Ill. 1969)) be set aside on several grounds, among them, that the district judge had abused his discretion:

In view of the fact that HUD-approved sites for 1500 Dwelling Units were awaiting submission to the City Council and that the arguments put forward in favor of delaying submission were based on political considerations and community hostility, reasons which had been properly rejected by the lower court in the original litigation, we hold that it was no abuse of discretion for the District Judge to impose deadlines for submission one year after the entry of the original "best efforts" order.

436 F.2d 306, 313 (7th Cir. 1970), application for stay denied, 401 U.S. 953 (1971).

⁶⁰ The court approved a plan containing provisions designed to prevent certain existing housing projects from becoming racially segregated. Ostensibly, vacancies in a housing project were to be filled according to numbers given to applicants at the time of their registration and "depending only upon bedroom size." However, applicants were allowed to designate a choice of locale and the court's final order recognized the CHA's plan of "community areas," in which eligible resident-applicants were given priority. In filling the vacancies in four specific projects, the court's order required that vacancies be offered

to eligible applicants on the appropriate list in such manner that not more than approximately fifteen per cent (15%) of all dwelling units in any of the projects shall from time to time be occupied by Negro families; and in such manner that not more than approximately twenty-five per cent (25%) of all dwelling units in any of the projects shall from time to time be occupied by other minority families.

Gautreaux v. Chicago Housing Authority, No. 66 C 1459 (N.D. Ill., docketed Nov. 24, 1969), modifying 304 F. Supp. 736, enforcing 296 F. Supp. 907 (1969), found in *Poverty Law Rep.*, ¶10,696. One author has commented that although the constitutionality of percent figures may be questionable, some "figure does seem reasonable if integrated public housing is one's goal and if white panic fleeing remains an empirical fact." Nagel, *Discrimination Issues in Public Housing*, 28 Legal Aid Brief Case 89, 90 (1970).

for admission to specified projects quite long. The result, however, is practically the same.

The constitutionality of the system of "benign quotas" has been substantially settled.⁶¹ In at least one case the principle of benign quotas has been rejected outright. In *Colon v. Tompkins Square Neighbors, Inc.*,⁶² a federal district court stated, with reference to tenant selection guidelines and policy, that:

[T]he document, in its reference to the desirability of a "balanced tenant body", vaguely smacks of a quota system which, in the opinion of this Court, represents a constitutionally impermissible process requiring arbitrary rejection of applicants after a set quota has been met.⁶³

In *Colon*, the plaintiffs, New York residents, alleged they were refused admission to a privately-run, publicly-financed low-income housing project, *solely* on the grounds that they were recipients of welfare funds. This, they argued, denied them their right to equal protection under the laws.⁶⁴ The court found that the housing authority's action with regard to welfare recipients bore no relation to any reasonable classification system and thus struck it down as invalid.⁶⁵

Discriminatory admission policies present little difficulty when the LHA is found to be systematically denying applications from particular racial, ethnic or status groups. *Colon* is useful for dealing with this type of situation. But when the issue becomes one of benevolent quotas, the solution is not so simple.⁶⁶ Where an application

⁶¹ Cf. *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681, 707 (N.D. Ill. 1960); *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Taylor v. Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954); *Banks v. Housing Authority of the City and County of San Francisco*, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), cert. denied, 347 U.S. 974 (1954).

For commentary on benign housing quotas, see Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 Yale L.J. 1387 (1962); Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 Rutgers L. Rev. 531 (1963); Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 Calif. L. Rev. 1 (1964); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U.L. Rev. 363, 388-98 (1966); Navasky, *The Benevolent Housing Quota*, 6 How. L.J. 30 (1960); *Public Housing and Integration: A Neglected Opportunity*, 6 Colum. J. of Law and Soc. Prob. 235 (1970).

⁶² 294 F. Supp. 134 (S.D.N.Y. 1968).

⁶³ Id. at 139.

⁶⁴ Id. at 138.

⁶⁵ Id. The issue of discrimination in tenant selection by local housing authorities in the Commonwealth of Massachusetts has not yet been raised in a court test. As regards tenant selection, the Massachusetts statute states only that, "for all purposes of this chapter no person shall, because of race, color, creed or religion, be subjected to any discrimination or segregation." Mass. Gen. Laws Ann. ch. 121B, 32(e) (Supp. 1971).

