Winter 1975


Sally Mengo
A New Discriminatory Effect in Zoning

In 1926 the Supreme Court held that the regulation of land use in a community was a proper exercise of a state's police power. Since that time the presumption that a comprehensive zoning plan is constitutional has been firmly entrenched in American jurisprudence. The burden of overcoming this presumption falls upon the litigant asserting the regulation's invalidity. In view of the courts' reluctance to overturn a regulation that serves to implement the reasonable objectives of a city's comprehensive zoning plan, an almost insurmountable obstacle is placed in the path of a plaintiff trying to invalidate such an ordinance.

Plaintiffs have been able to overcome this presumption of validity, however, by alleging and proving that racial discrimination has occurred under such a regulation, in violation of the Equal Protection Clause of the fourteenth amendment. Traditionally an equal protection challenge has been sustained upon one of three grounds. First, the regulation might discriminate on its face against a racial class. Second, the regulation might appear valid or neutral on its face, but its enactment was a direct result of discriminatory motives. Finally, the regulation might be valid on its face and without a discriminatory motive; but its application has been decidedly discriminatory.

4. Euclid involved a cumulative-type zoning plan. 272 U.S. at 379-84. Even though such a plan completely excluded uses from certain zones in a gridiron fashion, the court held the ordinance per se a valid exercise of the municipality's police power, leaving open a case-by-case approach of applying the ordinance to individual parcels. Id. at 397.
5. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (Court justified a zoning ordinance which limited the occupancy of single-family residential dwellings to no more than two unrelated persons by saying that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project . . . ."
Until recently, however, none of these traditional bases have successfully sustained an equal protection challenge where the regulation is valid on its face, is not the product of racial motivation, was applied consistently, but had a disparate effect upon racial minority members of the affected class.\(^9\) The case of Metropolitan Housing Development Corp. v. Village of Arlington Heights\(^{10}\) marks a decided departure from the standard result in a mere disparity case. In Metropolitan, the Seventh Circuit Court of Appeals held that a mere disparity case may yield a discriminatory result in violation of the Equal Protection Clause where the application of a municipality's zoning ordinance ultimately has a discriminatory effect by perpetuating a racially segregated housing pattern.

The significance of the Metropolitan holding is two-fold. First it outlines the aggregate of facts necessary to prove a racially discriminatory effect in cases where a municipality's adherence to its zoning ordinance prevents the construction of a low and moderate-income housing project, providing a clear and stringent standard for evaluating the impact of such facts.\(^{11}\) Second, and more notable, the court imposes an affirmative duty upon such a municipality to rezone areas for the construction of low-income housing when a failure to do so would perpetuate a de facto segregated housing pattern.\(^{12}\) This affirmative duty apparently attaches even if a refusal to rezone is consistent with a community's comprehensive plan.\(^{13}\)

---

\(^9\) See English v. Town of Huntington, 448 F.2d 319 (2d Cir. 1971). Ordinarily courts evaluate the validity of legislation in terms of whether the legislation—including zoning ordinances—bears a rational relation to a valid state purpose. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). More recently, however, the Supreme Court has confronted equal protection challenges based on racial classifications, in a much different light. The Court has also proceeded in a different fashion when it deems that a “fundamental right” has been violated by the challenged legislation. In such cases, when race or other “suspect” classifications have been created or “fundamental” rights have been violated, the Supreme Court employs a “rigid scrutiny” test, and a state will have to demonstrate a “compelling” state interest in order to overcome such an equal protection challenge. See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967) (race as a suspect class); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667-70 (1966) (voting as a “fundamental” right); McLaughlin v. Florida, 379 U.S. 184, 192-93 (1964) (race). Wealth, per se, is not a suspect class. See English v. Town of Huntington, 448 F.2d 319 (2d Cir. 1971). See also text accompanying notes 83-89 infra.

Further, the plaintiff must show that the ordinance discriminates against him, since housing itself is not a fundamental right which would be subject to a rigid scrutiny standard of review. Lindsey v. Normet, 405 U.S. 56, 74 (1972); Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1068-69 (2d Cir. 1974), cert. denied, 421 U.S. 948 (1975); Note, Low Income Housing and the Equal Protection Clause, 56 CORNELL L. REV. 343 (1971).

\(^{10}\) 517 F.2d 409 (7th Cir. 1975), cert. granted, 44 U.S.L.W. 3358 (Dec. 16, 1975).

\(^{11}\) Id. at 413-14.

\(^{12}\) Id. at 414.

