Exclusionary Zoning - Does a Zoning Ordinance With Racially Discriminatory Effects Violate the Constitution? Metropolitan Housing Development Corporation v. the Village of Arlington Heights

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The seemingly unlimited power of a local government to determine land use within its borders has collided with the gradually expanding limits of the equal protection clause of the fourteenth amendment. The results of Metropolitan Housing Development Corporation v. The Village of Arlington Heights indicate that a municipality indeed is limited in its zoning power whenever the effects of its land use policies promote segregation or, more specifically, inhibits integration.2

This comment will discuss the Arlington Heights case, and then concentrate upon three aspects of the decision. The effects analysis used by the Arlington court will be examined and compared to the alternate approach of motive inference. The constitutional reasoning used in similar cases will next be discussed, including not only the equal protection basis of the Arlington Heights decision but also the Fair Housing Act rationale of the court in United States v. City of Blackjack, Missouri.3 Finally, the compelling justification requirement imposed by the Arlington Heights court will be analyzed and the advisability of imposing a less stringent test will be examined.

LINCOLN GREEN

The Metropolitan Housing Development Corporation (M.H.D.C.), is a non-profit corporation organized to develop low and moderate income housing in the Chicago metropolitan area. It has been involved in the development of scores of apartments and houses under federally subsidized programs. In 1970 M.H.D.C. was selected by the Clerics of St. Viator, a Catholic religious order, to develop part of an eighty acre tract owned by the clerics. The sales agreement provided that the development be built for low and moderate income persons chosen in accordance with the provisions of

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1. 517 F.2d 409 (7th Cir. 1975).
2. Cases of this type are generally referred to as "exclusionary zoning," that is, the use of the zoning power by a municipality to maintain itself as an enclave of affluence or of social homogeneity. See, e.g., Brooks, Exclusionary Zoning, 3 AM. SOC'Y OF PLANNING OFFICIALS (1970).
3. 508 F.2d 1179 (8th Cir. 1974).
section 236 of the National Housing and Urban Development Act of 1968.

The development, called Lincoln Green, was to occupy 15 acres and to consist of 190 single family attached homes, commonly called townhomes. The property is located in and subject to the zoning ordinances of Arlington Heights, Illinois, a village situated in the northwest suburbs of Chicago. The Viatorian land, as well as all of the surrounding property, is zoned R-3, a designation primarily limited to single family residences with exceptions for churches and schools. Lincoln Green would be bordered by the remaining Viatorian land on two sides, including a Catholic high school. The other two sides of the development would be across the street from single family homes.

Arlington Heights, having no special zoning category for townhomes, requires a multifamily designation, R-5, for such developments. M.H.D.C. applied for a zoning variance on the property. Reports of the Fire Chief, the Building Commissioner, the Director of Public Works and the Acting Director of Engineering mentioned only one problem with the proposed development, that of water runoff. In order to alleviate that problem, M.H.D.C. incorporated suggested changes into its plans for the proposed development. M.H.D.C. also presented studies showing that no major traffic problems would result from Lincoln Green and that the project would make a net tax contribution to the Village.

4. Section 236 of the National Housing and Urban Development Act of 1968, 12 U.S.C. § 1715z-1. Section 236 is a program, administered through the Federal Housing Administration, to aid in the construction of rental units for low and moderate income persons. To qualify for subsidies the developer must rent to tenants who meet certain eligibility requirements in regard to their income and family size. The subsidies are passed to the tenants in the form of reduced rents.

5. The development was planned to include 100 one-bedroom units (primarily for elderly residents), 48 two-bedroom units, 30 three-bedroom units, and 12 four-bedroom units. The buildings would be two stories or less and occupy less than twelve percent of the property. Brief for Plaintiffs-Appellants at 12, Metropolitan Housing Development Corp. v. The Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).

6. Under the Zoning Ordinance of the Village of Arlington Heights this property can be developed for single-family detached dwellings at a density of 8750 square feet of lot per dwelling, yielding between fifty to sixty units on the subject property. Id. at 11.

7. Two members of the Arlington Heights Plan Commission noted:

   In the Village Code, there is no separate classification for townhouse development. Therefore, it of necessity accepts the classification of R-5. The proposal in no way approaches the density, architecture, or other characteristics of R-5. Professional planners designate townhouse construction of this nature akin to R-3 rather than R-5. The Lincoln Green proposal suffers from the lack of a separate classification in our ordinance.