⁶⁶ *Gautreaux v. Chicago Housing Authority*, No. 66 C 1459 (N.D. Ill., docketed Nov.

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quota procedure is used, a longer waiting list will result for those persons from the largest racial, ethnic or status group seeking admission. This, of course, raises basic equal protection questions. Yet, if no quota is applied, segregated public housing will likely result. The constitutionality of racial and ethnic quotas for admission to public housing, as noted, has not yet been decided.

None of this, of course, precludes the local housing authorities from employing the subterfuge of desirability tests, should they wish to engage in quota practices. Such tests may effectively disguise the practice of racial segregation.

F. *Desirability Standards*

Admissions standards concerning desirability provide LHA's their greatest latitude in choosing future tenants. There exists no precise federal statute defining standards for desirability. The HUD Unified Issuances System is similarly lacking in standards. Thus a housing authority, insofar as it operates a federally-funded operation, has great discretion and no precise regulatory checks.

The only federally-enunciated curtailment of this discretion came on December 17, 1968, when HUD issued a circular (known as HUD Circular 12/17/68) establishing rules and regulations which local authorities were to follow in determining admission to, and continued occupancy of, low-rent public housing:

2b. A local authority shall not establish policies which automatically deny admission or continued occupancy to a particular class, such as unmarried mothers, families having one or more children born out of wedlock, families having police records or poor rent paying habits, etc.⁶⁷

The language of the circular remained discretionary until it was given the weight of a federal regulation, as part of the Unified Issuances System, by the Supreme Court in *Thorpe v. Housing Authority of the City of Durham*.⁶⁸

The circular, as quoted above, would appear at first glance to have great thrust, especially in light of the *Thorpe* decision. But words such as "automatically" and "et cetera" obstruct its effectiveness. Local authorities continue to implement their own desirability standards as recent cases, to be discussed in this section, indicate. Although LHA's

24, 1969), modifying 304 F. Supp. 736, enforcing 296 F. Supp. 907. See discussion p. 44 supra.

⁶⁷ "Admission and Continued Occupancy Regulations for Low-Rent Public Housing," Department of Housing and Urban Development Circular (Dec. 17, 1968).

⁶⁸ 393 U.S. 268 (1969). It is important to note that this decision actually dealt with another Circular, that of Feb. 7, 1967, the subject of which was "Termination of Tenancy in Low-Rent Projects."

are required to publish their rules and regulations,⁶⁹ they do so in a rather scarce document entitled "Statement of Policy Concerning Admission to and Continued Occupancy of Federally-Assisted Projects."⁷⁰ In spite of, or perhaps, because of Circular 12/17/68, this document may set out only minimal standards. Thus, when an organization, legal services office or prospective applicant finally obtains a copy, there still may be no way of evaluating the chances of gaining admission. However, in the usual situation, the applicant never even knows that there exists a desirability standard until he is rejected for failing to meet it. There do exist state standards in this area, but they tend to be no more explicit than their federal counterparts. In New York there is no reference to standards of desirability in the Public Housing Law.⁷¹ There is some reference within Title 9-C NYCRR, similar in wording to Circular 12/17/68:

Standards of Desirability. It shall be a ground for eligibility for admission or continued occupancy in any authority project, that the applicant or tenant will be or is a desirable tenant. The standard to be used in approving eligibility for admission or continued occupancy of a family shall be that the family will not or does not constitute (a) a detriment to the health, safety or morals of its neighbors or the community, (b) an adverse influence upon sound family and community life, (c) a source of danger to the peaceful occupation of the other tenants, (d) a source of danger or cause

⁶⁹ The Consolidated Annual Contributions Contract issued by the Department of Housing and Urban Development, HUD-53011, (Nov., 1969) contains the following provision:

Sec. 206. Admission Policies

The Local Authority shall duly adopt and promulgate, by publication or posting in a conspicuous place for examination by prospective tenants regulations establishing its admission policies. Such regulations must be reasonable and give full consideration to its public responsibility for rehousing displaced families, to the applicant's status as a serviceman or veteran or relationship to a serviceman or veteran or to a disabled serviceman or veteran and to the applicant's age or disability, housing conditions, urgency of housing need, and source of income, and shall accord to families consisting of two or more persons such priority over families consisting of single persons as the Local Authority determines to be necessary to avoid undue hardship.

