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Zoning Law--Refusal to Rezone Which Perpetuates De Facto Segregation Does Not Violate Equal Protection Clause Unless Motivated by Discriminatory Purpose

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RECENT DEVELOPMENTS

ZONING LAW—REFUSAL TO REZONE WHICH PERPETUATES DE FACTO SEGREGATION DOES NOT VIOLATE EQUAL PROTECTION CLAUSE UNLESS MOTIVATED BY DISCRIMINATORY PURPOSE. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 97 S. Ct. 555 (1977).

Metropolitan Housing Development Corporation (MHDC) contracted to buy a fifteen acre tract located in the Village of Arlington Heights, an almost exclusively white suburb of Chicago,[1] in order to develop federally funded middle and low income housing. Because the tract was zoned only for detached single family dwellings, the sale was made contingent on the Village's grant of a zoning variance as well as the procurement of federal financing. In response to MHDC's request for rezoning, public hearings were held before the Village's Plan Board on the question.

At these hearings, three arguments were advanced against MHDC's request. First, concern was voiced over "the 'social issue'—the desirability . . . of introducing at this location in Arlington Heights low and moderate income housing . . . that would probably be racially integrated."[2] It was also argued that the change would defeat the reasonable expectation of persons who purchased property in the area relying on the fact that it had always been zoned for single family dwellings. Finally, opponents pointed out that the variance would be inconsistent with the Plan Board's use of multiple family zoning as a buffer between single family dwellings and commercial or manufacturing

1. The demographic breakdown of the Arlington Heights community according to the 1970 census was 64,884 white residents and 27 black residents. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413-14 (7th Cir. 1975). "According to statistics of plaintiffs' expert demographer and urbanologist Pierre de Vise, Arlington Heights is the most residentially segregated community in the Chicago metropolitan area among municipalities with more than fifty thousand residents." *Id.* at 414 n.1.

2. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 559 (1977).

areas because there was no commercial or manufacturing property adjacent to the tract. Following the hearings, the Plan Board denied MHDC's request in an ambiguously-worded motion.[3] The Village Board then adopted the Plan Board's motion.

MHDC sought injunctive and declaratory relief in federal court against the Board's refusal to rezone the parcel. Alleging that the Board's denial was racially discriminatory, the plaintiffs argued that the action violated both the fourteenth amendment and the Fair Housing Act of 1968.[4] Finding that the Board's action was not racially motivated but rather was designed "to protect property values and the integrity of the Village's zoning plan,"[5] the district court found in favor of the defendants. On appeal, the Seventh Circuit Court of Appeals held that the Village's denial violated the fourteenth amendment because its "ultimate effect" was discriminatory and not justified by any countervailing interests on the part of the Village. The Supreme Court, however, rejected the Seventh Circuit's "ultimate effect" analysis and appears to have firmly shut the door to equal protection challenges to zoning that further encourages de facto segregation but which cannot be shown to have been racially motivated.

Aside from the equal protection problem, two other issues emerged in the case. The Court's treatment of the first issue, that of whether the plaintiffs had standing, was the final word on a question that had been before the Court repeatedly over the last decade. The second issue, the applicability of the Fair Housing Act, which the Court avoided, may prove important in the future.

While the requirements for plaintiffs to gain standing to challenge

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3. *Id.* at 559-60.

4. 42 U.S.C. §§ 3601-3631 (1970). The following two sections were pleaded at the Supreme Court level.

42 U.S.C. § 3604 (1970) provides:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

42 U.S.C. § 3617 (1970) provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person on the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

5. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974).

zoning decisions were earlier set down in *Warth v. Seldin*,[6] *Arlington Heights* was the Court's first opportunity to apply the *Warth* test. Prior to *Warth*, courts had been divided on the questions of whether individuals unassociated with the community involved[7] or developers in those communities[8] could base zoning challenges on violations of the rights of third parties. In *Warth*, the Supreme Court restricted some courts' interpretation of the requirements for standing by requiring that a plaintiff show that he himself is injured by the challenged action of the defendant and that the injury be fairly traceable to the defendant's acts.[9] In *Arlington Heights*, the Court clearly applied the *Warth* test; plaintiffs were able to assert equal protection violations because one of the plaintiffs included a black man who testified that he would live in Arlington Heights if the housing project was completed.[10]

Rejected in the district court because no specific section was relied on and ignored in the court of appeals, the Fair Housing Act question was remanded by the Supreme Court. Even though the question has received little attention thus far,[11] the Act has been the basis of one court's invalidation of a system of restrictive zoning[12] and could well become important in light of the Court's treatment of the equal protection challenge in *Arlington Heights*.