Brief for Plaintiffs-Appellants Exhibit 43, Metropolitan Housing Development Corp. v. The Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).
After public hearings, the Plan Commission recommended against the rezoning. On September 28, 1971 the Board of Trustees of the Village voted six to one to deny the requested variance. The major justification for the refusal was that the Village's Comprehensive Plan, adopted in 1959, allowed R-5 zoning only as a buffer between single family homes and commercial, industrial or other high intensity use.

Suit was instituted in U.S. district court by M.H.D.C. and individual plaintiffs against the Village of Arlington Heights, seeking a declaratory judgment invalidating the Arlington Heights zoning ordinance as applied to the subject property. Also sought was an injunction restraining defendants, including the individual Trustees of the Village, from "preventing or interfering with the development of the housing project." The district court found that the Village was acting to protect property values and to adhere to its Comprehensive Plan. Since these were considered legitimate objectives, and not arbitrary action violative of the fourteenth amendment, the court found for the defendants.

THE ARLINGTON DECISION

An appeal to the United States Court of Appeals for the Seventh Circuit followed, in which petitioners argued several alternate theories.

The first theory was that the Village's zoning policies were administered in an arbitrary manner, so that M.H.D.C. was discriminated against in the manner prohibited in Yick Wo v. Hopkins. The court found that although the Comprehensive Plan was not strictly adhered to, there was some consistency in the Board's policies. The court noted that the Board had allowed 60 zoning changes, of which only four constituted clear violations of the buffer zone policy; two permitted variances possibly constituted violations, and other vari-

10. 373 F. Supp. at 209.
11. Id. at 212.
12. Metropolitan Housing Development Corp. v. The Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).
13. 118 U.S. 356 (1886). The case involved a San Francisco ordinance prohibiting the existence of laundries anywhere other than in brick or stone buildings. The facts indicated that Chinese aliens were the primary victims of the ordinance. The Court found application of the ordinance racially motivated and struck it down on equal protection grounds.
ances were rejected due to the buffer zone policy. Since Arlington Heights had demonstrated a concern for preserving the integrity of its plan, its refusal to rezone the Viatorian land was not impermissibly discriminatory.\(^4\)

M.H.D.C. next propounded a theory based on racial discrimination, reasoning that since forty percent of the prospective residents of Lincoln Green would be black, in conformance with the requirements of section 236, a higher percentage of blacks than whites would be affected, rendering the Board’s decision racially discriminatory. The United States Supreme Court had, however, in *James v. Valtierra*\(^6\) explicitly rejected a similar contention. There, the Court was concerned with a provision in the California Constitution which required approval by referendum of all state developed low-rent housing. The Court stated:

> The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.\(^1\)

Even though a greater percentage of blacks than whites would be affected by requiring a referendum on such low income housing, the Court found no impermissible racial classification implicit in the referendum requirement.\(^7\) Following this reasoning, the *Arlington Heights* court found that racial disparity alone, when applied to housing, is not tantamount to impermissible discrimination.\(^8\)

The court did, however, accept the premise that the resulting racial disparity would have an ultimately racially discriminatory effect which itself violated the equal protection clause of the fourteenth amendment.\(^9\) Such reasoning apparently distinguishes between an action affecting a racial minority disproportionately and an action having a discriminatory effect.

The court then required compelling justification from Arlington Heights for its refusal to rezone. The justifications advanced by the Village were determined not to be sufficiently compelling. The judgment of the district court was reversed and remanded.\(^20\)

\(^14\) 517 F.2d at 412
\(^15\) 402 U.S. 137 (1971).
\(^16\) Id. at 141.
\(^17\) Id.
\(^18\) 517 F.2d at 413.
\(^19\) Id. at 415.
\(^20\) Id.
MOTIVES v. EFFECTS

Although the Arlington Heights court refrains from discussion of the motives of the Village, evidence was introduced at trial by M.H.D.C. to demonstrate a racial motive. This evidence included petitions, signed by residents of Arlington Heights, protesting development of Lincoln Green,\textsuperscript{21} letters by residents to a local newspaper stating opposition to the project in racial terms,\textsuperscript{22} and accounts of public meetings describing large overflow crowds with participants making speeches about residents' feared influx of blacks.\textsuperscript{23} The Village President was quoted as saying that, "... the objections of the residents is (sic) a mandate to reject this proposal."\textsuperscript{24} A convincing argument could be made that the furor and emotion resulting from Lincoln Green could only be generated by racial motives on the part of Arlington Heights' residents and that this display of racial hostility influenced the Village Board.