\(^{13}\) Id.
Discriminatory Effect in Zoning

FACTS AND FINDINGS OF THE DISTRICT COURT

The controversy between the plaintiffs, Metropolitan Housing and individuals seeking to represent low and moderate-income minority individuals,14 and the defendant, the Village of Arlington Heights, arose when the Village's Board of Trustees refused the plaintiff corporation's request to rezone property from R-3 single family residential to R-5 multi-family residential uses.15 This refusal precluded the construction of a low and moderate-income townhouse complex which was to be financed by the federal government.16 The Board's refusal was apparently based upon what it viewed as a proper application of its comprehensive zoning plan. Under the plan, which had been in use since 1959, a multi-family development could be built only as a "buffer" between single-family uses and higher intensity uses.17 The parcel upon which Metropolitan Housing proposed to build was not such a buffer, since it was totally surrounded by single-family residences.18

Alleging that the trustees' failure to grant the request for rezoning violated the plaintiffs' statutory and constitutional rights,19 suit was filed in the United States District Court. Plaintiffs sought both a declaration that the zoning ordinance was invalid as applied,20 and an injunction restraining the Village from

---

14. The district court found that the individual plaintiffs seeking to represent other minority members similarly situated did not represent a proper class and therefore had no standing to challenge the Village's action. Metro. Housing Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 209-10 (N.D. Ill. 1974). It did find, however, that the presence of an intervening plaintiff of a minority group, along with that of the corporate plaintiff, was sufficient "to raise a case or controversy concerning the validity of the defendants' acts." Id. at 210. The court of appeals did not consider this issue.

For the latest ruling by the Supreme Court on the issue of standing to sue in exclusionary zoning cases see Warth v. Seldin, 422 U.S. 490 (1975).

15. Metropolitan Housing held a ninety-nine year lease with an option to purchase the property from the Clerics of St. Viator. The condition precedent to exercising the option was a rezoning of the subject property to permit construction of the proposed low-income housing project. 517 F.2d at 411.

16. Metropolitan was to obtain its financing pursuant to section 236 of the National Housing and Urban Development Act of 1968, 12 U.S.C. § 1715z-1 (1968). 517 F.2d at 411. The district court found, however, that since all funds available under this statute had been sequestered, the court could not grant present relief to the plaintiffs even if the action had been decided in their favor because the plaintiffs lacked the present capacity to carry out their plans. 373 F. Supp. at 211. On appeal, however, the Seventh Circuit did not consider this issue.

17. 517 F.2d at 411.

18. Id. at 412.


20. Count I of the complaint charged the defendants with perpetuating racial segregation through the use of their zoning laws in violation
interfering with the construction of the proposed development.\textsuperscript{21} Specifically, the plaintiffs alleged that the Village's refusal to rezone the subject property had a racially discriminatory effect in violation of the Equal Protection Clause of the fourteenth amendment. It was argued that the failure to rezone precluded racial minority groups from obtaining housing in Arlington Heights by and through a perpetuation of the pre-existing segregated character of the area.\textsuperscript{22}

In rejecting the plaintiffs' allegation that the trustees' action resulted in racial discrimination, the district court appears to have dismissed as immaterial to the cause of action\textsuperscript{23} those facts proffered which evidenced a segregated housing pattern in the Village and its vicinity.\textsuperscript{24} This is perhaps best explained by the court's reluctance to extend fourteenth amendment protection to what it termed "area-wide integration."\textsuperscript{25} Although the court noted the lack of low-income housing in the Arlington Heights region, it declined to recognize a distinct class of minority members, concluding that the Village's action had the same impact upon the entire group of prospective tenants.\textsuperscript{26} Implying that the class was of an economic rather than of a racial composition, the court concluded that the class had suffered no violation of equal protection since disparate results alone or discrimination solely by wealth have not been deemed enough to overturn an otherwise valid ordinance.\textsuperscript{27} The court further concluded that the class had no "constitutional right to low-rental housing."\textsuperscript{28} 


\textsuperscript{21} 517 F.2d at 411.
\textsuperscript{22} 373 F. Supp. at 209.
\textsuperscript{23} The court found that there were "many reasons why members of minority groups would not necessarily move into the defendant village, besides alleged discriminatory violations." Id. at 210.
\textsuperscript{24} See notes 54-61 infra.
\textsuperscript{25} 373 F. Supp. at 209. This would also explain the lower court's rejection of the case law presented by plaintiffs.
\textsuperscript{26} Id. at 210. Although the court cites no support for this conclusion, it would appear to be following James v. Valtierra, 402 U.S. 137 (1971). See text accompanying notes 33-43 infra.
\textsuperscript{27} See English v. Town of Huntington, 448 F.2d 319 (2d Cir. 1971). See also note 9 supra.
\textsuperscript{28} 373 F. Supp. at 210-11. Again there is an absence of authority cited in support of this conclusion, but the court would seem to have applied the "minimal scrutiny" test applicable in equal protection cases when the classification in question is not defined as suspect. See James v. Valtierra, 402 U.S. 137 (1971). Also, the right to low-income housing is not viewed as a fundamental right. See Lindsey v. Normet, 405 U.S. 56 (1972).