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6. 422 U.S. 490 (1975). This case dealt with nonresidents who, without property interests, sought standing to challenge the alleged exclusionary zoning practices of Pennfield, New York. They were joined by several developers who also had no property interests in the town. The Court ruled that the plaintiffs had not shown sufficient injury-in-fact to acquire standing and therefore did not reach the merits of the case. For analysis of this case, see Note, *Warth v. Seldin: Nonresidents Lack Standing to Challenge Exclusionary Zoning Laws*, 5 CAP. L. REV. 351 (1976); Comment, *Warth v. Seldin: More Restrictive Requirements of Standing and Ripeness in Federal Actions Challenging Exclusionary Zoning*, 12 NEW ENGLAND L. REV. 161 (1976).

7. *See, e.g.*, Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Crow v. Brown 457 F.2d 788 (5th Cir. 1972).

8. *See, e.g.*, Kennedy Park Homes Assn. v. City of Lackawana, 436 F.2d 108 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974).

9. 422 U.S. at 508. *See also* United States v. SCRAP, 412 U.S. 669, 688 (1973).

10. The development corporation also met the standing requirement because denial of the rezoning classification represented an absolute barrier to the housing project.

11. The plaintiffs failed to press the allegation of a violation of the Fair Housing Act at either the district or circuit court level.

12. In United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1402 (1975), an action was brought by the United States against the city alleging that through adoption of a zoning ordinance prohibiting the construction of any multiple-family dwellings the City had interferred with the right to equal housing opportunity in violation of 42 U.S.C. § 3617 and had denied persons housing on the basis of race in violation of 42 U.S.C. § 3604(a). The court held that the burden of proof in an action under the above statutory sections was proof that the defendants action "actually or predictably results in racial discrimination; in other words that it has

The district court's rejection of the equal protection argument hinged on the plaintiff's failure to establish either a discriminatory motive on the part of the Village[13] or the racially discriminatory effect of its refusal to rezone the property.[14] While the court of appeals ostensibly concluded that the district court's findings were not clearly erroneous, it was willing to overturn the Village's action because it failed to satisfy what the court felt was the additional requirement that the action not be discriminatory in "its historical context and ultimate effect."[15] Applying this test, the court found the Village's action discriminatory, despite evidence that there was other property available in the Village for low and middle income housing, because the refusal was likely to foreclose any other similar developments in the future and thus perpetuate the Village's racial composition.

The Supreme Court rejected the court of appeals' assumption that governmental action could be discriminatory simply because it had a racially disportionate impact. Relying on the 1976 case of *Washington v. Davis*,[16] the Court held that "[p]roof of racially discriminatory intent

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a discriminatory effect." 508 F.2d at 1184. The court went on to say that "the plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated." *Id.* at 1185.

The City of Black Jack, like the Village of Arlington Heights, was ninety-nine percent white and their zoning practices effectively denied access to all minorities in the moderate or low income bracket. Whether the Eighth Circuit's interpretation of the Fair Housing Act would be sustained today is questionable. The court of appeals decision relied heavily on several cases that subsequently have been disapproved of by the Supreme Court. *See* Washington v. Davis, 426 U.S. 229, 245, n.12 (1976); note 16 *infra*. For further analysis, see Note, *Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976).

13. The court did admit that plaintiffs had proven that the highest and best use for the disputed tract would be for multiple-family dwellings. However, there were enough other factors present to uphold the zoning board's decision. These factors included the fact that the proposed rezoning was a deviation from the systematic development plan, recognition of injury to home values in surrounding areas, and the existence of available vacant tracts previously zoned for multiple-family dwellings. 373 F. Supp. at 211.

14. The district court held that plaintiffs failed to prove discrimination "against racial minorities as distinguished from the under-privileged generally." *Id.* at 210.

15. 517 F.2d at 413-14. For further analysis of the court of appeals decision on the equal protection issue, see Note, *Metropolitan Housing Development Corporation v. Village of Arlington Heights: A New Discriminatory Effect in Zoning*, 9 J. MAR. J. OF PRAC. and PROC. 533 (1976); Note, *Zoning——Equal Protection*, 1976 WIS. L. REV. 234 (1976).