In a similar case, Dailey v. City of Lawton, Oklahoma,\textsuperscript{25} an attempt was made to build, in a white area, a housing project primarily for black, Spanish-American, and poor white residents. Evidence of racially motivated petitions and telephone calls was introduced, and a dissenting member of the Planning Commission testified that the opposition to the project was racially motivated.\textsuperscript{26} The court stated that:

> if proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. In our opinion it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals.\textsuperscript{27}

The actions of the City of Lawton were found to be racially motivated and arbitrary, in violation of the fourteenth amendment.\textsuperscript{28}

The Arlington Heights case can be distinguished from Lawton in that the area surrounding the land for the Lawton housing project was zoned high density residential,\textsuperscript{29} and that present and former directors of the Lawton Planning Commission felt there was no

\textsuperscript{21} Brief for Plaintiffs-Appellants Exhibits 17, 42, 37 and 38, Metropolitan Housing Development Corp. v. The Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).
\textsuperscript{22} Id., Exhibit 48.
\textsuperscript{23} Id. at 28.
\textsuperscript{24} Id., Exhibit 42.
\textsuperscript{25} 425 F.2d 1037 (10th Cir. 1970).
\textsuperscript{26} Id. at 1039.
\textsuperscript{27} Id.
\textsuperscript{28} Id. at 1040.
\textsuperscript{29} Id. at 1038.
reason not to rezone the land. Similar evidence in the Arlington Heights case might have provided a sufficient basis for that court to infer a racial motive. Even under such circumstances, a decision grounded on ascertainable effects is a more rational approach than speculation into motivation.

Although not discussing motives, certain language in the Arlington Heights opinion intimates that a malevolent motive was present. The court took judicial notice "... that there exists in Chicago and its environs a high degree of racial residential segregation." The four-township northwest Cook County area which includes Arlington Heights, had, in the years 1960 to 1970, a population increase of 219,000 people, of which only 170 were black. While the percentage of blacks in this area actually decreased over this period, the black population in the entire Chicago metropolitan area increased from fourteen percent in 1960 to eighteen percent in 1970. The court utilized such statistics to conclude that the Village "exploited" the segregation problem to become an almost one hundred percent white community. While such a comment may be interpreted to refer to the Village's motivation in keeping the all-white status quo, such statistics are more appropriate in discussing the "historical context" aspect of effect.

Courts are increasingly investigating the effects of laws, ordinances, and administrative decisions, both in the public and private sectors, while ignoring the motives or intent of those decision-makers. The United States Supreme Court, in Griggs v. Duke Power Co., held that good intent does not redeem employment practices which tend to freeze the status quo of prior discriminatory practices. Congress directed the thrust of the Civil Rights Act of 1964 to the consequences of these employment practices, and not merely to the motivation behind utilizing them. The court in Williams v. Mathews, a case involving a real estate transaction, stated:

The courts will look beyond the form of a transaction to its substance and proscribe practices which actually predictively result in

30. Id. at 1040.
31. 517 F.2d at 413.
32. Although the population of Arlington Heights in 1970 was 64,884 only 27 of its residents were black. According to statistics of plaintiffs' expert demographer and urbanologist, Pierre de Vise, Professor, University of Illinois at Chicago Circle, Arlington Heights is the most residentially segregated community in the Chicago metropolitan area among municipalities with more than fifty thousand residents. Id. at 414.
33. Id.
34. 401 U.S. 424 (1971).
36. 499 F.2d 819 (8th Cir. 1974).
rational discrimination irrespective of defendant’s motivation. Another eighth circuit case following this reasoning is United States v. City of Blackjack, Missouri, a case which is similar to the facts of the Arlington Heights case, and which also used an effects analysis. In City of Blackjack, residents voiced opposition to a low to moderate income housing project, Park View Heights, which was similar to the development in Arlington Heights. An important distinguishing fact, however, was that the City of Blackjack, after learning of the project took positive action to incorporate the land upon which the development was to be built, and zone it in a way to preclude construction. The court stated that an improper motive could be established circumstancestially, and inferred that race was the significant factor in both of these actions. However, the court did not base its decision on an illegal purpose, and stated:

Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly because, . . . whatever our law once was . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

Cases such as Dailey, which infer motive from circumstantial evidence, appear to be on the decline. Courts now seem to be shifting their focus away from motivation and to an analysis of effect. The Supreme Court preferred this approach in Wright v. Council of City of Emporia. In Emporia, the district court found the purpose of new school districting to be discriminatory; it did not, however, rest its holding on motivation, but rather on the effect of the action. The Supreme Court held this approach to be proper.