The minimal scrutiny test requires only that the classification bears a rational relationship to a legitimate legislative purpose, and the court determined the Village's action to do just that: [5] The weight of the evidence proves that the defendants were motivated with respect to the property in question by a legitimate desire
The question of whether the defendants could be required to rezone property for multi-family use under these circumstances was answered in the negative and the requested relief was denied.20

Again contending that the operation of the ordinance perpetuated segregation and thereby infringed upon their equal protection rights, the plaintiffs appealed to the Seventh Circuit Court of Appeals, charging that the district court was in error in deciding that the Village's action was not discriminatory. The appellate court agreed and held that the municipality's action had produced a racially discriminatory effect in violation of the Equal Protection Clause.30

THE OPINION OF THE SEVENTH CIRCUIT

In considering the plaintiffs' contentions, the court first held that the Village's zoning policy had not been administered in a discriminatory manner,31 and then settled the issue of whether proof of racial motivation was required to establish discrimination by concluding that it was unnecessary.32 After dispensing with these traditional issues, the court proceeded to evaluate the Village's failure to grant the plaintiffs' request in terms of whether the action nevertheless produced a discriminatory effect.

The court began its inquiry by determining whether a discriminatory effect could be found based solely upon the fact that
forty percent of the prospective tenants in the housing project were to be Black. Even though the court noted statistics which showed that Blacks were over-represented in the low and moderate-income class eligible for tenancy in Metropolitan Housing's project, it declared that this disparity alone did not make the Village's action, which affected the entire group of prospective tenants, racially discriminatory. This conclusion relied upon *English v. Town of Huntington* and *James v. Valtierra*. In *Valtierra* the United States Supreme Court found that a state constitutional provision providing for voter approval of state developed low-income housing did not deny minorities equal protection. Because the referendum in *Valtierra* applied to all low-income housing projects and not only to those which would be occupied by minority groups, the Court stated that even though a portion of those within the group affected were members of a racial minority, this did not establish proof of racial discrimination.

In *Huntington*, the Second Circuit upheld a municipality's enforcement of building code and zoning laws which would operate to displace a significant number of Blacks and Puerto Ricans. In spite of this effect, the court held that the ordinances were valid under the fourteenth amendment since they were enforceable against all members of the community.

**The Possibility of a Dangerous Precedent**

*Metropolitan* could have been distinguished from *Valtierra* and *Huntington* on the facts. The Seventh Circuit's decision

---

33. 517 F.2d at 413.
34. 448 F.2d 319 (2d Cir. 1971).
36. Id.
37. Id. at 141.
38. 448 F.2d at 324.
39. Id. The dissent in *Huntington* on the other hand apparently would have found a discriminatory effect by using the same technique as later applied in *Metropolitan*: viewing the town's action in terms of its historical context and ultimate effect, and finding a "long standing policy of passivity resulting in housing discrimination against minority groups. . ." Id. at 326 (Oaks, C.J., dissenting).
40. The issue in *Valtierra* revolved around the democratic right of citizens to participate in decisions of public policy through the vehicle of a referendum, 402 U.S. 137, 141-43 (1971). It could, therefore, have been distinguished by recognizing, as did the district court in *Sisters of Providence*, that the voting rights involved . . . inject quite a different constitutional ingredient, one not present in pure zoning cases, and courts are quite understandably more willing to uphold referendum procedures rather than second guess or interfere with the fundamental sufferage right.

to follow these cases suggests the adoption of dicta in Valtierra which recognized the dangers implicit in always categorizing a legal procedure which burdens a group composed of some minorities as a denial of equal protection. By an application of this reasoning in Metropolitan, the court implied that the invalidation of a zoning ordinance, which furthers a municipality's legitimate interest, on the sole basis that the group affected includes a significant proportion of minority members, would serve to subject all zoning regulations to a judicial review under a rigid scrutiny standard when faced with an equal protection challenge. The court therefore held that "racial disparity alone as it relates to the housing project under consideration does not amount to racial discrimination."

