Florida State University Law Review

Volume 6 | Issue 1 Article 12

Winter 1978

Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S. Ct. 555 (1977)

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Zoning—DISCRIMINATORY INTENT MUST BE PROVED BEFORE COURTS MAY REACH FOURTEENTH AMENDMENT EQUAL PROTECTION ISSUES—*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 97 S. Ct. 555 (1977).

The Village of Arlington Heights, a suburb located about twenty-six miles northwest of Chicago, Illinois, has had a comprehensive land use plan in effect since 1959.[1] The plan divides Arlington Heights into three basic areas: 1) a central, single-family residential area, 2) a "buffer-zone," and 3) a commercial and industrial area. Metropolitan Housing Development Corporation (hereinafter MHDC)[2] contracted with the Clerics of St. Viator, a Catholic religious order, to buy fifteen acres of land within the single-family residential area of the Village[3] where MHDC proposed to build a public housing development, to be called Lincoln Green, for low-to-moderate income families.[4] This development would be the only subsidized housing in the Village.[5] Because the majority of the eligible tenants for Lincoln Green were black and the Village's population was almost entirely white,[6] Lincoln Green would most likely raise the minority population of the Village over a thousand percent.[7]

MHDC, through the appropriate channels, applied to the Village for a zoning change for the fifteen acres from single-family to multi-family.[8] The Village refused to grant the change, basing its refusal on the grounds that it wanted to preserve the property values of the surrounding single family homes, and that it wanted to maintain

1. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd & remanded*, 97 S. Ct. 555 (1977).

2. "Metropolitan Housing Development Corporation is an Illinois non-profit corporation organized in 1968 for the purpose of developing low and moderate income housing in the Chicago metropolitan area." 517 F.2d at 410-11.

3. The price was $300,000 for a 99-year lease and sale agreement. *Id.* at 411.

4. Lincoln Green was to be a 1900-unit townhouse development. The townhouses would not differ significantly in appearance from the surrounding single-family dwellings. *Id.* at 411, 415.

5. *Id.* at 411.

6. The population of Arlington Heights in 1970 was 64,884 people, but only 27 residents were black. "According to statistics of plaintiffs' [MHDC's] 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 50,000 residents." *Id.* at 413-14 n.1.

7. *Id.* at 414.

8. MHDC alleged that the Village had arbitrarily granted zoning variances to commercial developers in violation of its own "buffer zone" policy. The court of appeals, however, accepted the Village's evidence that only four out of 60 zoning change applications had been granted in "clear violation of the 'buffer zone' policy . . . ." *Id.* at 412.

the integrity of its comprehensive plan.[9] The Village stated that these grounds for refusal were compelling reasons for not granting the zoning variance.[10]

MHDC and individual plaintiffs filed suit alleging that the refusal to rezone perpetuated racial segregation in the Village[11] and denied MHDC the right to use its property in a "reasonable manner" in violation of the fourteenth amendment,[12] the Civil Rights Act of 1866,[13] the Civil Rights Act of 1971,[14] and the Fair Housing Act of 1968.[15] The federal district court held that the Village's decision not to rezone did not have a racially discriminatory effect and that there were "good faith reasons" for the Village's decision.[16] The United States Court of Appeals for the Seventh Circuit reversed and held that since the Village had shown no compelling public interests, its refusal to grant the zoning change constituted a violation of the equal protection clause of the fourteenth amendment.[17]

The court of appeals discarded MHDC's contention that the Village was administering its zoning policy in a discriminatory manner.[18] The evidence showed that the Village was applying its buffer zone policy, though not with absolute consistency.[19] The court said that the Village's refusal to rezone was not discriminatory for equal protection purposes merely because the refusal affected more blacks

9. The Village's witness asserted that the property values of the surrounding single-family dwellings might decrease by as much as 5-10%. *Id.* at 415.

10. The circuit court held that the Village's decision not to rezone had racially discriminatory effects and could be upheld only upon a showing of a compelling public interest. *Id.*

11. *Id.* at 411.

12. U.S. CONST. amend. XIV, § 1, provides in relevant part: "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

13. 42 U.S.C. § 1981 (1970) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

14. 42 U.S.C. § 1983 (1970) provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

15. 42 U.S.C. § 3601 (1970) states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

16. 373 F. Supp. 208 (N.D. Ill. 1974).

17. 517 F.2d at 415.

18. *Id.* at 412.