⁷⁰ HUD Handbook, RHA 7401.1 ch. 9, § 1, appendix 2. It is interesting to note that these rules and regulations are often difficult to obtain even by legal services groups. According to a letter dated May 13, 1970, from Joseph J. Kohler, former Director, Tenant and Operations Services Division, Region I, to the Legal Aid Society of Westchester County, HUD's policy is to have local authorities release this information. It is this writer's experience that local authorities fail to comply. For a contrary opinion, see Comment, Public Housing, 22 Vand. L. Rev. 875, 926 (1969), "a local authority is almost certain to comply with the federal requirement that information on admissions procedures be easily obtainable."

⁷¹ N.Y. Public Housing Law § 156 (McKinney, 1955), as amended, (Supp. 1970).

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of damage to the premises or property of the authority, or
(e) a nuisance.⁷²

In the Massachusetts statute there is no reference to a standard of desirability. The pertinent section of this law⁷³ refers to "family" several times and allows for discretion by the authority to the extent that it may decide, for example, what constitutes a family. However, all other references in the law are to standards based on income. At the federal level, because the statutory framework is so weak, the litigation concerning the concept of desirability tends to be very basic in nature. In addition, the standards involved in the decisions often come from state statutes similar to those of the New York law, as set forth in Title 9-C NYCRR. Finally, there is a lack of precedent from which a sophisticated definition of desirability may be fashioned.⁷⁴

One standard of desirability upon which courts have ruled involves sexual conduct. In *Thomas v. Housing Authority of City of Little Rock*,⁷⁵ the first case to treat the issue, a federal district court held that a housing authority could not automatically exclude from public housing all families "unfortunate enough to have or acquire one or more illegitimate children."⁷⁶ The court found that the housing authority policy automatically excluding all unwed mothers who otherwise would qualify for admission could not be sustained: "In the Court's estimation the fatal vices of the policy are its inflexibility, and its general disharmony with the spirit and aim of the low rent housing program."⁷⁷ The holding appears to be purposely drawn in a narrow fashion. The court specifically explained that it was not finding improper the right of a housing authority to maintain a desirability standard concerning illegitimacy, or, as expressed in *Thomas*, "an unwed mother policy."⁷⁸ Nonetheless, there are statements in the de-

⁷² NYCRR § 1627-7.2. It further states that "in making such determination consideration shall be given to the family composition, parental control over children, family stability, medical and other past history, reputation, conduct and behavior, criminal record, if any, occupation of wage earners, and any other data or information with respect to the family that has a bearing upon its desirability, including its conduct or behavior while residing in a project."

⁷³ Mass. Gen. Laws Ann. ch. 121B, § 32 (Supp. 1971).

⁷⁴ U.S.C. § 1410(g)(2) (1970) states in part: "the public housing agency shall adopt and promulgate regulations establishing admission policies which shall give full consideration to its responsibility for the rehousing of displaced families, to the applicant's status as a serviceman . . . and to . . . age or disability, housing conditions, urgency of housing need, and source of income . . ." See language in the standard contract between the federal government and LHA's excerpted in note 69 supra.

⁷⁵ 282 F. Supp. 575 (E.D. Ark. 1967).

⁷⁶ Id. at 580.

⁷⁷ Id.

⁷⁸ Id. at 581. "[T]he Court thinks that the Authority might permissibly formulate a policy giving some evidentiary or presumptive effect to the presence of illegitimate children in a family group, particularly where there are more than one of such children,

cision which permit various interpretations. The court pointed to the fact that a lack of illegitimacy did not presuppose morality. Moreover, it stated that the effect of an unwed mother policy could be to deny benefits to those who are most in need of public housing.