The Historical Context—Ultimate Effect Test

The court of appeals did not resolve the overall controversy by viewing the effect of the Village's action solely in terms of its immediate disparate impact alone. Instead, it noted the existence of facts which disclosed a continuing de facto segregated housing pattern within the immediate and surrounding area.

The enforcement of the building and zoning regulations was in conjunction with an urban renewal project and that the town had pledged its facilities to help relocate those displaced by the program, 448 F.2d 319 at 324, none of which occurred in Metropolitan.

1. 402 U.S. at 142.
2. 517 F.2d at 413; Comment, The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge, 81 Yale L.J. 61, 73 (1971).
3. 517 F.2d at 413 (emphasis added).
4. Had the court ended its inquiry here, Valtierra and Huntington would have required that no discriminatory effect be found. See notes 35-53 and accompanying text supra. But see Sisters of Providence v. City of Evanston, 335 F. Supp. 396, 403 (N.D. Ill. 1971).
5. Notes 54-61 infra. Similar facts were presented in United States v. City of Black Jack, 508 F.2d 1179, 1182-83, 1186 (8th Cir. 1974), and Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied sub nom. City of Lackawanna v. Kennedy Park Homes Ass'n, 401 U.S. 1010 (1971), cited by the court in support of their position. Although the cause of action in Black Jack was brought under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq., and was based on the adoption by the City of a zoning ordinance which prohibited the construction of any new multiple-family dwellings, thus precluding plaintiffs from constructing a low and moderate-income housing project on property previously zoned for such a use, the remaining facts and the impact of the ordinance upon low-income minority groups eligible for the project are relatively the same as in Metropolitan.

In Kennedy Park, one of the first cases to deal with the issue of zoning and equal protection in terms of the "historical context-ultimate effect test," the defendant city rezoned the property, which the plaintiffs had selected for the construction of a low-income development, to a park and recreational area and declared a moratorium on new subdivisions. Although the City rescinded both ordinances, it refused to issue a sewer permit to enable the project to tie into the city sewer system. 436 F.2d at 111.

Although this case also involved the allegation and proof that the City's action stemmed from discriminatory motives, id. at 110-11,
In so doing, the court appears to be saying that when such facts are presented, a minority plaintiff's opportunity for equal access to housing in a community may not be foreclosed by a mere showing that on its face an ordinance has no measurably greater effect on minorities than on Whites. The true character of the ordinance's impact in terms of its historical context and ultimate effect must be determined first. By taking this approach, the court followed a pattern recently set by other courts which had reviewed similar zoning issues within the context of an equal protection challenge. It did so by extending its analysis beyond an inquiry of the racial composition of the affected class to include a consideration of the Village's action in terms of its historical context and its ultimate effect.

The historical context—ultimate effect test represents the latest judicial yardstick for measuring whether governmental action has produced a racially discriminatory effect in violation of the fourteenth amendment. It was approved by the Supreme Court in *Reitman v. Mulkey*, where the test was employed to invalidate a state constitutional amendment. Subsequently, it has been used to invalidate a variety of legislative actions taken at various levels of state government.

The court's decision and application of the "historical context—ultimate effect test" reveals that the same result would have been reached had the case been decided strictly on the basis of whether the City's action produced a racially discriminatory effect in violation of the Equal Protection Clause:

> 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.

*Id. at 114.*

46. Notes 54-61 infra.

47. 517 F.2d at 413-15.


49. 387 U.S. 369, 373, 378-79 (1967) (determining the constitutionality under the Equal Protection Clause of the fourteenth amendment to the United States Constitution of a state constitutional provision allowing private property owners to refuse to sell or rent to racial minorities).

50. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) (action brought under Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq., charging city with discrimination in adopting a zoning ordinance which prohibited construction of multi-family dwellings); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (refusal by city to permit low-income housing project to tie into city's sewer and water system); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied sub nom. City of Lackawanna v. Kennedy Park Homes Ass'n, 401 U.S. 1010 (1971) (rezoning of plaintiff's property, moratorium on new subdivisions and denial of permission for low-income project to tie into city's sewer); Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974) (rejection of request for rezoning to permit construction of low-
Discriminatory Effect in Zoning

The historical context—ultimate effect test consists of two elements, as its name reflects. In cases where it has been applied, the object of analysis has been to discover whether the subject action resulted in perpetuating segregation. To make this determination the court first views the ordinance within its historical context, focusing on statistical data which reveals a significant number of minorities within the group affected, a history of segregated housing within the immediate and surrounding areas, and presently existing segregated housing. If a pattern of racial segregation emerges after viewing these facts, the ultimate effect portion of the test is then applied to ascertain what impact the ordinance will have upon the segregated areas over a period of time.