19. *Id.*

than whites.[20] The Village's action was aimed at the low income housing project, not at a specific race, and so was insufficient to invoke the strict scrutiny standard of review.[21] But the court also said that the Village's refusal to rezone " 'must be assessed not only in its immediate objective but its historical context and ultimate effect.' "[22]

The Chicago metropolitan area, and especially the Village, had a history of segregated housing.[23] The court emphasized that the percentage of blacks in the Village between 1960 and 1970 decreased, while the percentage of blacks in the Chicago metropolitan area had increased by four percent during the same period.[24] The court focused on the fact that instead of helping to reverse this trend of segregation, the Village had been "exploiting the problem" by ignoring it.[25] Because of the Village's exploitation of its segregated character, the court of appeals applied the strict scrutiny standard of constitutional review and held that the Village's refusal to rezone had racially discriminatory effects and was a violation of fourteenth amendment equal protection rights.[26]

On January 11, 1977, the United States Supreme Court reversed the Seventh Circuit on the constitutional issues and remanded the case for further consideration of the statutory issues.[27] First, the Court considered the issue of standing, holding that the plaintiffs had standing to assert their respective rights.[28] Secondly, the Court held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[29] The Court listed "evidentiary sources" and "subjects of proper inquiry" for determining whether a racially discriminatory purpose exists in a particular case.[30] Thirdly, the Court found the evidence in

20. *Id.* at 413.

21. *Id.* The court stated: "Governmental action having a disproportionate impact on a class composed of an extremely high percentage of racial minorities might be classified as discriminatory in an equal protection sense. But that is not this case." *Id.*

22. *Id.*, *citing* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 112 (2d Cir. 1970).

23. 517 F.2d at 413-14.

24. *Id.* at 414.

25. *Id.* at 414-15.

26. *Id.* at 415.

27. 97 S. Ct. 555 (1977). The Court agreed 7-1 on standing and the legal criteria (parts I-III of the opinion), but Justices White, Marshall, and Brennan would have remanded on the constitutional issues as well. Justice White thought the bulk of the decision unnecessary.

28. *Id.* at 561-63.

29. *Id.* at 563.

30. *Id.* at 564-65. Indicators of racially discriminatory intent would be the actions of officials and official organizations prior to the refusal to rezone. If the officials voiced prejudices against the excluded race at official meetings, or if the official organizations had a

Arlington Heights insufficient to show a racially discriminatory intent and so applied only the rational basis standard of review. The Court implied that it would invoke the strict scrutiny standard of review only in cases where there was proof of a racially discriminatory purpose.[31] Applying the rational basis standard, the Court held that because MHDC had failed to prove a discriminatory intent on the part of the Village, the discriminatory effect of the Village's decision was inconsequential and did not constitute a violation of fourteenth amendment equal protection.[32] The Court did not discuss the statutory issue of whether the refusal to rezone violated the Fair Housing Act, 42 U.S.C. § 3601, but rather remanded that question for further consideration.

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history of passing discriminatory ordinances, proof of discriminatory intent could be found in records of meetings and of the decisionmaking organizations.

The Court pointed out that if the property at issue had always been zoned for multi-family use but was changed to single-family use when MHDC's plans to construct integrated low- and middle-income housing became known to the Village, it would not be difficult to prove discriminatory intent. But since the property at issue had always been zoned for single-family use, evidence of discriminatory intent was lacking. *Id.*

31. *Id.* at 563.

> [I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Id. (footnote omitted).

32. *Id.* at 566. The Court also stated that proof of a racially discriminatory purpose would not necessarily have invalidated the Village's refusal to rezone; such proof would merely have shifted to the Village the burden of proving that it would have refused to rezone even absent any discriminatory purpose. *Id.* at 566 n.21.

Justice White dissented, arguing that the case should have been remanded to the court of appeals for further consideration of the constitutional and statutory issues. Justice White felt that it was improper for the Court to reverse the judgment, after a reexamination of the evidence supporting the findings of fact below, on the basis of an intervening decision. The intervening decision was Washington v. Davis, 426 U.S. 229 (1976), which was decided subsequent to the court of appeals' decision finding a fourteenth amendment violation in *Arlington Heights*. Justice White found it particularly inappropriate for the Court to reexamine the evidence in the case in light of the legal standards announced in the instant case and in *Davis*. The proper ruling, suggested Justice White, would be to vacate the judgment below and remand the case in order to permit the court of appeals to reconsider its ruling in light of the intervening decision.