The racially discriminatory effect of the decision not to rezone by the Arlington Heights Board was found to be “in all probability, that no section 236 housing will be built in Arlington Heights since plaintiffs were unable to find an economonically feasible and suitable

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38. Id. at 826.
39. 508 F.2d 1179 (8th Cir. 1974).
40. Id. at 1185. Leaders of the incorporation movement, individuals circulating petitions, and even zoning commissioners all expressed opposition to Park View Heights in racial terms. Speakers received cheers at public meetings debating incorporation when racial remarks accompanied their criticism of the project.
41. Id. at 1183.
42. Id. at 1185.
45. 407 U.S. at 462.
Although this project would have minimal effects in alleviating the segregation problem in the entire metropolitan Chicago area, it would have an impact in Arlington Heights by increasing its minority population one thousand percent.

Of more crucial importance to the court was the fact that although the Village was not responsible for the segregated housing patterns in the entire Chicago area, it could not ignore the problem. The Seventh Circuit, in an earlier opinion, had found that a defendant could not use his innocence in creating a discriminatory situation as a defense to charges that he utilized the problem for his own advantage. *Clark v. Universal Builders, Inc.*, held that a builder could not exploit the inflated market prices that existed because of the segregated housing situation in Chicago, even though he was in no way responsible for creating the discrimination that led to the problem. Arlington Heights had never sponsored nor participated in any low-income housing development. The easing of the de facto segregation problem is contingent upon allowing the construction of such developments. For these reasons the *Arlington Heights* court held

the rejection of Lincoln Green has the effect of perpetuating both this residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem.

In *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida*, similar grounds were found sufficient to constitute a discriminatory effect. The ultimate effect of Delray's past and present conduct in administering its housing policies would be the confinement of low income housing construction to the segregated area of the city. Since racial minority citizens in disproportionate numbers live in low income housing, segregation would be reinforced. The court found these consequences particularly

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46. Metropolitan Housing Development Corp. v. The Village of Arlington Heights, 517 F.2d at 414. Conflicting evidence was presented as to whether there were other suitable sites where Lincoln Green could have been constructed. Chief Judge Fairchild agreed with the majority opinion's reasoning but dissented on this point.

A review of the record reveals that, at the time of the Village's decision to deny the variance, there were at least nine undeveloped tracts of land in excess of fifteen acres zoned R-5. . . . The record does not contain a sufficient showing by plaintiffs that it was not reasonably possible to construct the proposed project on one of these sites. *Id.* at 416.

47. *Id.* at 414.

48. 501 F.2d 324 (7th Cir. 1974).

49. *Id.* at 334.

50. 517 F.2d at 414.

51. *Id.*

52. 493 F.2d 799 (5th Cir. 1974).

53. *Id.* at 810.
distressing in the area of federally assisted housing, due to the national policy to balance and disperse public housing. Local authorities are under an obligation to further these goals, certainly to the extent of refraining from frustrating efforts to carry out the policy. Delray's past actions were found to be inconsistent with this policy and added force to the claim against the city.

A court need not stop at examining the "ultimate effect;" it can, and should, also examine the "historical context." This investigation is not limited to the past actions of the particular local government, it can extend to the entire metropolitan area. The Blackjack court found that the discriminatory effect of the ordinance was more onerous when viewed in light of housing segregation in the entire St. Louis metropolitan area. The action by the City of Blackjack was found to be "one more factor contributing to the confinement of blacks in the center city."

The analysis by which the Arlington Heights court found a discriminatory effect appears to be most practical under the circumstances. If the area surrounding Arlington Heights were in fact successfully integrated, the Village's denial of a zoning variance would have had little impact on the availability of housing to racial minorities. The effect of the denial is therefore heightened by the fact that the forty percent of the prospective tenants who are black have little hope of finding affordable housing outside of segregated black areas.

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55. 493 F.2d at 811.

56. 508 F.2d at 1186. Many state courts have held that municipalities are not isolated and, consequently, that land use decisions by one local entity can affect the entire region. See Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, appeal dismissed, 409 U.S. 1003 (1972); National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); Note, Phased Zoning: Regulation of the Tempo and Sequence of Land Development, 26 Stan. L. Rev. 585 (1974); Walsh, Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?, 3 Conn. L. Rev. 244 (1971). Contra, Construction Industry Association of Sonoma County, et. al. v. The City of Petaluma, 522 F.2d 897 (1975), in which the court stated:

If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. See Milliken v. Bradley, 418 U.S. 717 (1974), in which the Court struck down a massive inter-district remedy for segregated schools in Detroit, Michigan. The Court did find that if a constitutional violation in one school district had a segregrative effect in another district, boundaries would be set aside for remedial purposes.

