U.C. DAVIS LAW REVIEW

University
of
California
Davis

VOLUME 17 WINTER 1984 NUMBER 2

ARTICLES

The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement

Joel L. Selig *

During the latter part of the Carter administration, the United States Department of Justice made racially exclusionary municipal practices a major target of its efforts to enforce the Fair Housing Act. This Article traces the history of the Department's efforts in this area, and examines the theory, results, and ultimate curtailment of its exclusionary zoning initiative.

From 1978 to 1980, the Civil Rights Division of the Department of Justice was engaged in a creative initiative in Fair Housing Act enforcement. During that period, the Division placed a high priority and a major commitment of resources on the use of the Attorney General's authority to attack racially exclusionary practices by municipal governments. The Division focused on practices which have the purpose or

* Professor of Law, University of Wyoming. A.B. 1965, J.D. 1968, Harvard University. The author served in the Civil Rights Division of the United States Department of Justice from 1969 to 1973 and from 1977 to 1983, and was deputy chief of the sections responsible for Fair Housing Act enforcement from 1978 to 1982.

HeinOnline -- 17 U.C. Davis L. Rev. 445 1983-1984

effect of discriminating against minority residents or prospective residents by such methods as controlling the development or location of racially integrated low-cost housing. The initiative did not reach full fruition, however, because of decisions made in the Carter administration, and has been further curtailed by the Reagan administration. The history of the Division's efforts in this area raises a number of theoretical and practical issues, and illuminates the difficulties encountered under current circumstances in any federal effort to modify exclusionary local land use practices. This Article analyzes the legal, policy, and pragmatic considerations behind the Division's approach to Fair Housing Act land use litigation. It then reviews each of the cases brought before and during the initiative as well as those that were developed during the initiative but never saw the light of day.

I. BACKGROUND

The federal Fair Housing Act — Title VIII of the Civil Rights Act of 1968[1] — prohibits, *inter alia*, racial and national origin discrimination in residential housing. The Act created three new enforcement mechanisms: "conference, conciliation, and persuasion" by the Department of Housing and Urban Development,[2] lawsuits by private individuals,[3] and lawsuits by the Attorney General in cases of a "pattern or practice" of resistance to the rights secured,[4] or a denial of such rights which raises an issue of "general public importance."[5]

The Attorney General's authority under this statute has been exercised over the years with frequency, vigor, and success. The Civil Rights Division brought or participated as amicus curiae in over 300 cases in the first ten years of its enforcement efforts under the Fair Housing Act.[6] The Division was successful in virtually all of these cases, obtaining affirmative injunctive relief either after trial or by consent.[7] Many of the judicial opinions in Division cases made important

---

[1] 42 U.S.C. §§ 3601-3631 (1976 & Supp. V 1981).

[2] 42 U.S.C. § 3610(a) (1976).

[3] 42 U.S.C. §§ 3610(d), 3612 (1976).

[4] 42 U.S.C. § 3613 (1976).

[5] *Id.*

[6] Throughout this Article, the author makes unsourced statements based on his personal knowledge of the Justice Department's experiences in fair housing enforcement. *See supra* note *. The line between fact and opinion will be apparent from the nature or context of the statement.

As used in the text, the first ten years of enforcement refers to the period from April 11, 1968, the date of enactment of the Fair Housing Act, to April 10, 1978.

[7] Through April 10, 1978, 270 consent decrees had been entered in the 285 housing

HeinOnline -- 17 U.C. Davis L. Rev. 446 1983-1984

contributions to the law, defining the contours of the Fair Housing Act in a broad and efficacious fashion.[8]

Most of the Division's cases over the years involved overt, intentional discrimination by private sector defendants. These defendants included apartment rental or management companies which refused to rent to or otherwise discriminated against minorities,[9] real estate agencies which steered black homeseekers to integrated or predominantly minority areas,[10] and other sources of private discrimination. Some of these activities by private sector defendants were declared subject to the Fair Housing Act as a result of legal interpretations sponsored by the Division in its litigation.[11] Of the 285 suits the Division filed during its first decade of Fair Housing Act enforcement, only thirteen were against public sector defendants, and only three of these involved exclusionary land use practices.[12]

A survey of the first decade of these enforcement efforts provided grounds for satisfaction and pride but also for dissatisfaction and disappointment. On the positive side, the Division had been generally successful in the many cases that it had undertaken. It had contributed to the precedents set during the formative years of judicial interpretation of the Act. The Division had eliminated many documented instances of overt patterns of discrimination. The ripple effect of these examples

---

discrimination suits filed by the Attorney General. This does not mean that only 15 cases went to trial: multiple consent decrees in the same case are generally counted separately.