Justice White also felt that the Court should not have listed "evidentiary sources" or "subjects of proper inquiry" to be used in determining whether a racially discriminatory purpose or intent existed. Because the court of appeals accepted the district court's finding that the Village's decision was not motivated by a racially discriminatory purpose, White argued that it was unnecessary for the Court to discuss the standard for proving the racially discriminatory purpose required by *Davis* for a fourteenth amendment violation. 97 S. Ct. at 567.

I. STANDING

In *Baker v. Carr*,[33] the United States Supreme Court stated the gist of the question of standing: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions?"[34] Economic injuries have long been sufficient injuries upon which to base standing.[35] In *Sierra Club v. Morton*,[36] however, the Court enlarged the class of cognizable injuries to include aesthetic and environmental harm. In *Sierra Club*, although the plaintiffs did not allege a personal stake in the outcome sufficient to confer standing, the Court said: "We do not question that this type of [environmental] harm may amount to an 'injury in fact' sufficient to lay the basis for standing . . . . But the 'injury in fact' test requires that the party seeking review be himself among the injured."[37]

In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[38] another case involving environmental issues, the Court expanded further the class of persons having standing to sue. The *SCRAP* Court stated that if the plaintiff himself were injured, he would have standing; the fact that the plaintiff was one of many persons similarly injured would not preclude him from bringing suit.[39] But the Court did not eliminate the "injury in fact"

33. 369 U.S. 186 (1962). This case involved voters claiming a violation of their fourteenth amendment rights because the Tennessee legislature was malapportioned. The Court held that voters residing in counties which were unfavorably apportioned had standing to sue because they were voters who alleged facts showing disadvantage to themselves as individuals. *Id.* at 206.

34. *Id.* at 204. The question posed in *Baker* was used as a test for standing in cases involving economic and social well-being. *See* Linda R.S. v. Richard D., 410 U.S. 614 (1973); Data Processing Serv. v. Camp, 397 U.S. 150 (1970).

35. *See* Hardin v. Kentucky Util. Co., 390 U.S. 1, 7 (1967); Chicago v. Atchison, T. & S. Fe Ry., 357 U.S. 77, 83 (1958); F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).

36. 405 U.S. 727 (1972).

37. *Id.* at 734-35. The Sierra Club failed to establish standing because it did not allege that any of its members specifically were injured.

38. 412 U.S. 669 (1973).

39. *Id.* at 686-87. SCRAP was an association of five law students who sued to suspend the application of a railroad freight surcharge until the submission of an environmental impact statement in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(c). SCRAP alleged that the surcharge would have an adverse effect on recycling materials and thus significantly affect the environment. Each member of SCRAP alleged in part that the harm to the environment would harm him personally because he used the mountains and lakes for camping and fishing. The Court held that the members of SCRAP had standing because they alleged harm to themselves, even though all persons who utilize the natural environment would suffer the same harm.

requirement.[40]

Both *Sierra Club* and *SCRAP* involved Section 10 of the Federal Administrative Procedure Act (APA), which provides that any person suffering a legal wrong or adversely affected by an agency action is entitled to judicial review of that action.[41] Arguably, the standing requirements under the APA are less stringent than standing requirements in the traditional case or controversy. But the Supreme Court continues to cite *Sierra Club* and *SCRAP* in many cases not involving the APA.[42]

In *Schlesinger v. Reservists Committee to Stop the War,*[43] the "injury in fact" requirement was restated. In that case, the Reservists brought suit on behalf of all taxpayers and citizens of the United States who were injured by government officials' actions in violation of the incompatibility clause of the Constitution.[44] The Court held the Reservists had no standing to sue on behalf of taxpayers or citizens because they did not allege any special injury to themselves. The Court said: "Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions."[45]

Finally, in the landmark case of *Warth v. Seldin,*[46] the Court stated its criterion for standing in cases involving zoning. Eight individual plaintiffs and several organizations brought suit against the Town of Penfield and its officials. These plaintiffs claimed to represent " 'all taxpayers of the City of Rochester, all low and moderate income persons residing in the City of Rochester, all black and/or Puerto Rican/Spanish citizens residing in the City of Rochester and all persons employed but excluded from living in the Town of Penfield who are affected or may in the future be affected by the defendants' policies and practices . . . .' "[47] The plaintiffs claimed generally that a zoning ordinance of the Town of Penfield, "by its terms and as enforced by the defendant board members, effectively excluded persons of low and moderate income

40. *Id.* at 688-89. *See also* O'Shea v. Littleton, 414 U.S. 488 (1974).

41. 5 U.S.C. § 702 (1970).