In applying the test in Metropolitan the Seventh Circuit first analyzed the racial composition of the Arlington Heights area. In reviewing the statistical data presented, the court noted a history of residential segregation within the Chicago metropolitan area, the rapid growth of the municipality over a twenty year period, the segregated character of the Village itself, and the income housing); Sisters of Providence v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971) (city's refusal to rezone property for low-income housing project); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972) (denial of building permit to construct low-income housing).

51. See cases cited at note 48 supra.
52. See cases cited at note 50 supra; Note, Low-Income Housing and the Equal Protection Clause, 56 CORNELL L. REV. 343, 354-57 (1971). See generally the Metropolitan appellate court decision, 517 F.2d 409 (7th Cir. 1975).
53. 517 F.2d at 413-14 (by implication); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 113-14 (2d Cir. 1970) (by implication).
54. 517 F.2d at 413. The Seventh Circuit recently took judicial notice of Chicago's residential segregation in Clark v. Universal Builders, Inc., 501 F.2d 324, 334-35 (7th Cir. 1974), cert. denied, 419 U.S. 1070 (1974). It is unclear whether by considering this fact in Metropolitan the court finds it essential for a village's action to perpetuate both segregation within and without the village before the municipality's action will establish a racially discriminatory effect. See text accompanying notes 69-77 infra.

Other cases, however, that have considered zoning issues in this context, have confined themselves to an investigation of the immediate area of the city in question. E.g., Sisters of Providence v. City of Evanston, 335 F. Supp. 396, 404 (N.D. Ill. 1971).
55. In 1970 Arlington Heights' population was 64,884, more than twice its 1960 population of 27,878, which in turn was more than seven times its population of 8,768 in 1950. On the other hand, the Black population of the municipality was one in 1850, four in 1960, and twenty-seven in 1970. Stipulation of Uncontested Facts, #21, Metro. Housing Dev. Corp. v. Village of Arlington Heights, 72 C 1453 (N.D. Ill. 1974).
56. Id. With only twenty-seven Blacks out of a population of 64,884, as of the 1970 census, the court safely concluded that the Village was almost 100% White. 517 F.2d at 413-14.

It is uncertain at what percent of minority representation within a community the courts would no longer find a segregated housing pattern. It is clear, however, that even if Blacks are significantly represented in the municipality's population, a town's action can still be deemed racially
shift in employment opportunities from the City of Chicago to the suburbs. From these statistics the court concluded that a pattern of segregated housing existed in and around Arlington Heights.

The court next turned to a consideration of the ultimate effect of these facts in terms of the Village's refusal to rezone the plaintiff's property. The court considered data which it found established the total lack of, and need for, low rent property within the municipality, the absence of alternative sites within the Village for a “236” housing project, the percentage of minorities eligible to take advantage of plaintiff's housing project, and the Village's failure to have “sponsored [or] participated in any low-income housing developments” or to have made preparations to do so in the future. In view of these special findings, the court determined the ultimate effect of the Village's refusal to be “in all probability, that no section 236 housing [would] be built in Arlington Heights,” and declared that the refusal of the municipality to grant plaintiff's request for rezoning had the effect of perpetuating residential segregation in both the Chicago metropolitan area and in Arlington Heights.

discriminatory if it effectively confines them to one district within the community. E.g., Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied sub nom. City of Lackawanna v. Kennedy Park Homes Ass'n, 401 U.S. 1010 (1971).

While the City of Chicago lost 230,000 jobs; the number of jobs in the four-township Arlington Heights area rose from 100,000 to 200,000 . . . . In 1970 only 137 of the 13,000 people who worked in Arlington Heights were black. Part of the explanation for this is that many black workers have been unable to find housing they can afford in Arlington Heights. . . . One of the main problems Arlington Heights' employers faced in hiring minorities was the lack of adequate housing within a reasonable distance of their plants. 517 F.2d at 414, n.2.

It is unclear how much weight this fact carried in terms of the court's conclusion. Judge Swygert, however, did indicate that the impact of the absence of minority representation in Arlington Heights' population over a ten-year span, would be “fully appreciated only in the context of the shift in employment opportunities during that same period.” Id.

“There is not a single unit of subsidized housing in Arlington Heights.” Brief for Appellant at 18. Defendants themselves had “recommended development of 150 to 250 units of moderate income housing and 50 units of low-income housing in Arlington Heights . . . .” Id. at 17.