The effect of *Thomas* was to open the area to debate, as evidenced by the recent federal district court decision in *McDougal v. Tamsberg*.⁷⁹ In that case a mother of five children attacked the constitutionality of the housing authority eligibility policy under which she was declared ineligible for public housing. The court commented that although low-income families may have no vested right to acceptance and occupancy in a low-rent project, it is equally certain that a denial of admission cannot be predicated on unconstitutional regulations or practices which project a denial of equal and constitutional treatment.⁸⁰ The court read *Thomas* narrowly, interpreting it to hold only that one could not *automatically* exclude persons because of their status as unwed mothers. The court in *McDougal* further stated that

[a] large number of illegitimate children, each by different men, is a factor which may be considered by the Housing Authority in screening applicants for its facilities in order to eliminate those whose conduct might constitute criminal activity, or disorderly conduct, or which might amount to a nuisance or seriously violate ordinary standards of decency.⁸¹

The question left unanswered by *McDougal* is what precisely is so detrimental about families with large numbers of illegitimate children that makes them undesirable tenants. In addition, the court did not decide whether in fact it is the duty of the housing authority to provide accommodations specifically for these members of society, or whether the local authority must afford persons found ineligible on this ground certain procedural rights, such as a hearing.

A second standard of desirability—criminal activity—has been the subject of extensive litigation. The landmark case in this area is *Manigo v. New York City Housing Authority*.⁸² In that case, petitioner brought an action to set aside a decision of the New York City Housing Authority finding her family ineligible for low-income public housing on grounds that her husband had a criminal record. Petitioner's hus-

where they are of recent birth, and where the births have followed each other in quick succession."

⁷⁹ 308 F. Supp. 1212 (D.S.C. 1970).

⁸⁰ *Id.* at 1215.

⁸¹ *Id.* at 1216.

⁸² 51 Misc. 2d 829, 273 N.Y.S.2d 1003 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 803, 279 N.Y.S.2d 1014, cert. denied, 389 U.S. 1008 (1967).

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band had been arrested seven times during the eight years immediately preceding the making of the application. On four occasions the husband had been adjudicated a juvenile delinquent or youthful offender. Two years prior to the time his wife sought admission, he had spent ten days in jail for disorderly conduct. He had also been arrested for possession of drugs, but the charges were dropped. The court found that although the fact that he had been adjudicated a youthful offender alone was not enough to disallow him the benefits of certain laws, it held that he could be granted or denied "a right or privilege," such as admission to public housing, based upon a study of his entire behavior pattern over a period of years.⁸³ No Fourteenth Amendment equal protection violation was found by the court. In addition, the court cited the housing authority's "Resolution Relating to Desirability as as a Ground for Eligibility," and stated:

There can be no doubt that the respondent [Housing Authority], to protect the large concentration of children and elderly persons who reside within its properties, must take steps to prevent the development of unsafe conditions therein. Without a proper screening of prospective tenants the dangers to those persons residing therein would be multiplied many times over.⁸⁴

The question remains, however, whether the court gave its stamp of approval to the New York City Housing Authority's standards for judging non-desirability, or whether non-desirability would have been found in this case under any standard.⁸⁵ A second question remaining is how much criminal activity is needed to make one ineligible. If *Manigo* is to be the standard, it would appear that some pattern of criminal activity must be found although neither a series of convictions nor a serious crime need be shown.⁸⁶

HUD Circular 12/17/68 is also applicable to the admission standard involving criminal activity. It provides that "[a] Local Authority shall not establish policies which automatically deny admission or continued occupancy to a particular class, such as . . . families having

⁸³ Id. at 832, 273 N.Y.S.2d at 1005.

⁸⁴ Id. at 831, 273 N.Y.S.2d at 1004.

⁸⁵ Id. at 830-31, 273 N.Y.S.2d at 1004, quoting Resolution Relating to Desirability as a Ground for Eligibility, Authority Res. No. 12-9-683: "The standard to be used in approving eligibility for admission or continued occupancy of a family shall be that the family will not or does not constitute (1) a detriment to the health, safety or morals of its neighbors or the community, (2) an adverse influence upon sound family and community life, (3) a source of danger to the peaceful occupation of the other tenants, (4) a source of danger or cause of damage to the premises or property of the Authority, or (5) a nuisance."

⁸⁶ See *New York City Housing Authority v. Watson*, 23 Misc. 2d 408, 189 N.Y.S.2d 274 (Sup. Ct. 1959); *Sanders v. Cruise*, 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958).

police records⁸⁷ It analogizes to the absoluteness test in *Thomas* to state that criminal activity, like illegitimacy, cannot be an absolute ground for a denial of admission.