[8] *E.g.*, United States v. City of Black Jack, Mo., 508 F.2d 1179 (8th Cir. 1974) (exclusionary land use; effects test), *cert. denied*, 422 U.S. 1042 (1975); United States v. Pelzer Realty, 484 F.2d 438 (5th Cir. 1973) (home sales), *cert. denied*, 416 U.S. 936 (1974); United States v. Bob Lawrence Realty, 474 F.2d 115 (5th Cir.) (blockbusting), *cert. denied*, 414 U.S. 826 (1973); United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971) (model decree); United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973) (apartment rentals), *modified as to relief and aff'd*, 509 F.2d 623 (9th Cir. 1975).

[9] *E.g.*, United States v. Reddoch, 1 Eq. Opp'ty Hous. Cas. ¶ 13,569 (S.D. Ala.), *aff'd*, 467 F.2d 897 (5th Cir. 1972).

[10] *E.g.*, United States v. Real Estate One, 433 F. Supp. 1140 (E.D. Mich. 1977).

[11] *E.g.*, United States v. Hunter, 459 F.2d 205 (4th Cir.) (newspaper publishing discriminatory advertisements), *cert. denied*, 409 U.S. 934 (1972); United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. 1072 (N.D. Ill. 1977) (discriminatory appraisal standards), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978); United States v. Wisconsin, 395 F. Supp. 732 (W.D. Wis. 1975) (state anti-testing statute).

[12] For a discussion of these three cases, see *infra* text accompanying notes 96-134. Six of the other ten public sector cases involved internal segregation in public housing authorities. *See also infra* notes 18, 20.

HeinOnline -- 17 U.C. Davis L. Rev. 447 1983-1984

probably contributed to the elimination of such practices by many persons and companies in addition to those the Division had actually sued. It had reacted responsively to complaints received both from people who had experienced discrimination and from fair housing organizations which had documented violations. Through its cases as well as the influence of its activities, the Division had enhanced the availability of residential free choice. All of this notwithstanding, there were substantial reasons to expand the scope of enforcement in the second decade of the Division's program.

The Division's efforts had had little impact on one of the most serious causes and manifestations of continuing racial separation in American life: the concentration of blacks and hispanics in central city areas.[13] Traditional cases against private sector defendants had not had much impact on this problem, and would probably have even less impact in the future, as patterns of discrimination by larger real estate companies continued to become less frequent. The law governing private discrimination was well established. The justification for devoting the Division's resources to obvious but low impact private sector cases rather than to difficult but potentially groundbreaking public sector cases became less and less apparent. A reappraisal of priorities was called for by Assistant Attorney General Drew S. Days III. He was dissatisfied with requests to approve routine lawsuits affecting small numbers of units of housing, and with the absence of proposed lawsuits challenging exclusionary land use practices.

The reappraisal which Mr. Days desired met with some resistance on the part of career attorneys who had led or been associated with the Division's fair housing litigation in the past. Attorneys who had investigated and proposed small, low impact cases for litigation were not enthusiastic when some of their cases were disapproved or referred to a local United States Attorney's office for handling.[14] Some of the career

---

[13] *See* M. DANIELSON, THE POLITICS OF EXCLUSION 1-26 (1976); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 118-21 (1968) (citing differences in the dispersal of urban black and white ethnic populations); L. RUBINOWITZ, LOW-INCOME HOUSING: SUBURBAN STRATEGIES 10-11 (1974); U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN 145 (1974) ("Severe residential segregation and isolation between races and ethnic groups is a marked feature of virtually every metropolitan area in which minorities reside."); *see also* Abramowitz & Jackson, *Desegregation: Where Do We Go From Here?*, 19 HOW. L.J. 92, 99 (1975); Clark, *Racial Justice in Education: Continuing Struggle in a New Era*, 23 HOW. L.J. 93, 97-98 (1980); Taylor, *Summary of the Cases and Legal Issues in School Desegregation*, 19 HOW. L.J. 20, 22 (1975).