42. *See, e.g.,* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Austin v. New Hampshire, 420 U.S. 656 (1975); United States v. Richardson, 418 U.S. 166 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); Roe v. Wade, 410 U.S. 113 (1973); Linda R.S. v. Richard D., 410 U.S. 614 (1973).

43. 418 U.S. 208 (1974).

44. Art. I, § 6, cl. 2 of the Constitution provides that "no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

45. 418 U.S. at 221.

46. 422 U.S. 490 (1975). *Warth* was a 5-4 decision, with Justices Douglas, Brennan, White, and Marshall dissenting.

47. *Id.* at 493-94 n.1.

from living in the town in contravention of the plaintiffs' First, Ninth, and Fourteenth Amendment rights . . . ."[48] Although the individual plaintiffs alleged that the zoning practices being enforced by the Town of Penfield against builders and developers had caused the lack of affordable housing within the town, none of the individuals had any present interest in living in Penfield or purchasing property there.

The *Warth* plaintiff organizations, Housing Council in the Monroe County Area, Inc., and Rochester Home Builders Association, Inc., alleged that the zoning policies of the Town of Penfield had prevented their members from building housing for low and moderate income persons in Penfield. None of the builder and developer members of these organizations had plans to build such housing in Penfield, however, and, with one exception,[49] none had ever been denied a zoning permit or variance.

The Second Circuit held that none of the plaintiffs had standing. Affirming the court of appeals' decision, the Supreme Court said: "We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention."[50]

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48. *Id.* at 493.

49. *Id.* One developer, Penfield Better Homes Corp., had been denied a zoning variance for construction of moderate income housing in Penfield in 1969, but when the complaint was filed in 1972, Penfield failed to allege that the proposed housing project remained viable. *Id.* at 516-17.

50. *Id.* at 508 (footnote omitted) (emphasis in original). The Court distinguished opposing leading cases from the situation in *Warth* on the grounds that in the other cases "the plaintiffs challenged zoning restrictions as applied to particular projects that would supply housing within their means, and of which they were intended residents," while the petitioners in *Warth* relied on "little more than the remote possibility . . . that their situation might have been better had respondents acted otherwise." *Warth* was cited as controlling in the 1976 case of Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), which—although not a zoning case—dealt with discrimination against indigent persons and with the Administrative Procedure Act. This case involved Revenue Ruling 69-545 of the Internal Revenue Service, which gave tax-exempt status to hospitals that made certain of their facilities open to indigent persons. Plaintiffs, a group of unincorporated associations, nonprofit corporations, and indigent persons, filed suit against the Secretary of the Treasury and the Commissioner of Internal Revenue alleging that the preferred tax status of these hospitals encouraged discrimination against the poor in hospital facilities. The Court held that the plaintiffs had no standing because the injuries they alleged—inaccessibility of hospitals to them—was not caused by the defendants, but by a third party, the hospital. The plaintiffs alleged that Revenue Ruling 69-545 encouraged discrimination against the poor because it allowed hospitals to obtain a tax-exempt status simply by providing emergency care to the poor. Such hospitals could deny regular medical care to indigent persons and still retain their tax-exempt status.

"In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Id.* at 38.

Neither the individual plaintiffs nor the plaintiff organizations in *Warth* fulfilled these standing requirements.

Arlington Heights also involved individual plaintiffs and plaintiff organizations. Citing *Warth* and *Baker* as controlling, the Court in *Arlington Heights* conferred standing on the plaintiff organization, MHDC, and an individual plaintiff, a black person eligible for low income housing in the Village. MHDC had standing to assert its own "right to be free of arbitrary or irrational zoning actions."[51] The individual plaintiff had standing to assert his right to be free of racial discrimination.[52] The Court left open the question of whether MHDC could have asserted the rights of prospective minority tenants to be free of racial discrimination because the one individual plaintiff had standing to assert those rights as his own.[53]

MHDC, unlike the plaintiff organizations in *Warth,* alleged specific injury to itself which could be remedied by a favorable determination. The plaintiff organizations in *Warth* had no specific plans for construction of low or middle income housing. They simply alleged that the Penfield zoning decisions denied them the opportunity to build such housing. MHDC had spent thousands of dollars on plans for a specific low and moderate income housing project, Lincoln Green, to be built in the Village. MHDC had contracted for the land upon which to build Lincoln Green, and was ready to begin construction as soon as rezoning could be obtained. The Village's refusal to rezone was an effective barrier to MHDC's construction of Lincoln Green, and would result in MHDC's loss of the money expended on planning. A zoning change would not guarantee that Lincoln Green would be built, since financing and federal project approvals were needed. However, a favorable decision (an injunction against the Village) would remove the absolute barrier created against Lincoln Green by the Village.[54] Unlike the plaintiff organizations in *Warth,* MHDC was granted standing. MHDC was not granted standing because it had been denied the opportunity to build, but because it had alleged a sufficient economic and noneconomic *injury* as a result of being denied the opportunity to build.[55]

It is important to note that MHDC was found to have standing for two independent reasons. First, MHDC had shown economic injury by reason of the funds expended in planning Lincoln Green.