The courts have not seen the last of litigation over desirability standards. As the number and complexity of these cases increase, the courts will be forced to make determinations which are often sociological in nature. There is great diversity of opinion as to the purpose of low-rent public housing. For example, there is controversy as to whether the goal of public housing is a better *social* environment or a better *physical* environment for the tenants.⁸⁸ Such a question is sociological as well as legal. The courts' resolution of the question of proper desirability standards may be premised either upon their opinion of the proper function of public housing, or upon their jurisdiction to make such a decision, or both. Another sociological problem, not treated in this article, is whether desirability standards are improper because they are the result of forced middle class standards.⁸⁹ Despite their reluctance to become involved in the evaluation of eligibility standards,⁹⁰ the courts will be forced, sooner or later, to face these difficult problems.

III. MANAGEMENT PRACTICES AND THE RIGHT TO A HEARING

The basic method of dealing with an adverse admissions policy determination is through a hearing. Arguably, if a proper hearing took place upon rejection, many of the issues concerning admission standards might be resolved without litigation. This procedural device has become a complex issue in its own right. While a particular statute might compel some form of hearing, an underlying consideration is whether rudimentary constitutional principles, such as due process,

⁸⁷ HUD Circular (12-17-68) § 2b "Admission and Continued Occupancy Regulations for Low-Rent Public Housing."

⁸⁸ M. Rosen, *Tenant's Rights in Public Housing Project on Social Welfare Law*, 24-25, 31 (unpublished paper in N.Y.U. School of Law Library 1967).

⁸⁹ For an excellent commentary, see, Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 Duke L.J. 399. The author comments that [t]he admission policies of the [sic] most Local Authorities are totally discordant with the purpose of the national public housing program. "It makes little sense to deprive a poor family of perhaps its only comfort—decent housing—because the extra mouth to feed belongs to a bastard rather than a legitimate child," or because one member of the family many years before had committed an "undesirable act."

Id. at 434.

⁹⁰ In *Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. 795 (N.D. Ohio 1970), the court granted the plaintiffs' demands that the Housing Authority conduct hearings before it may reject an applicant. However, the court, despite its requirement that the Housing Authority issue detailed reasons for its decisions, reaffirmed the validity of a statute delegating discretion. It concluded that "[i]t is an exercise in futility to expect to procure justice by eliminating all need for the exercise of judgment and discretion." *Id.* at 797.

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demand a hearing in all situations where applicants have been rejected.

There exists one federal statute which affords a right to a hearing when an LHA determines that a person is ineligible for low-rent housing. However, it speaks only of "an opportunity for an informal hearing."⁹¹ The New York Public Housing Law contains no statement concerning hearings. In Title 9-C NYCRR, there is reference to "appeals" by which the rejected applicant may apply in writing for a hearing within thirty days after notice of his ineligibility. At the hearing he may be represented by counsel or other representative.⁹² No reference is made to the specific type of hearing, whether there will be a right to confrontation, or whether notice will be given concerning the reasons for rejection.⁹³ In Massachusetts there is no provision for a review procedure when an applicant is rejected. The right to a hearing applies only in cases of termination of tenancy.⁹⁴

There are only two cases which deal with the question of hearings upon rejection of an applicant for admission to low-rent public housing. In *Sumpter v. White Plains Housing Authority*,⁹⁵ now being appealed to the New York State Court of Appeals, the Appellate Division overturned the trial court's decision that petitioner had a right to an evidentiary hearing, complete with legal counsel, and the right to confront witnesses and testify in his own behalf:

In our view, the administrative complications and burdens attendant upon the various housing authorities in the

⁹¹ 42 U.S.C. § 1410(g)(4) (1970) provides:

the public housing agency shall promptly notify (i) any applicant determined to be ineligible for admission to the project of the basis for such determination and provide the applicant upon request, within a reasonable time after the determination is made, with an opportunity for an informal hearing on such determination, and (ii) any applicant determined to be eligible for admission to the project of the approximate date of occupancy insofar as such date can be reasonably determined.

⁹² NYCRR § 1627-7.3(b).