57. The problem is magnified by the inability of blacks to take full opportunity of the
Although the *Arlington Heights* decision does state that the Village has an affirmative duty, the court does not impose such a duty. It merely orders the Village not to interfere with the actions of an outsider, M.H.D.C., in attempting to alleviate the problem.

**THE BLACKJACK RATIONALE**

The *Arlington Heights* court found a violation of the fourteenth amendment, whereas the Eighth Circuit in *Blackjack* used different reasoning to achieve the same result. That court used the so-called "prima facie case" concept to find a violation of a federal statute. Once defendant's actions can predictively be shown to result in discrimination, to overcome such an inference defendant must demonstrate that a compelling governmental interest is furthered by its actions. The court made it clear that it was not basing its decision on the fourteenth amendment, but instead was extending the compelling governmental interest requirement to the violation of a federal statute, the Fair Housing Act.

In a more restrictive manner the Supreme Court adopted the "prima facie case" approach. *McDonnell Douglas Corp. v. Green* dealt with alleged employment discrimination in violation of Title VII. The Court found that plaintiff had the burden of establishing a prima facie case, and presented a typical procedure by which plaintiff could satisfy that requirement. Resulting segregation in the corporation would not have been sufficient for the *McDonnell* Court. If such a prima facie case were established, the burden

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58. A highly significant state court opinion, *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), found a community does have an affirmative duty:

> Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income.

*Id.* at 731-32.

59. 517 F.2d at 414.

60. United States v. City of Blackjack, Missouri, 508 F.2d 1179 (8th Cir. 1974).

61. *Id.* at 1185 n.4.


65. Plaintiff could show: (1) he was a member of racial minority; (2) he applied and was qualified for a job opening; (3) he was rejected; and (4) the job then remained open and the employer continued seeking applicants of equal qualifications as plaintiff. 411 U.S. at 802.
would shift to defendants to articulate a legitimate nondiscriminating reason for its action. Compelling justification would not be required in such a case, but it must be noted that the defendant in an employment discrimination case is typically a private corporation, whereas the defendant in a discriminatory zoning action is a governmental entity. It may be that no justification presented by a private entity could be considered compelling.

Contrasts between the prima facie case requirements of *McDonnell* and the prima facie approach of *Blackjack* are striking. Allowing a mere discriminatory effect to be used as an inference of racial discrimination and then placing a heavy burden on defendant to justify its actions may not have been contemplated by the Court in *McDonnell*, at least in dealing with Title VII.

To achieve the objectives of the Fair Housing Act, it may indeed be proper for a court to require compelling reasons for actions having a discriminatory effect. The Act states that “[i]t is the policy of the United States to provide within constitutional limitations, for fair housing throughout the United States.” In language “as broad as Congress could have made it,” the Act makes it unlawful to take an action that makes a dwelling unavailable to a person because of race, color, religion or national origin. It has been established that, under the thirteenth amendment, the Fair Housing Act is an appropriate and constitutionally permissable exercise of congressional power to eliminate all badges and incidents of slavery.

It appears from the reach thus given the Fair Housing Act that the rights of racial minorities to housing may be akin to a fundamental right requiring compelling justification. The reasoning adopted by the *Blackjack* court therefore has a constitutional basis

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66. Id.
67. The rationale of the “prima facie case” approach adopted by the Eighth Circuit is concerned with such a distinction. The case of Williams v. Mathews Co., 499 F.2d 819 (8th Cir. 1974), dealt with racially discriminatory policies by a private real estate developer. That court examined the policies and procedures of defendant merely to find legitimate reasons for its actions.
in the thirteenth amendment, although the court could cite no precedent for its application of the compelling governmental interest standard to a similar fact situation.\textsuperscript{73}

**The Arlington Reasoning**

M.H.D.C. briefed an argument based on the *Blackjack* reasoning.\textsuperscript{74} However, the *Arlington Heights* court declined to follow this precedent. There are a number of possible reasons for the court ignoring this approach.