Plaintiff's trial Exhibit no. 56 suggests that of the fourteen alternative sites available, experts rejected two because of poor access to the property, several because of expense, e.g., $50,000 per acre, three because of poor topography or a flood problem, two because they were sold, and one because of its isolated location. Plaintiff's Exhibit no. 56, Metro. Housing Dev. Corp. v. Village of Arlington Heights, 72 C 1453 (N.D. Ill. 1974).

The court's emphasis upon the unavailability of an alternative site for the project suggests that had one indeed been available, the scales might have tipped in favor of the defendant. 517 F.2d at 414.

Statistics revealed that forty percent of the prospective tenants were Blacks. 517 F.2d at 414.

Specifically the court noted that although the project might
Perpetuation of Segregation as a Violation of the Fourteenth Amendment

A racially discriminatory effect exists when an ordinance either imposes a heavier burden on a minority group than on all others similarly situated, or is applied to create such an effect. Thus a regulation that operates to confine Blacks to particular areas, by excluding them from others, places a special burden upon them by preventing them from gaining equal access to decent housing.

It has been held in a variety of situations involving access to housing that to pass an ordinance or to effectuate a policy that perpetuates racial segregation causes a racially discriminatory effect in violation of the Equal Protection Clause. In most

only have minimal effects in terms of alleviating the segregative housing problem for the entire Chicago area, it might well result in increasing Arlington Heights' minority population by over one thousand percent.

Id. Thus the refusal to permit construction maintained the Village’s status quo.


64. E.g., Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied sub nom. City of Lackawanna v. Kennedy Park Homes Ass'n, 401 U.S. 1010 (1971). The City of Lackawanna was divided into three wards with 98.9 percent of its nonwhite population living in the First Ward. A steel plant occupied about half of the First Ward and the living conditions in the remaining space were characterized by deterioration, filth, pollution and crime. Building contractors had consistently refused to build homes for Black citizens in the other wards, and there were no low-income housing developments outside the First Ward.

A low-income housing project was finally initiated but the mayor refused to sign a request from the development for permission to tie into the city's sewer system. No one could occupy the building until the proper sewage facilities were provided. Blacks, therefore, were confined to the First Ward and denied access to housing in other areas by the fact that the city's policies had simply made it unavailable, if not non-existent. Id. at 110-11.

65. United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 810-11 (5th Cir. 1974) (a refusal to allow a low-income project to tie into city sewer system was held, inter alia, to reinforce segregation within the city and to constitute a racially discriminatory effect); Gautreaux v. Romney, 448 F.2d 731, 738 (7th Cir. 1971) (site selection for public housing in areas with a high percentage of minorities was held to produce a "segregated result" in violation of the Equal Protection Clause); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), cert. denied sub nom. City of Lackawanna v. Kennedy Park Homes Ass'n, 401 U.S. 1010 (1971) (rezoning of low-income housing site to recreational use, placing a moratorium on new subdivisions, and refusing permission to tie into city sewer system, were held to indicate "state action amounting to specific authorization and continuous encouragement of racial discrimination, if not almost complete racial segregation, and to be an unjustified exercise of police power); Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 295 (9th Cir. 1970) (referendum which nullified passage of an ordinance permitting rezoning for low-income proj-
of these instances, the state action involved did not produce, but merely reinforced, a pre-existing de facto segregated housing pattern. The courts also agreed that the agencies or officials implementing the policy or enforcing the ordinance had an affirmative duty under the Equal Protection Clause to refrain from interfering with the efforts of those who sought to alleviate the segregated character of the area.66

Most courts considering the problem have placed major emphasis on the policies behind the public housing programs. The consistent view has been that

in the realm of federally assisted housing, local authorities have an obligation to further the national policy of balanced and dispersed public housing and to refrain from frustrating efforts to carry out that policy.67

Thus, it is the obligation of city administrations to further the goal of eradicating racial imbalances.68

In the realm of zoning, however, a search of relevant authorities reveals that until the Metropolitan decision, no federal courts69 had ruled specifically that a community has an affirma-

denial of decent housing, and an “integrated environment” were held to present a substantial constitutional question); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), aff’d in part, rev’d in part, 473 F.2d 910 (6th Cir. 1973) (building permit revoked for construction of low-income housing project and site selection for low-income projects confined to areas of minority concentration were held to violate plaintiffs’ equal protection rights):

Courts have unequivocally stated that local officials may not exercise the normal modicum of discretion if the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods.