⁹³ NYCRR § 1627-7.2: "Any applicant or tenant determined to be ineligible by virtue of the standard herein set forth shall be declared to be ineligible on the ground of non-desirability." In New York this is the only information required to be given a person.

⁹⁴ Mass. Gen. Laws Ann. ch. 121B, § 32(g) (Supp. 1971).

The tenancy of a tenant of a housing authority shall not be terminated without cause and without reasons therefor given to said tenant in writing. A tenant at his request shall, except in the case of nonpayment of rent, be granted a hearing by a housing authority at least fifteen days prior to any such termination. The housing authority's determination of cause shall be reviewable in the district court whenever an action for summary process is brought for possession of the premises. There is no reason why this procedure could not be made available to applicants as well as to tenants. Although the administrative burden would be great, the procedure would at least have the salutary effect of insuring that applications are evaluated according to specific criteria.

⁹⁵ 36 App. Div. 2d 728, 320 N.Y.S.2d 472 (1971), reversing 63 Misc. 2d 654, 313 N.Y.S.2d 133 (1970).

State preclude the rigid requirement ordered by Special Term for a "full evidentiary hearing" in each case of rejection.⁹⁶

The court appears to have based its decision almost entirely upon representations made at oral argument that at least 9,411 applications for public housing had been rejected during 1970.⁹⁷ No doubt, the court was concerned that a decision giving a right to a hearing in each such case would result in administrative hardship on the various state housing authorities. It should be noted, however, that of the 9,411 rejections, only 483 were based on non-desirability. The remaining, presumably, were for reasons of income, family size and residency. Since non-desirability is the standard upon which hearings are generally sought and over which local authorities have the most discretion, a decision to grant hearings would have gone far to resolve the "right to a hearing" problem without unduly burdening the LHA's. Unfortunately, the basic constitutional question of the right to a hearing was not reached despite an attempt to analogize to the right-to-hearing available to persons denied welfare benefits.⁹⁸

*Davis v. Toledo Metropolitan Housing Authority*⁹⁹ reached a result similar to that of the trial court in *Sumpter*. It found that petitioners were entitled to both injunctive relief and a hearing, as well as a statement from the housing authority indicating to them exactly which desirability standards they did not meet.¹⁰⁰ With reference to the hearing, the court held that "the Authority must render findings of fact and conclusions as to the plaintiffs' eligibility. This would not be accomplished by merely stating that the plaintiffs were ineligible on the grounds of undesirability."¹⁰¹ However, the court did not find that the desirability standards promulgated by the Authority violated in any way petitioners' constitutional rights.¹⁰² It is submitted that a retention of those general standards, coupled with the requirement of specificity in factual determinations, does little to expand on the meaning of desirability.

The principles applied in *Davis* and *Sumpter* are derived from the

⁹⁶ 320 N.Y.S.2d at 473.

⁹⁷ *Id.*

⁹⁸ Accord, *Barnett v. Lindsay*, 319 F. Supp. 610 (D. Utah 1970). "The rule established by *Goldberg [v. Kelly]* was grounded on the constitutional hypothesis that welfare benefits 'are a matter of statutory entitlement' As such, summary denial of welfare assistance cannot be distinguished from summary termination. Just as the entitlement is created by statute for the benefit of needy persons meeting specified qualifications, so the rights surrounding that entitlement are created when the statutorily defined need arises and not after the benefits have been dispensed." *Id.* at 612.

⁹⁹ 311 F. Supp. 795 (N.D. Ohio 1970).

¹⁰⁰ *Id.* at 797-98.

¹⁰¹ *Id.* at 798.