[14] Trial attorneys who prepare cases for litigation are understandably unenthusiastic

HeinOnline -- 17 U.C. Davis L. Rev. 448 1983-1984

section level leadership were chary of the legal and practical difficulties of developing and prosecuting exclusionary zoning litigation.[15] These attorneys believed that, as far as potential litigation is concerned, a bird in the hand is worth two in the bush. Their basic argument was that all meritorious pattern or practice cases encountered should be brought, except when they were very small or a private remedy would be more effective. They believed that a reasonably good geographical and subject matter balance had been achieved in the past by encouraging and responding to complaints, investigating all potentially meritorious allegations received, seeking out certain special kinds of cases, and filing suit whenever a pattern or practice of discrimination was established, and that this method would continue to be the most responsive to the actual problems victims of discrimination were encountering on a day to day basis.

This somewhat sanguine approach was not fully persuasive. At 1978 staffing levels, the number of Civil Rights Division attorneys available at any given time to develop and litigate fair housing cases was about ten[16] — less than half the number assigned to fair housing litigation in the past. There was an inevitable inverse relationship between the amount of time spent on low priority and high priority cases. Decisions about resource allocation should be made by design rather than fortuity. Since the Attorney General was specifically directed by statute to exercise his authority in the bigger, more important cases,[17] there were compelling reasons for the Division to focus more of its resources on

---

when a meritorious case is disapproved or referred to someone else for prosecution. In theory, referral of certain civil rights cases to United States Attorneys' offices would increase the total number of cases the Division could bring and allow headquarters attorneys to focus their expertise on more complex cases. In practice, however, the results were less than satisfactory in most of the housing cases referred to United States Attorneys' offices during the author's 1978-82 experience, notwithstanding generous offers of technical assistance from headquarters. In a number of cases the United States Attorney's office either declined to file suit, even though requested to do so by the Assistant Attorney General, or filed suit and then failed to prosecute vigorously. Despite perennial pressure for delegation of civil rights responsibilities which may have reached its zenith in the Carter administration (when such requests fell on receptive ears among Departmental leadership), fair housing litigation, with few exceptions, has not been a priority matter for United States Attorneys. Requests by the Division that United States Attorneys' offices investigate civil fair housing complaints have, with some exceptions, been unproductive, and the number of civil suits developed by United States Attorneys' offices has been negligible.

[15] *See infra* text accompanying notes 31-35, 80-83, 116-17.

[16] This figure does not include attorneys in the credit discrimination half of the Housing and Credit Section.

[17] *See* 42 U.S.C. § 3613 (1976).

HeinOnline -- 17 U.C. Davis L. Rev. 449 1983-1984

exclusionary land use practices.

Accordingly, by an internal process of pressure and compromise between career and political leadership, the fair housing litigation priorities of the Civil Rights Division were reoriented. In the fall of 1978, section leadership directed housing attorneys to spend at least twenty-five percent of their time developing high impact cases.[18] Highest priority was given to land use and other cases that would have a significant impact on the problem of racial separation between central cities and suburbs. By early 1979, the legal theory and investigative strategy to be pursued by the Division in exclusionary land use cases had been developed and approved, and investigations had begun. An internal reorganization of the Division[19] increased these efforts and they reached their denouement in the year and a half immediately preceding the Reagan administration.[20]

---

[18] The consensus that emerged among Division and section leadership identified the following as high priority cases: (1) exclusionary land use cases and other cases connected with city/suburban segregation; (2) sex discrimination cases, hispanic cases, and cases involving mortgage credit and racial redlining (because the Division had brought relatively few such cases in the past); (3) certain kinds of interference or vigilante cases (in which law enforcement obligations suggest special Attorney General responsibilities); and (4) public housing segregation (partly because of the Department of Housing and Urban Development's (HUD) past ineffectiveness in this area). The following were identified as, generally speaking, low priority cases: (1) second home cases; (2) racial steering cases involving single family homes (because proof is unusually difficult and relief is of dubious effectiveness); (3) hypothetical cases (statements implying a discriminatory policy when no occasion to implement has arisen); and (4) cases against defendants who are making a bona fide attempt to preserve racial stability in a substantially integrated context (integration maintenance cases).

[19] As part of this reorganization, the Housing and Credit Section merged with the Education Section to form the General Litigation Section. One of Assistant Attorney General Days' reasons for this merger was to sharpen the focus on the interrelated problems of school and housing segregation.

[20] While not the subject of this Article, it may be of interest to note briefly the other major fair housing enforcement policy changes implemented in the Carter administration. As previously suggested, small cases — cases involving fewer than 100 units, other than land use cases, sex discrimination, or hispanic cases — were generally either not authorized by Mr. Days or referred by him to United States Attorneys' offices. Most of the traditional racial discrimination cases brought under Mr. Days involved at least 200-300 units, and many were considerably larger. The Reagan administration, which is both chary of land use cases and anxious to improve its statistics by bringing more fair housing cases, may well initiate small, traditional housing suits involving purposeful discrimination and presenting no ideological problems.