The language of the Fair Housing Act may require that, to find a violation, a more positive discriminatory act must occur than the court could discern in the actions of the Village Board. The Board merely failed to change the status quo, which contrasts with the positive actions taken by the City of Blackjack after learning of the plans for the housing development. Furthermore, in *Sisters of Providence of St. Mary of the Woods v. City of Evanston*,\textsuperscript{75} the court stated:

> The denial of a zoning petition, though in a sense a negative process, when resulting in racial discrimination and part of a pattern that has perpetuated racial stratification is no less assertive conduct of a discriminatory nature than the more positive procedure of . . . zoning out low and moderate income housing.\textsuperscript{76}

Although *Sisters of Providence* was an equal protection case, its reasoning should apply with equal force to decisions based on federal statutes. The *Griggs* holding made it clear that positive acts are not necessary to find a discriminatory effect. Since there are situations where there is not even the opportunity to request a change, the existence of a status quo situation having a discriminatory effect can be sufficient to constitute a prima facie violation of a statute.\textsuperscript{77}

Another reason the *Arlington Heights* court may have had in using the fourteenth amendment is that there is precedent in the area of equal protection for requiring compelling justification, and that was the standard the court wanted applied to Arlington Heights. The same court, one year earlier, used the prima facie approach to find a violation of the thirteenth amendment in a hous-

\textsuperscript{73} 508 F.2d at 1185.

\textsuperscript{74} Brief for Plaintiffs-Appellants at 32, Metropolitan Housing Development Corp. v. The Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).

\textsuperscript{75} 335 F. Supp. 396 (N.D. Ill. 1971).

\textsuperscript{76} Id. at 403.

\textsuperscript{77} Griggs v. Duke Power Co., 401 U.S. 424, (1971). The Court based its opinion on the consequences of the use of employment practices, not the initiation of the practices. Id. at 432.
The finding in *Clark v. Universal Builders, Inc.* was that a dual housing market existed in Chicago and this caused inflated market prices. This was sufficient to establish a prima facie case of racial discrimination. After giving the builder an opportunity to present legitimate reasons for his pricing policies, the court required the builder to forego those inflated prices. The Seventh Circuit, in speaking of violations of the Fair Housing Act by private entities, may feel it appropriate to apply the legitimate objective test rather than the more difficult to meet compelling justification test. When a governmental entity is involved, the state action requirement of the fourteenth amendment is fulfilled, and it is more appropriate to speak of such a violation in terms of equal protection and compelling justification.

The *Arlington Heights* court held that, absent compelling justification for the Village’s decision, the refusal to grant the requested zoning change is a violation of the equal protection clause. In support of its holding, the court cited *United Farmworkers of Florida Housing Project, Inc. v. City of Delray, Florida.* The City of Delray Beach refused to permit a proposed housing project to tie into the City’s existing water and sewer systems. Although the area was outside the city limits, the City was guided by its “Master Land Use Plan” in deciding whether to annex the land and whether to provide water and sewer services. The court found that many deviations from the annexation policies and significant exceptions to the Master Plan were granted to accommodate white citizens’ requests. Such conduct appears to be a classic case of government acting in an arbitrary manner, however the court did not base its decision on such grounds. The court instead used the same reasoning later adopted in *Arlington Heights.* The effect of the City’s refusal was racially discriminatory and the City had a “heavy burden of demonstrating that its refusal, and resulting discrimination were necessary to promote a compelling governmental interest.”

This case is distinguishable from *Arlington Heights* in that, in *Delray,* even though zoning policies are discussed, the court is primarily concerned with the granting of city services. Decisions by municipalities regarding the granting of services have in the past

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78. Circuit Judge Swygert wrote the opinions in both the *Arlington* and *Clark* cases.
79. 501 F.2d 324 (7th Cir. 1974).
80. *Id.* at 339.
81. 493 F.2d 799 (5th Cir. 1974).
82. *Id.* at 809.
83. The classic example is *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).
84. 493 F.2d at 809.
received closer judicial scrutiny than zoning decisions. Zoning restrictions limiting growth or discriminating against the poor must only be rationally related to some aspect of the police power. This broad power given to local governments in zoning was reiterated in Village of Belle Terre v. Boraas, where even the preservation of community values was found to be a valid zoning objective.

The Arlington Heights zoning decision was found to be racially discriminatory and race is a suspect classification. Distinctions based on a suspect classification are subject to strict scrutiny by courts. The strict scrutiny standard requires that the objective sought to be advanced by the classification must rise to the level of a compelling governmental interest. Compelling justification must therefore be necessary to uphold a zoning distinction based on race or to one that has an effect of racial discrimination.

85. In Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y., 436 F.2d 108 (2nd Cir. 1970), cert. denied, 401 U.S. 1010 (1971), a case with similar fact pattern, the original action was brought against zoning ordinances. The City quickly rescinded those ordinances, but the Mayor then simply refused to grant the sewer permits necessary to construct the subdivision. Although zoning was discussed, the refusal to grant city services was the basis for the court finding the City’s actions unconstitutional.