¹⁰² *Id.*

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decisions in a long series of public housing eviction cases which held that a housing authority does not have the same freedom to evict tenants as does a private landlord. In 1955, the Court of Appeals for the District of Columbia, in *Rudder v. United States*,¹⁰³ ruled that "[t]he government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process."¹⁰⁴ The Second Circuit in *Escalera v. New York City Housing Authority*¹⁰⁵ recently held that although local rules may measure up to HUD regulations with regard to termination of tenancy, these rules may still fail if they do not comply with due process standards.¹⁰⁶

In support of their prayer for relief, petitioners in both *Davis* and *Sumpter* cited *Goldberg v. Kelly*.¹⁰⁷ In that case, the Supreme Court held that a full evidentiary hearing was required before termination of assistance could occur in a welfare case. The Court concluded that procedural due process mandated adequate notice giving reasons for the termination, the opportunity to defend by presenting one's own evidence and arguments, and the right to confront and cross examine adverse witnesses. Of course, the *Goldberg* holding cannot be interpreted as compelling a formal hearing in all types of agency decisions. Yet, the rationale that governmental bodies should not act arbitrarily suggests that applicants for any state-bestowed benefit, such as low-income housing, should be treated fairly and with due regard for their rights as citizens. The immediate hardship that results from the summary rejection of one's housing application could be mitigated by the implementation of procedures which insure conscientious evaluation of applications.

One other decision referred to by petitioner-applicant in *Sumpter* is worthy of note. In *Williams v. White Plains Housing Authority*,¹⁰⁸ a public housing eviction case, the standards of the hearing requirement were held to include

¹⁰³ 226 F.2d 51 (D.C. Cir. 1955).

¹⁰⁴ Id. at 53. There are numerous cases on point in this area: *Vinson v. Greenburgh Housing Authority*, 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968), aff'd per curiam, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970); *Ruffin v. Housing Authority*, 301 F. Supp. 251 (E.D. La. 1969); *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522 (1954); *Kutcher v. Housing Authority of City of Newark*, 20 N.J. 181, 119 A.2d 1 (1955); *Lawson v. Housing Authority of the City of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605, cert. denied, 350 U.S. 882 (1955); *Housing Authority of City of Los Angeles v. Cordova*, 130 Cal. App. 2d 883, 279 P.2d 215 (App. Dep't Super. Ct. 1955), cert. denied, 350 U.S. 969 (1956).

¹⁰⁵ 425 F.2d 853 (2d Cir. 1970).

¹⁰⁶ Id. at 861.

¹⁰⁷ 397 U.S. 254 (1970).

¹⁰⁸ 62 Misc. 2d 613, 309 N.Y.S.2d 454 (Sup. Ct.), aff'd, 35 App. Div. 2d 965, 317 N.Y.S.2d 935 (1970).

adequate notice both of the acts which form the basis of the tenant's alleged undesirability and the consequences of an adverse determination, together with the right to be represented by counsel, to confront witnesses and to challenge the evidence upon which the Authority relies in making its determination.¹⁰⁹

The court in effect found the regulations under Title 9-C NYCRR inadequate.

To date, there has been no judicial determination of the elements of a hearing in an ineligibility situation. None of the federal decisions sheds any light on the issue except *Escalera*, but that case dealt with evictions, rent increases, and fines. *Goldberg* and *Williams* are the cases giving the best insights into the components of a full evidentiary hearing. If a court finds, as the Appellate Division did in *Sumpter*, that a *Goldberg-Williams* hearing is not administratively feasible, the following choices are available. First, the court could choose a diluted form of *Goldberg* hearing, in which procedural formalities would not apply. Second, it could apply the interview hearing presently given in New York under the Public Housing Law and Title 9-C NYCRR. Third, it could grant no hearing at all, with documentary evidence and affidavits being submitted to a board of review for decision. Fourth, it could grant no hearing and relegate the rejected applicant to seeking judicial review of the authority's ruling. Finally, it could grant a judicial evidentiary hearing to determine desirability. Under present standards, rejected applicants do not receive full-scale evidentiary hearings. In fact, they rarely are made aware of their right to know the reasons for their rejection. It is submitted, however, that even were these individuals granted such evidentiary hearings, they generally would not be able to represent themselves adequately. Therefore, this form of hearing must provide either protection for the applicant who is inexperienced in such situations, or some system of representation. The hearing could be conducted by a disinterested party. A lay advocate system of representation using community members, project inhabitants, or, if they are available, legal services attorneys, might be introduced.

In addition to providing an excellent discussion of the need for an evidentiary hearing, the *Davis* decision shows how quickly a federal court can get to the merits of the case if it so desires. There was no problem with state review, jurisdiction or abstention. These topics had been stumbling blocks in the past. Arguments by housing authorities on these points were rejected in both *Escalera* and *Holmes*

¹⁰⁹ 35 App. Div. 2d at 965, 317 N.Y.S.2d at 936.