51. 97 S. Ct. at 562.
52. *Id.* at 562-63.
53. *Id.* at 562.
54. *Id.* at 561.
55. *Id.* at 561-62.

Additionally, however, the Court ruled that MHDC had shown sufficient non-economic injury to establish standing.

> MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest.[56]

Thus, where a nonprofit corporation of this type pursues a specific project proposal, there apparently need not be a substantial outlay of funds to satisfy the economic injury test for standing. *Arlington Heights* suggests an alternative theory of non-economic injury—provided there is a specific project at stake.

The individual plaintiff in *Arlington Heights* was granted standing because he alleged a specific injury to himself which could be remedied by a favorable determination. The individual plaintiff, Mr. Ransom, was a black man who worked in the Village but lived twenty miles away. Mr. Ransom testified at trial that if Lincoln Green were built, he would be eligible to live in Lincoln Green and would want to do so. He alleged that because of the Village's exclusionary zoning practices he had been unable to obtain housing in the Village, and that a favorable decision would result in the probability of Lincoln Green being built and therefore his obtaining housing in the Village.[57] Mr. Ransom's allegations met the *Warth* requirement that plaintiffs challenging zoning restrictions challenge them "as applied to particular projects that would supply housing within their means, and of which they were intended residents."[58] Thus, Mr. Ransom was able to demonstrate that unless relief from the assertedly illegal actions of the Village was forthcoming, his immediate and personal interests would be harmed.[59]

A crucial factor in the *Arlington Heights* standing decision is that a favorable decision in the case would not have *guaranteed* that MHDC would build Lincoln Green or that the individual plaintiff, Mr. Ransom, would obtain housing there if it were built. A favorable decision and an injunction against the Village would merely remove the barrier to Lincoln Green created by the Village's refusal to re-

56. *Id.* at 562.

57. *Id.* at 563.

58. 422 U.S. at 507.

59. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976): "When a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."

zone. A favorable decision in *Warth* would also have removed the barrier to low and moderate income housing in Penfield, but would not have guaranteed that such housing would be built. Yet the *Arlington Heights* plaintiffs were granted standing, while the *Warth* plaintiffs were not. The distinction is that the *Arlington Heights* plaintiffs had a specific housing project at stake, while the *Warth* plaintiffs were alleging the general right to construct low and moderate income housing. Under the *Arlington Heights* rationale, the plaintiff must demonstrate a specific personal injury that is likely to be redressed by a favorable decision.[60]

II. "EVIDENTIARY SOURCES" AND "SUBJECTS OF PROPER INQUIRY"

After the Court resolved the standing issue it turned to the merits and stated the controlling principle:

> Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.[61]

The Court then listed various factors to be used when determining whether a discriminatory intent or purpose exists in any particular case.[62] These factors may best be presented as questions: Is there a pattern of discrimination caused by legislation which appears neutral on its face?[63] Were the laws written in such a way as to affect only one group in the population? Is there a series of events or legislative actions which were taken to effect discrimination? Does the law fall more heavily on one race than another? Is the law difficult to explain on nonracial grounds? If the answer to any of these questions is "yes," then under the principles enunciated in *Washington v. Davis*,[64] there may be evidence of a racially discriminatory intent or purpose.

Washington v. Davis involved a suit by black police officers against city officials for the use of a verbal ability test allegedly

60. 97 S. Ct. at 561.

61. *Id.* at 563.

62. *Id.* at 564, *citing* Gomillion v. Lightfoot, 364 U.S. 339 (1960); Lane v. Wilson, 307 U.S. 268 (1939); Ginn & Beal v. United States, 238 U.S. 347 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

63. 97 S. Ct. at 564, *citing* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Griffin v. County School Bd., 377 U.S. 218 (1964); Lane v. Wilson, 307 U.S. 268 (1939); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

64. 426 U.S. 229, 242 (1976).

"unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment . . . ."[65] The black officers alleged that the test was discriminatory against blacks because a higher proportion of blacks failed the test than did whites. The Supreme Court held that in the absence of intent to discriminate, the test would not be struck down. The Court noted, however, that a racially discriminatory purpose need not appear on the face of a law or statute,[66] but may be "inferred from the totality of the relevant facts . . . ."[67]

The Court in *Arlington Heights* said that the holding in *Washington v. Davis* "reaffirmed a principle well established in a variety of contexts," and cited cases holding that a discriminatory purpose must be proven.[68] The Court conceded that "contrary indications" could be drawn from some of its cases; however, the Court only mentioned these decisions in a footnote.[69] The most prominent of these cases is *Palmer v. Thompson*,[70] where the City of Jackson, Mississippi, when ordered by a court to integrate all public facilities, integrated all facilities but closed its municipal swimming pools to all citizens—black and white. Black citizens sued city officials alleging discriminatory motive and effect. The Court held that the closing of the swimming pools to all citizens was not discriminatory, regardless of the intent, because black and white citizens were affected equally. "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivation of the men who voted for it."[71]

The Court in *Washington v. Davis* distinguished *Palmer v. Thompson* on the ground that the *Palmer* decision did not involve "a statute or ordinance having neutral purposes but disproportionate racial consequences,"[72] like the test at issue in *Washington v. Davis*. The *Palmer* decision can be distinguished from *Arlington Heights* because the latter involved an ordinance "having neutral purposes but disproportionate racial consequences" as applied to

65. *Id.* at 234.
66. *Id.* at 241.
67. *Id.* at 242.
68. 97 S. Ct. at 563, *citing* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Wright v. Rockefeller, 376 U.S. 52 (1964); Akins v. Texas, 325 U.S. 398 (1945). *See also* City of Richmond v. United States, 422 U.S. 358 (1975).
69. 97 S. Ct. at 563 n.10, *citing* Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367 (1968). These cases hold that the Court will not strike otherwise valid legislation because of the underlying intent or motivation.
70. 403 U.S. 217 (1971).
71. *Id.* at 224.
72. 426 U.S. at 243.

MHDC and its plans for the Lincoln Green Development.[73] The intent behind the ordinance was neutral, but the ordinance affected more blacks than whites.

III. WASHINGTON V. DAVIS

The Supreme Court in *Washington v. Davis* admittedly reached a conclusion contrary to those of an impressive list of prior court of appeals decisions.[74] These lower court cases essentially held "that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications."[75] Some of these contrary cases dealt with various aspects of zoning.

The first of these cases, *Norwalk CORE v. Norwalk Redevelopment Agency*,[76] actually dealt with urban renewal. The minority plaintiffs were displaced by an urban renewal project and alleged that the defendants did not assure or attempt to assure relocation for Negro and Puerto Rican displacees to the same extent that they did for white displacees. The defendants replied that they had no intent to discriminate; that the relocation of more whites than Negroes or Puerto Ricans was purely the accidental result of a nondiscriminatory relocation plan. The court of appeals held that the discriminatory effect of the relocation was sufficient to allege denial of equal protection of the laws and to require the federal court to consider the claim on its merits.[77]

Another contrary case was *Kennedy Park Homes Association v. City of Lackawanna*.[78] In this case, after Kennedy had planned the construction of a proposed low income housing project, the Lackawanna City Council adopted a moratorium on new subdivisions and zoned certain acreage, including the proposed project's site, as open space and park area, despite a contrary recommendation by the

73. *See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568 (1977); Jefferson v. Hackney, 406 U.S. 535 (1972).

74. 426 U.S. at 244-45 n.12. "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 of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement." *Id.* at 244-45.

75. *Id.* at 244.

76. 395 F.2d 920 (2d Cir. 1968).

77. The Second Circuit responded: " 'Equal protection of the laws' means more than merely the absence of governmental action designed to discriminate . . . ." *Id.* at 931.