86. The landmark decision of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), held that if the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. Illinois law is in accord. For example, Morgan v. City of Chicago, 370 Ill. 347, 18 N.E.2d 872 (1938), held that courts will not substitute their judgment when it is fairly debatable whether a zoning ordinance is an unreasonable exercise of the police power. For a thorough discussion of the role of the courts in zoning, see Schnidman, The Courts Enter the Zoning Game, Will Local Government Win or Lose? 43 Geo. Wash. L. Rev. 590 (1975).

87. In discussing services the court, in United Farmworkers of Florida Housing Project v. The City of Delray Beach, Florida, 493 F.2d 799, 808 (1974), stated: “While a city may have no obligation . . . to provide services . . . once it begins to do so, it must do so in a racially nondiscriminatory manner.” Also see Brown v. Louisiana, 383 U.S. 131 (1966) (libraries); and City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956) (beach and swimming pool).

88. Housing in Lindsey v. Normet, 405 U.S. 56 (1971), and wealth in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), were found not to be suspect classifications. Therefore zoning restrictions discriminating against the poor must only be rationally related to some aspect of the police power. The use of exclusionary zoning to exclude the poor has been the subject of numerous articles. See, e.g., Rubinowicz, Exclusionary Zoning: A Wrong in Search of a Remedy, 6 U. Mich. L.J. 625 (1973), and Use of Zoning Laws to Prevent Poor People from Moving into Suburbia, 16 How. L.J. 351 (1971).

89. 416 U.S. 1 (1974). Another recent example of the zoning power is Construction Industry Ass'n of Sonoma v. The City of Petaluma, 522 F.2d 897 (9th Cir. 1975), where the court allowed local zoning authorities to restrict growth.


**Compelling Justification**

A requirement of compelling justification will seldom be satisfied. The justification advanced in *Delray* was the necessity for the City to remain faithful to its annexation policies and Master Plan. This was found hardly credible because the City made many exceptions to the plan in the brief time period the plan was in effect. The *Delray* court did recognize the importance of master plans in land use planning, suggesting that if the plan has been adhered to for a longer period of time, the court might have ruled differently.

The Arlington Heights master plan, the court found, had been followed fairly consistently since its adoption in 1959. The *Arlington Heights* court did not find the integrity of the plan compelling because there had been some deviations from it. Further, the rationale behind the buffer policy would not be violated in spirit by the type of dwellings planned for Lincoln Green.

Due to the growing importance of comprehensive plans for land use and the necessity for these plans to remain pragmatic, city planners should not strive for one hundred percent adherence solely to prepare a compelling justification defense. Whether even one hundred percent faithfulness would satisfy a court is problematical.

The other justification offered by Arlington Heights was that property values in the surrounding area might diminish as much as five to ten percent due to the construction of Lincoln Green. The reason advanced by the Village for this diminution, was that residents could no longer rely on the integrity of the Comprehensive Plan. The court not only rejected this justification, it might have inferred that the real reason for the feared diminution was racial. The same court, in *Clark*, found that a segregated housing market...
kept property values artificially high.\textsuperscript{88} Thus, it is understandable why the court found Arlington Heights was "exploiting the problem by allowing itself to become an almost one hundred percent white community."\textsuperscript{99}

The defendant in *Blackjack* also offered the prevention of devaluation of property values as a justification, as well as inadequate roads, traffic control and the prevention of overcrowded schools. That court was not satisfied that the achievement of any of these goals was advanced by the City's zoning ordinance.\textsuperscript{100}

The justification offered in *Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y.*,\textsuperscript{101} that the city sewer system was inadequate, was also held insufficient. The court found that the system had been grossly deficient for years, and that the City was responsible for allowing the deterioration. The City was then ordered to provide adequate sewerage facilities for the proposed development.\textsuperscript{102} If a city could demonstrate that a new project would strain a variety of city services, \textit{e.g.}, schools, roads, sewage, etc., and it did not have the present resources to solve the resulting problems without a major deterioration in its services, compelling justification might be found. But even in this situation the court might, as in *Kennedy*, order the city to grant its new residents the same services it had been granting its citizens.