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v. New York City Housing Authority,¹¹⁰ where the issues on the merits were similar to those in *Davis*.¹¹¹ In regard to abstention and state review, the court in *Holmes* felt that there would not be so great a disruption of local regulatory procedure as to make federal intervention inappropriate. With regard to jurisdiction, the court in *Escalera* found that cases of this type contain substantial federal questions. With reference to abstention, the *Holmes* court stated that:

At least in actions under the Civil Rights Act the power of a federal court to abstain from hearing and deciding the merits of claims properly brought before it is a closely restricted one which may be invoked only in a narrowly limited set of "special circumstances."¹¹²

There is one additional area in which the prospective applicant has encountered difficulty when dealing with a housing authority. As has already been discussed, it is often difficult to obtain information from the authority. Of great interest to the applicant is finding out the length of the waiting list and his position on the list. Some authorities maintain such lists and they will divulge such information. In New York, Title 9-C NYCRR requires the keeping of such lists. However, eligible families are not always told where they stand. Two cases hereinbefore discussed have dealt with the issue of waiting lists. In *Holmes v. New York City Housing Authority*,¹¹³ the Second Circuit, in sustaining a cause of action with regard to admission to public housing, held that

due process requires that selections among applicants be made in accordance with "ascertainable standards," . . . and in cases where many candidates are equally qualified under these standards, that further selections be made in some reasonable manner such as "by lot or on the basis of the chronological order of application."¹¹⁴

In *Colon v. Tomkins Square Neighbors, Inc.*,¹¹⁵ a case in which discrimination against welfare recipients who applied for housing was held to be a violation of the equal protection clause of the Fourteenth

¹¹⁰ 398 F.2d 262 (2d Cir. 1968).

¹¹¹ The *Davis* court found no difficulty in applying the *Goldberg* holding to public housing. "It seems clear, therefore, that those seeking to be declared eligible for public benefits may not be declared ineligible without the opportunity to have an evidentiary hearing." 311 F. Supp. at 797.

¹¹² 398 F.2d at 265, citing *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). For similar language in *Escalera*, see 425 F.2d at 865.

¹¹³ 398 F.2d 262, (2d Cir. 1968).

¹¹⁴ Id. at 265, quoting *Hornsby v. Allen*, 330 F.2d 55, 56 (5th Cir. 1964).

¹¹⁵ 294 F. Supp. 134 (S.D.N.Y. 1968). See discussion at p. 46 *supra*.

Amendment, the court suggested that "a system should be created whereby a chronological waiting list is maintained, thereby affording the applicants an opportunity to gauge the progress of their cases as well as allowing both initial and renewed applications credit for time passed."¹¹⁶ While each of these cases deals with waiting list problems, none requires the unveiling of such lists to eligible applicants. Clearly, such information may be of great value to the applicant.

IV. CONCLUSION

The Report of the National Advisory Commission on Civil Disorders stated in 1968 that, "[t]oday, after more than three decades of fragmented and grossly underfunded federal housing programs, decent housing remains a chronic problem for the disadvantaged urban household."¹¹⁷ A major reason for this situation is, no doubt, an insufficient amount of housing in this country. Persons eligible to enter low-rent public housing may wait anywhere from six months to three years for a vacancy to occur. A massive dose of new low-rent housing is clearly needed. But until such time as this housing is available, applicants for public housing will have to deal with the reality that housing authorities may act, if they desire, as benevolent despots.

As has been demonstrated, the problem concerning admission to low-rent public housing encompasses considerably more than a shortage of housing units. Given the weaknesses inherent in the admission regulations and the ambiguities that pervade the case law in this area, an applicant—even one with legal counsel—can never be certain that his application is being processed in accordance with statutory or constitutional requirements. Reform is urgently needed. It would be overly optimistic, however, to expect the various administrative agencies to provide the necessary impetus. The courts must bear this burden—and rightfully so—since the questions involved are, in the final analysis, constitutional in nature.

¹¹⁶ *Id.* at 139.

¹¹⁷ Report of the National Advisory Commission on Civil Disorders 467 (1968).

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