78. 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

City's planning expert. The City argued that the discriminatory effects of its actions were not intentional, but the court of appeals found that "racial motivation resulting in invidious discrimination guided the actions of the City."[79] But the court also stated: "Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify."[80] This result in *Kennedy Park Homes Association* was cited by the Seventh Circuit in *Gautreaux v. Romney*,[81] where the court noted: "Courts have held that alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools."[82]

Finally, the court in *Washington v. Davis* cited two Fifth Circuit cases which reaffirmed the trend in the courts of appeals to disregard discriminatory intent where a discriminatory effect results. First, in *Hawkins v. Town of Shaw*,[83] the Town had provided adequate public services—paved streets, effective drainage, sewage facilities, and good lighting—to the white sections of town but not to the black sections. The Town argued that this allocation of municipal facilities was not the result of a racially discriminatory intent. The court disagreed:

> In a civil rights suit alleging racial discrimination in contravention of the Fourteenth Amendment, actual intent or motive need not be directly proved, for:
>
> ' "equal protection of the laws" means more than merely the absence of governmental action designed to discriminate; . . . 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.' . . .
>
> Having determined that no compelling state interests can possibly justify the discriminatory *results* of Shaw's administration of municipal services, we conclude that a violation of equal protection has occurred.[84]

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79. *Id.* at 109.

80. *Id.* at 114.

81. 448 F.2d 731 (7th Cir. 1971).

82. *Id.* at 738. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 765 (1963), in which the Supreme Court stated: "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

83. 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (5th Cir. 1972).

84. *Id.* at 1291-92 (citations omitted).

In the second Fifth Circuit decision, *Crow v. Brown,*[85] the court stated:

> [I]t is abundantly clear that, in the absence of supervening necessity, any [government] action or inaction intended to perpetuate *or which in effect does perpetuate* the conditions just described [racial segregation] cannot stand.[86]

The Court in *Washington v. Davis* did not distinguish the contrary cases individually or otherwise, although it did acknowledge that there was "another side to the issue."[87] Instead the Court cited several of its own decisions which were in line with its holding.[88] The Court simply dismissed the contrary holdings by stating that it disagreed with the cases cited to the extent that any of those cases expressed the view that racially discriminatory purpose was not necessary to show an equal protection violation.[89] With one sentence, the Court in *Washington v. Davis* overruled decisions of courts of appeals representing a large portion of the United States.

IV. *Washington v. Davis* As Applied to *Arlington Heights*

In *Washington v. Davis* the Supreme Court stated:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497 (1954). *But our cases have not embraced the proposition that a law or other official act,* without regard to whether it reflects a racially discriminatory purpose, *is unconstitutional solely because it has a racially disproportionate impact.*[90]

However, the *Washington* Court also noted that a racially discriminatory purpose need not appear on the face of a law or statute,

85. 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972).

86. *Id.* at 392 (emphasis added).

87. 426 U.S. at 244-45.

88. *Id.* at 240-41, *citing* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Alexander v. Louisiana, 405 U.S. 625 (1972); James v. Valtierra, 402 U.S. 137 (1971); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Hunter v. Erickson, 393 U.S. 395 (1969); Wright v. Rockefeller, 396 U.S. 52 (1964); Cassell v. Texas, 339 U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1947); Akins v. Texas, 325 U.S. 398 (1945).

89. 426 U.S. at 245.

90. *Id.* at 239 (emphasis added).

but may be "inferred from the totality of the relevant facts . . . ."[91] The relevant facts in *Arlington Heights,* as found by the Seventh Circuit Court of Appeals and adopted by the Supreme Court, were: that Lincoln Green would have been the only low and moderate income housing in the Village, "despite a great demand for such housing in that area";[92] Lincoln Green would have consisted of townhouses and sixty percent open green space (it would not have detracted from the aesthetic appearance of the surrounding single family dwellings); MHDC made various changes in its Lincoln Green proposal to try to satisfy the Village Plan Commission; Lincoln Green would make a net contribution to the Village's taxes;[93] no other economically feasible site was available to MHDC; Lincoln Green would have increased the Village's minority population by over one thousand percent; and the Village's refusal to rezone perpetuated the Village's segregated character by preventing construction of low and middle income housing in the Village.[94] The totality of these facts raises a strong inference of racially discriminatory purpose.

The *Arlington Heights* Court found that the impact of the Village's decision not to rezone did "arguably bear more heavily on racial minorities."[95] But the Court dismissed this observation by focusing on zoning facts other than those listed above. The Court emphasized that the proposed site for Lincoln Green had always been zoned for single-family dwellings, and that neighboring property owners had relied on the maintenance of single-family zoning in the vicinity. The Court also found that the Village's refusal to rezone was a legitimate method of maintaining the Village's character through its affirmative zoning practices and policies. Based on these facts, the Court concluded that MHDC and the individual plaintiffs had failed to prove that discriminatory purpose was a motivating factor in the Village's refusal to rezone.[96]

V. Fair Housing Act Claims

The Supreme Court remanded MHDC's claims under the Fair Housing Act of 1968[97] because the court of appeals, "proceeding in