An option that should be left open to a city is to give legitimate reasons why the site is unsuitable for the project. Justifications such as conflict with the Comprehensive Plan, insufficiency of city sewers and traffic problems should suffice. Conflicts with the ecology and aesthetic considerations could also be weighed. If the city can then demonstrate that there is available to plaintiff alternate property similar in price and location and that a project built on the alternate site would have the same effect on the segregation problem, then that should constitute sufficient justification.\textsuperscript{103} However, to courts

\begin{itemize}
\item[98.] Clark v. Universal Builders, Inc., 501 F.2d 324, 334 (7th Cir. 1974).
\item[99.] 517 F.2d at 414.
\item[100.] 508 F.2d at 1188.
\item[102.] 436 F.2d at 413.
\item[103.] Even more convincing would be the adoption of a comprehensive plan providing for that community's share of the region's housing needs. In such a situation, [t]o permit a developer to come in at a later date and demand, as a matter of right, that a piece of property not presently zoned to permit development of low or moderate cost housing be so zoned, is to undermine the entire premise of land use regulation.
\end{itemize}

strictly applying the traditional compelling justification standard used in the area of the fourteenth amendment, it would not be sufficient. If the decision rested on the Fair Housing Act and the thirteenth amendment, perhaps a court could be more pragmatic in its determination of justification.

CONCLUSION

The steadily expanding limits of the equal protection clause of the fourteenth amendment have now infringed on the formerly solid police power of local governments to determine land use. Such a development may be necessary to solve the serious problem of segregated housing existing in many metropolitan areas. For example, the court in Blackjack characterized the City's decision not to rezone as contributing to the process by which the St. Louis metropolitan area assumes the shape of a doughnut, with the Negroes in the hole and with mostly whites occupying the ring.\textsuperscript{104} It has been stated that the goal of our national housing policy is to replace these ghettos with truly integrated and balanced living patterns for persons of all races.\textsuperscript{105}

The immediate result of cases such as Arlington Heights would be to encourage builders to seek zoning variances in suburbs with a small racial minority population. As long as the builder can present evidence that a large percentage of the prospective residents consist of racial minorities and that the municipality has done, and will continue to do, nothing to encourage integration or discourage segregation, that municipality would be ill advised to refuse to rezone.

A municipality should be especially cooperative with a non-profit builder, such as M.H.D.C., utilizing funds from federal programs. Courts will tend to look more favorably upon granting judicial relief to aid developments planned by such builders than developments planned by private builders. A private builder must be considered primarily interested in profit and any resulting integration would be, at best, secondarily important. The actions of many non-profit builders are planned to have the ultimate effect of integration. This effect is necessary before a municipality's actions in halting a development can be found racially discriminatory. Also, these federal programs evidence the congressional policy to encourage low income integrated housing and this serves as a strong justification for finding violations of the Fair Housing Act.

The Arlington Heights decision may find constitutional justifica-

\textsuperscript{104} 508 F.2d at 1186.
\textsuperscript{105} Barrick Realty, Inc. v. City of Gary, Indiana, 491 F.2d 161, 164 (7th Cir. 1974).
tion in the area of equal protection, but such a basis may have more far-reaching significance than the court had foreseen. Although this decision purports to be limited to its facts, the essence of its rationale can be applied to areas other than housing. A firmer and tighter constitutional basis for such zoning decisions exists in the Fair Housing Act. The goals of this Act enunciate a national housing policy, which gives greater justification for using the effects analysis in zoning cases.

Furthermore, the compelling standard of the fourteenth amendment can be exchanged for more pragmatic considerations. If a less demanding standard was applied to the justification advanced by Arlington Heights, it would be a closer question of fact as to whether the availability of alternate sites, zoned in accordance with the Comprehensive Plan, would be sufficient justification.

Ascertaining effects through statistics is certainly preferable to guessing motives, but the effect must be very direct, probable and undesirable. Courts have used effects in such fields as voting, education, employment and housing. Manifestly, these are fields where there is a strong national policy and commitment to stop discrimination. The difficulty of overcoming the burden of justification once a discriminatory effect is found should make courts wary about extending this reasoning outside these areas.

It should also be clear that finding a discriminatory "ultimate effect" is not enough; there must be a "historical context" of racial discrimination. A zoning ordinance having a discriminatory effect will have a much more serious impact in a segregated community that has completely abdicated its responsibilities in relieving the segregation problem than in a community that in the past has provided racial minorities with reasonable access to affordable housing.

THOMAS W. CODY

106. The recent case of Warth v. Seldin, 95 S.Ct. 2197 (1975), indicates that in order to challenge the constitutionality of a zoning ordinance, plaintiff must first satisfy stringent standing requirements. The Court found that to challenge exclusionary zoning practices plaintiff must demonstrate a particularized personal interest. A present contractual basis in a housing project would satisfy that requirement.