341 F. Supp. at 1180; Sisters of Providence v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971) (refusal to rezone property designated as R-5 to R-5A, to permit higher density use for low-income housing project, if found to have the effect of maintaining racial patterns, states a claim under the Equal Protection Clause); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), aff’d, 457 F.2d 788 (5th Cir. 1972) (denial of building permits to construct low-income housing projects outside areas of minority concentration, invalidated as violative of plaintiffs’ equal protection rights):

[I]n the area of public housing local authorities can no more confine low-income blacks to a compacted and concentrated area than they can confine their children to segregated schools.

332 F. Supp. at 390.

66. See cases cited at note 65 supra.

67. United Farmworkers of Florida Housing Project v. City of Delray Beach, 493 F.2d 799, 811 (5th Cir. 1974).


69. The New Jersey Supreme Court recently announced that under the New Jersey Constitution, a city has an affirmative duty to plan and to provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including . . . low and moderate cost housing, to meet the needs . . . of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.

Discriminatory Effect in Zoning

tive duty under the Equal Protection Clause to alleviate de facto segregation in housing by invalidating the application of a legitimate zoning ordinance to the subject property.\textsuperscript{70} Cases which have imposed an affirmative duty in terms of restraining enforcement of an ordinance at issue have either relied upon traditional findings of discrimination in addition to the Metropolitan analysis, or have been faced with refusals relating to building and zoning requirements beyond a mere refusal to rezone.\textsuperscript{71}

Affirmative Duty to Rezone

Given this background of case law, the Metropolitan court declared that a village has an affirmative duty to rezone an area if it would be a step toward "easing the problem of de facto segregated housing."\textsuperscript{72} The imposition of this affirmative duty is clearly dependent upon the facts presented in Metropolitan,\textsuperscript{73} and particularly, as the court found, upon the fact that the Village had failed "to accept any responsibility for helping to solve this problem."\textsuperscript{74}

Rejecting the contention of the Village that, because it took no active measures to create the segregated housing pattern it was under no affirmative duty to alleviate it,\textsuperscript{75} the Seventh Cir-

\textsuperscript{70} In Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291 (9th Cir. 1970), the court recognized the "importance of equal opportunities in housing" and speculated in dicta that it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups. Id. at 295-96.

In Sisters of Providence, Judge Marovitz noted in dictum that there was an affirmative duty to "correct racially disproportionate housing," but did not "comment on how much of an initiative a city must take" to do so. 335 F. Supp. at 403.

71. In Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974), the court ordered defendant city, inter alia, to refrain from engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race... or of interfering with the implementation and execution of federal housing programs...

\textsuperscript{72} Id. at 237. Here, however, the plaintiffs had succeeded in proving that the city's failure to approve the application for rezoning was racially motivated, id. at 232-34, and that the segregated pattern of the community had evolved from a "prior pattern of discrimination." Id. at 236.

The decisions in both Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970) and Kennedy Park, 436 F.2d at 109 and 114, rested on a finding that the action involved resulted from racial motivation and both cases involved additional state action besides a refusal to rezone.

In Kennedy Park there was also a refusal to give permission to tie into the city sewer system, and the placing of a moratorium on all new subdivisions. Also the zoning issue in Kennedy Park revolved around the city's deliberate rezoning of the project site to a recreational use. Id. at 109. In Dailey, the city refused to issue a building permit until plaintiffs obtained rezoning. 425 F.2d at 1038.

\textsuperscript{73} Id. at 413-14.

\textsuperscript{74} Id. at 414.

\textsuperscript{75} Id.
The circuit concluded that to ignore segregated housing patterns, while enforcing a zoning plan, is to "exploit" that segregation, when the result is to maintain the all White character of the community. The court found that such exploitation is an act of discrimination violative of plaintiffs' equal protection rights.

Exploitation Theory

In claiming that exploitation is an act of discrimination, the court relied heavily upon the precedent it had established in Clark v. Universal Builders, Inc. In Clark, the court sustained plaintiff's contention that anyone taking "advantage of the opportunity created by racial residential segregation to exploit blacks" would be committing a racially discriminatory act in violation of the Civil Rights Act of 1866 and the thirteenth amendment of the United States Constitution.

Applying this theory to the Metropolitan facts, the court concluded that the Village's failure to help alleviate both its own segregated character, as well as that of the surrounding area, had the effect of exploiting racial housing patterns by maintaining the nearly one hundred percent White composition of its population. In light of the Village's affirmative duty to help

---

76. Id. Judge Marovitz, faced with a similar zoning issue with an equal protection challenge in Sisters of Providence, admitted no distinction between a city's actively attempting to "prevent low and moderate income housing by condemning or rezoning property that is being sought for that purpose... [or] passively refusing to rezone under a seemingly valid ordinance." 335 F. Supp. at 403 (emphasis added).