Delays were experienced with the "notice letter" procedure used in the past for housing (and other) cases. This procedure involved delaying the filing of a complaint while conducting pre-suit consent decree negotiations. To reduce these delays, the Divi-

HeinOnline -- 17 U.C. Davis L. Rev. 450 1983-1984

II. Objective, Theory, and Strategy

A. *The Problem*

More than ten years ago, a national commission warned that "[o]ur nation is moving toward two societies, one black, one white — separate and unequal."[21] Racial separation between central cities and suburbs remains a pervasive feature of today's urban landscape.[22] Many metro-

---

sion developed uniform criteria for the procedure for filing fair housing suits. Under these criteria, a suit was filed immediately in most fair housing cases, and any negotiations were conducted and completed during litigation. Under the Reagan administration, the notice letter procedure will probably be used more frequently.

In cases involving internal segregation in public housing, the Division sought and obtained racial quotas for assignments of new tenants to integrate the housing. *See* United States v. Housing Auth. of Owensboro, No. 78-0178-0(B) (W.D. Ky. May 23, 1980) (Agreed Order of Settlement) (copy on file at U.C. Davis Law Review office); United States v. Housing Auth. of West Helena, No. H-C-79-58 (E.D. Ark. Sept. 25, 1979) (Consent Order) (copy on file at U.C. Davis Law Review office); United States v. Housing Auth. of Helena, No. H-C-79-59 (E.D. Ark. Sept. 24, 1979) (Consent Order) (copy on file at U.C. Davis Law Review office). In the Reagan administration, such relief will not be sought.

The Division reluctantly acquiesced in the proposition, absent a particularly compelling test case, that the Attorney General, unlike private parties, is not legally authorized to seek damages for victims of discrimination in fair housing cases. The Division had lost this issue four times in the courts of appeals, and had never obtained certiorari on it. *See* United States v. Simon, 612 F.2d 575 (3d Cir. 1979) (affirmance without published opinion); United States v. Rent-A-Homes Sys., 602 F.2d 795, 797-98 (7th Cir. 1979); United States v. Mitchell, 580 F.2d 789, 793 (5th Cir. 1978); United States v. Long, 537 F.2d 1151, 1155 (4th Cir. 1975), *cert. denied*, 429 U.S. 871 (1976); *see also* Northside Realty Assocs. v. United States, 605 F.2d 1348, 1355-57 (5th Cir. 1979) (civil contempt). While the Division believed the appellate courts' decisions on this issue to be erroneous, it concluded that it would be unfair to defendants to pursue the issue when the likelihood of success had become so slight. This determination is unlikely to be changed by the Reagan administration.

[21] Report of the National Advisory Commission on Civil Disorders 1 (1968).

[22] Some 58.9% of all black households and 49.5% of all hispanic households in the United States live in central cities, compared to 29.7% of the total households. U.S. Dep't of Commerce, Statistical Abstract of the United States 45 (1982). Only 19.9% of black and 34.5% of hispanic households live in metropolitan areas outside central cities, compared to 38.4% of the total households. *Id.*

The trend is even more pronounced in the nation's major urban areas. Of the ten largest cities in 1980, eight had combined black and hispanic populations of over 40%, including Detroit (63% black), Baltimore (55% black), Chicago (40% black, 14% hispanic), and Los Angeles (17% black, 28% hispanic). *Id.* at 22-24. Minorities tend to be further concentrated into neighborhoods within the central city. Of the 47 largest cities in the country with black populations over 50,000, the proportion of the black population living in census tracts which were more than 50% black ranged from a low of

HeinOnline -- 17 U.C. Davis L. Rev. 451 1983-1984

politan areas retain "the racial shape of a donut,"[23] with a ring of predominantly white suburbs surrounding a hole in which most blacks and hispanics are concentrated.[24]

The patterns of land use and development in major metropolitan areas precluding or severely limiting low-cost housing in the suburbs have contributed significantly to this racial separation, although the degree of contribution and the extent of causation is often a complicated empirical question.[25] The kind of racial separation prevalent in many metropolitan areas may well be the most significant and critical negation of the integrated housing goal today. Racial residential separation also contributes to a series of other problems, including racial isolation

---

51.8% (San Antonio) to a high of 96.2% (Washington, D.C.), with 39 of the 47 higher than 75%, in 1970. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN 150 (1974).