91. *Id.* at 242.
92. 517 F.2d at 411.
93. *Id.*
94. *Id.* at 414.
95. 97 S. Ct. at 565.
96. *Id.* at 565-66.
97. 42 U.S.C. §§ 3601-3631 (1970). MHDC alleged the Village violated §§ 3604(a) and 3617. 97 S. Ct. at 566.

a somewhat unorthodox fashion," did not address itself to these claims.[98] Upon remand, the Seventh Circuit held that under some circumstances a showing of discriminatory effect is sufficient to show a Fair Housing Act violation without a showing of discriminatory intent.[99] The court of appeals further held that if there were no other land available to MHDC which was "properly zoned and suitable" for the construction of Lincoln Green, the Village, by refusing to rezone, was guilty of a Fair Housing Act violation.[100] The court of appeals remanded the case to the district court for a factual determination of the availability of such land and instructed the district court to place the burden of proving the existence of an alternative site on the Village.[101]

VI. CONCLUSION

The effect of the Supreme Court's decision in *Arlington Heights* is that in cases of alleged zoning discrimination brought in federal courts, discriminatory intent must be proved before courts can reach fourteenth amendment equal protection issues. This decision affects two different and opposing groups. The first group is made up of planners, city and county officials, and residents of established communities with anti-growth attitudes. The second group consists of minority and low to middle income persons.

In the first group, it appears that governmental bodies will be able to maintain the integrity of their zoning plans and residents will be able to preserve their property values and the aesthetics of their communities. Communities like the Village which traditionally have been exclusively white, upper-class communities may remain

98. *Id.*

99. 558 F.2d 1283 (7th Cir. 1977). The court listed four factors to be used to determine under what circumstances conduct that produces a discriminatory impact will violate the Fair Housing Act. Those factors are:

(1) how strong is the plaintiff's showing of discriminatory effect;

(2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis;*

(3) what is the defendant's interest in taking the action complained of; and

(4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Id. at 1290.

100. *Id.* at 1294.

101. *Id.* at 1295. In a concurring opinion, Chief Judge Fairchild stated that if no other suitable site was available to MHDC, the Village's refusal to rezone was a violation of the Fair Housing Act. Chief Judge Fairchild also asserted, however, that the burden of proving the existence or non-existence of an alternative site should be on the plaintiff, MHDC, rather than on the Village.

so. By refusing to change preexisting zoning plans, communities, cities, and other governmental entities may promote their "unintentional" exclusionary natures. Theoretically, any community in the United States may thus exclude any person or group of persons so long as no intent to discriminate is proved.

The advantages of the first group work to the detriment of the second group. Low and middle income persons will be unable to obtain housing in exclusive neighborhoods because of preexisting zoning laws and comprehensive plans. Minority persons will continue to be excluded from all or predominantly white neighborhoods because the neighborhoods have become white "unintentionally." Developers who so desire will be unable to provide housing for low income and minority tenants for the same reasons.

There is a need for controlling the growth of cities through managing and planning; but the controlled growth of cities should not occur at the expense of low income and minority persons. A balance must be struck between managing the growth and providing adequate housing in a nondiscriminatory manner. The Court failed to reach a proper balance in *Arlington Heights.* The result of this decision is that under constitutional law, communities may discriminate against minority and low-income persons so long as they discriminate subtly.

It is evident after the Supreme Court's decision in *Arlington Heights* that plaintiffs must turn to other theories and other forums for solutions to their housing problems. The *Arlington Heights* plaintiffs may still redeem their rights on Fair Housing Act grounds, but similar plaintiffs perhaps would be better situated to choose state tribunals for prosecution of the same or similar claims. The New Jersey Supreme Court has placed on municipalities the affirmative duty to provide nondiscriminatory low-cost housing.[102] The

102. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 336 A.2d 713 (N.J.), *appeal dismissed,* 423 U.S. 808 (1975).

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.

Id. at 727-28.

Florida Local Government Comprehensive Planning Act of 1975 calls for "[t]he provision of adequate sites for future housing, including housing for low- and moderate-income families . . . ."[103] Because state courts and legislative bodies are more closely in contact with the problems of urban housing than are the federal courts, they might afford the best and most equitable solutions to *Arlington Heights* problems. Ideally, the Fair Housing Act and state land planning innovations should help plaintiffs such as those in *Arlington Heights* to obtain the national goal of "fair housing throughout the United States."[104]

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103. FLA. STAT. § 163.3177(f)(4) (1977).
104. 42 U.S.C. § 3601 (1970).