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 condemning or zoning out low and moderate income housing. . . . [T]he technical distinction between the degrees of activity involved is relevant only as to the burden of proof . . . .

Id. 77. 517 F.2d at 415. See Burton v. Wilmington Parking Authority, note 32 supra.

78. 501 F.2d 324 (7th Cir. 1974). Clark had presented the issue of whether the actions of a builder who took advantage of a housing market created by the racial discrimination of others, which enabled him to charge higher prices for houses situated in Black areas than comparable homes situated in White areas, violated plaintiffs' thirteenth amendment rights, and civil rights, referring specifically to the Civil Rights Act of 1866, 42 U.S.C. § 1982, which guarantees to minorities the same property rights that are enjoyed by Whites.

The court contrasted the new "exploitation theory" of discrimination presented by plaintiffs with the traditional theory of discrimination, to determine whether a cause of action was stated, 501 F.2d at 328-34, defining the traditional theory of discrimination as action prompted by discriminatory motives. See, e.g., Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970), and Yick Wo v. Hopkins, 118 U.S. 356 (1886) (policies applied in a discriminatory manner).

79. 501 F.2d at 328.
80. Id. at 334.
81. 517 F.2d at 414-15.
“eliminat[e] the pervasive problem of segregated housing,” the court declared that the Village's refusal to rezone plaintiff's property had a racially discriminatory effect which would be valid only if there was a compelling state interest to justify it.82

Compelling State Interest Test

Because zoning ordinances carry with them a presumption of constitutionality, the courts generally will uphold them if there is any rational basis of support.83 Therefore, in the decisions holding that a comprehensive plan itself bears a rational relationship to a valid state objective, plaintiffs rarely have success in overturning such ordinances.84 Where a suspect class or fundamental right issue is raised under an equal protection challenge, however, plaintiffs can persuade the court to apply a "rigid scrutiny" test, which requires the state to show a compelling interest before the ordinance will be upheld despite its discriminatory results.85

The existence of a racially discriminatory effect is also a violation of equal protection invoking this rigid scrutiny standard of review.86 This burden on the state is extremely heavy and is rarely sustained.87 This is especially true in zoning cases where the maintenance of a city's comprehensive zoning plan or the protection of neighboring property values, while legitimate interests sufficient to provide a rational basis for the ordinance,88 have not yet been considered by the courts as compelling interests sufficient to justify racial discrimination.89

CONCLUSION

It is difficult to predict the impact that the Metropolitan decision will have. The precise scope of a community's affirmative duty to alleviate segregation in conjunction with its zoning policies is unclear. It is certain that a municipality may not pas-

82. Id. at 415.
The 'compelling interest' doctrine . . . constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective.
sively maintain racial imbalance by adhering to seemingly neutral land use regulations that effectively exclude low-income housing. But "how much of an initiative a city must take to correct racially disproportionate housing" is unsettled.

The Supreme Court of New Jersey has declared that "developing municipalities" have an affirmative duty to provide for all types of housing within their boundaries through their land use regulations, and that they may not hinder the opportunity for equal access to housing through zoning policies. This represents at once both the broadest and the narrowest possible interpretation of Metropolitan.

For a "developing" municipality under the Metropolitan standard, this could mean that its comprehensive plan be required to include the designation of specific areas as suitable for low-income housing and that it must avoid other land use regulations which would effectively preclude the construction of such housing. For a municipality with few undeveloped areas, however, the nature of a duty to zone for low-income housing is more difficult to define. Whether areas with existing structures would be rezoned is questionable. Apart from this issue, it may be safe to infer that rezoning of particular sites may be required only when it could be shown that a higher density use would have no adverse impact upon the area. One guideline in deciding whether a developed community should be required to rezone an area may well be the existence of employment opportunities in and around the community, as suggested in Metropolitan. This consideration is directly related to the issue of whether minorities in such situations have a right to live in an area, absent a reason other than a mere desire to do so.

The Supreme Court may answer these questions when it hears the Metropolitan case during its next term.

In light of the Court's past rulings in the realm of zoning,
and its reluctance to limit the states' police power therein, it could declare the Seventh Circuit's decision an unwarranted intrusion into the discretion reserved to legislatures to regulate land use and community planning. It may be, however, that in balancing this power against the goals of eliminating segregation, the Court will affirm the decision and curb the discretion of local zoning officials where its clear result is "segregation of low-income Blacks from all White neighborhoods."

Sally Y. Mengo

100. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). "[E]very line drawn by the legislature leaves some out that might well have been included. That exercise of discretion, however, is legislative, not a judicial function." Id. at 8.