16. 426 U.S. 229 (1975). *Washington* dealt with a challenge by Negro police applicants who were rejected because they failed to pass a verbal skills test. Plaintiffs argued that the test bore no relationship to job performance and that a disproportionate number of black applicants were failing and, therefore, being excluded from the police force. After holding that the disproportionate racial impact was insufficient to trigger strict scrutiny, the Court overruled a large number of equal protection cases:

> Cases dealing with public employment include: Chance v. Board of Examiners, 458 F.2d 1167, 1176-1177 (CA2 1972); Castro v. Beecher, 459 F.2d 725, 732-

or purpose is required to show a violation of the Equal Protection Clause."[17] While not requiring that the motivation be " 'dominant' or 'primary,' " the Court held that such intent had to be shown to be a "*motivating factor*" in a zoning decision. While recognizing that the effect of a zoning decision may reflect a discriminatory intent, the Court made it clear that this alone would be insufficient to establish such intent.[18]

Apart from this cases, the Court gave several examples of how discriminatory intent could be established:

> The historical background of the decision is one evidentary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . [Others are] [t]he specific sequence of events leading up to the challenged decision . . . [and] departures from the normal procedural sequence . . . .
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.[19]

In *Arlington Heights*, the Supreme Court has continued the consolidation of local zoning powers evidenced in recent cases.[20] Even

733 (CA1 1972); Bridgeport Guardians v. Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1337 (CA2 1973); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1200 (Md.), *aff'd* in pertinent part *sub nom.* Harper v. Kloster, 486 F.2d 1134 (CA4 1973); Douglas v. Hampton, 168 U.S. App. D.C. 62, 67, 512 F.2d 976, 981 (1975); *cert. pending*, No. 75-1026. There are also District Court cases: Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126, 143 (ND Miss. 1974); Arnold v. Ballard, 300 F. Supp. 723, 736 737 (ND Ohio 1975); United States v. City of Chicago, 385 F. Supp. 543, 553 (ND Ill. 1974); Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (Minn. 1972), *rev'd* on other grounds, 498 F.2d 143 (CA8 1974).

In other contexts there are Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (CA2 1968) (urban renewal); Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108, 114 (CA2 1970), *cert. denied*, 401 U.S. 1010 (1971) (zoning); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (CA9 1970) (dictum) (zoning); Metropolitan H. D. Corp. v. Village of Arlington Heights, 517 F.2d 409 (CA7), *cert. granted*, 423 U.S. 1030 (1975) (zoning); Gautreaux v. Romney, 448 F.2d 731, 738 (CA7 1971) (dictum) (public housing); Crow v. Brown, 332 F. Supp. 382, 391 (ND Ga. 1971), *aff'd*, 457 F.2d 788 (CA5 1972) (public housing); Hawkins v. Town of Shaw, 437 F.2d 1286 (CA5 1971), *aff'd* on rehearing en bane, 461 F.2d 1171 (1972) (municipal services). The cases impressively demonstrate that there is another side to the issue; but, with all due respect, *to the extent that those cases rested on or expressed the view that proof on discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.*

426 U.S. at 244-45, n.12 (emphasis added).

17. 97 S. Ct. at 563.

18. Justice Powell noted that disproportionate impact of official action would provide only "an important starting point". *Id.* at 564.

19. *Id.* at 564-65.

20. *See, e.g.*, Construction Indus. Assoc. v. City of Petaluma, 522 F.2d 897 (9th

though not entirely foreclosing challenges based on circumstantial evidence of discriminatory intent, the Court's action has substantially diminished the likelihood that equal protection challenges will be successful in the future. As the resolution of the case suggests, the burden of proof placed on a challenger in such circumstances will be extremely difficult to overcome.

If discriminatory intent was not clearly a factor motivating the Village to refuse the requested variance, which likely would have increased the black population over 1000%,[21] then it appears that municipal leaders who are sufficiently cautious in making no discriminatory statements and offering nonracial rationalizations are free to engage in zoning that has clear discriminatory effects. At present, the the Fair Housing Act appears to be the only potential barrier to such action. *Arlington Heights* may also be significant because it provides some indication how the question will be treated in the courts.

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Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *But see* Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932 (1977).

21. The project would have contained 190 units and would have dramatically raised the black population from its former level of 27. *See* note 1 *supra*.