For a general discussion of racial separation in cities, see sources cited *supra* note 13; *see also* Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 547-49 & n.1 (1979).

[23] *See* United States v. City of Black Jack, Mo., 508 F.2d 1179, 1186 (8th Cir. 1974) (quoting Mahaley v. Cuyahoga Metropolitan Hous. Auth., 355 F. Supp. 1257, 1260 (N.D. Ohio 1973), *rev'd*, 500 F.2d 1087 (6th Cir. 1974)), *cert. denied*, 422 U.S. 1042 (1975).

[24]

> The hard fact of this economic-racial exclusion is most evident in population statistics, which reveal the extent to which artificial city boundaries are dividing us along racial and ethnic lines. In the decade of the sixties, white central city population in metropolitan areas having populations of over 500,000 *declined* by 1.9 million people, while comparable black populations *increased* by 2.8 million. The white suburban collars of these areas saw their white populations increased by 12.5 million and their black populations grow by a scant 800,000 people. This is not a mere matter of neighborhoods. We have always had racial, ethnic, and economic neighborhoods; perhaps we always will. This is different. In each metropolitan area we are setting up two geographically, politically, and economically distinct civilizations.

Wright, *Are the Courts Abandoning the Cities?*, 4 J.L. & EDUC. 218, 220 n.10 (1975) (emphasis in original).

[25] *See* M. DANIELSON, *supra* note 13, at 1-3, 27-33, 74-78; Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 9 URB. L. ANN. 9 (1971); Kushner, *supra* note 22, at 590-98; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 780-82 (1969).

Local government can cause or perpetuate racial segregation in housing by enacting zoning ordinances which prevent the entry of low-income persons into the community. Such ordinances may include minimum lot and building size requirements, or restrictions or prohibitions on multi-family dwellings, subsidized housing, or mobile homes, which make the cost of the community housing prohibitive to these individuals.

HeinOnline -- 17 U.C. Davis L. Rev. 452 1983-1984

in the schools,[26] deterioration of central city services as a result of race-related economic and political factors,[27] and relative inaccessibility to minorities of suburban employment opportunities.[28] While some civil rights laws have had dramatic effects on social problems of great magnitude — southern school segregation[29] and voting discrimination[30] are the most obvious examples — the Fair Housing Act has not yet had an appreciable impact on the problem here described.

Through the initiative discussed in this Article, the Department of Justice sought to have an impact on this problem. The Civil Rights Division was fully aware of certain inherent limitations and legitimate concerns when it decided to expand its enforcement efforts in this direction. For example, it would be no more realistic to assume that a handful of Justice Department lawyers could reshape the urban landscape than it would be to assume that they could eliminate private sector discrimination. Expectations were modest rather than grandiose; the goal was to make some contribution to solving a serious problem, not to solve it in its entirety. The hope was that success in litigated cases would lead to additional changes at the local level without litigation.

---

[26] *See* M. DANIELSON, *supra* note 13, at 19; L. RUBINOWITZ, *supra* note 13, at 22; Abramowitz & Jackson, *supra* note 13, at 99-101.

[27] *See* M. DANIELSON, *supra* note 13, at 18; U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN 159 (1974); Kushner, *supra* note 22, at 659.

[28] *See* M. DANIELSON, *supra* note 13, at 23-26; A. DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA 19-20 (1973); R. FORMAN, BLACK GHETTOS, WHITE GHETTOS AND SLUMS 42-45 (1971); Wright, *supra* note 24, at 222 n.13.

[29] Following Brown v. Board of Education, 347 U.S. 483 (1954), the percentage of southern blacks attending schools with whites increased from .001% to 91.3% in 1972. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN 50 (1974). It has also been noted that school integration in southern states has outdistanced that in northern states. *See* Abramowitz & Jackson, *supra* note 13, at 93-94 (as a result of integration in 1968-72, a higher percentage of southern blacks were enrolled in majority white schools, and fewer southern blacks were enrolled in all-black schools, than in the North); Read, *Judicial Evolution of School Integration Since* Brown v. Board of Education, 39 LAW & CONTEMP. PROBS. 7, 47 (1975).

[30] Since enactment of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, black voter registration in eleven southern states has increased dramatically, from approximately 29.1% (1960) (includes other minorities) to 56.5% (1982) of the voting age population. This represents an increase of over 2.8 million black voters in these states. The percentage of registered blacks in Alabama has increased from 13.7% to 69.7%, and in Mississippi from 5.2% to 64.2%. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 488 (1982). With the rise in black voting strength has come an increase in black elected officials to over 5000 nationwide, over 60% from the South. *Id.*

HeinOnline -- 17 U.C. Davis L. Rev. 453 1983-1984

The initiative's concept was subject to a philosophical challenge: did Congress intend the Fair Housing Act merely to promote free residential choice on the part of persons of similar income levels,[31] or to accomplish the broader objective of "replac[ing] the ghettos 'by truly integrated and balanced living patterns?' "[32] Given the context of a sparse and equivocal legislative history,[33] however, it seemed ultimately sterile and unilluminating to debate this issue. There is no necessary inconsistency between the goals of integration and free residential choice, and if the Fair Housing Act could in fact break down racial separation between cities and suburbs, the result would no doubt be consistent with the central and multidimensional purpose of the legislation. The more serious question was whether the Act is addressed to economic discrimination per se — to which the plain answer was that it is not — and whether, therefore, it is proper to attack exclusionary practices which are economic rather than racial in origin and effect. The latter issue was complex and relatively subtle: a proper application of the Act must make the nexus with the prohibited conduct of racial or national origin discrimination, but this could be done in a manner that takes cognizance of economic factors without rendering them dispositive. Finally, legitimate questions could be raised concerning whether exclusionary land use practices are a determinative factor in urban/suburban racial separation. Common sense, as well as the fact that some suburban areas contain substantial numbers of lower income white families but a disproportionately small number of comparable minority families, suggested that other factors are at work. Such factors include private discrimination, the anticipation of private discrimination, lack of knowledge of such choice as may be available, and a sorry history of discriminatory federal housing policies whose effects have outlasted their formal abolition.[34] While the influence of these other factors was

---

[31] *See* Statement by the President [Nixon] on Federal Policies Relative to Equal Housing Opportunity, 1971 PUB. PAPERS 721, 730-32.

[32] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting statement of Sen. Mondale, 114 CONG. REC. 3422 (1970)).

[33] *See* Fair Housing Act of 1968, Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (1968); H.R. 2516, 90th Cong., 2d Sess. (1967); H.R. REP. NO. 473, 90th Cong., 1st Sess. (1967); S. REP. NO. 721, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1837.

[34] *See* Kushner, *supra* note 22, at 566-69, 576-90. While Kushner's analysis may be somewhat overdrawn, the history of the federal government's involvement in and perpetuation of housing segregation is beyond dispute. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976) (racially segregated public housing); Bradley v. School Bd., 338 F. Supp. 67, 214-21 (E.D. Va.) (racially restrictive covenants in federally assisted housing), *rev'd on other grounds*, 462 F.2d 1058 (4th Cir. 1972), *aff'd per curiam by an*

HeinOnline -- 17 U.C. Davis L. Rev. 454 1983-1984

recognized, as were the potential difficulties of establishing a causal connection between exclusionary zoning and the absence of minorities, these difficulties did not seem insurmountable,[35] and could best be addressed on a case by case basis. In sum, the Civil Rights Division was confronted with a problem worthy of attack under a statute whose goals would be served by the effort. The Division determined to use the Attorney General's authority to address the problem despite its potential intractability.

B. *The Limits of Private Litigation*

There are two obstacles faced by private plaintiffs in exclusionary land use cases in the federal courts that have severely limited private litigation, but that should not substantially impede litigation by the Attorney General. First, exclusionary land use litigation is frequently complex, lengthy, and costly. While the Justice Department's resources are not unlimited, its staying power will frequently exceed that of private plaintiffs, including developers and fair housing groups. This consideration provided an additional reason for the government's involvement in such litigation: without government intervention, important violations of the Fair Housing Act might remain unredressed. The second limitation on private litigation is that it frequently is — and due to restrictive standing decisions may normally have to be[36] — site-specific. A site-specific case challenges municipal actions that interfere with the use of a specific parcel of land in a specific way by a particular developer who has actually taken steps to implement plans for use of the parcel in question. The potential impact of a site-specific case is often limited for a number of reasons, such as the small number of units encompassed by the particular project, or intervening events which render completion of the project impracticable by the time litigation is successfully concluded. Even if site-specific litigation results in completion of the project in question, it is of no assistance to the next project

equally divided court, 412 U.S. 92 (1973) (Powell, J., not participating).

[35] *Cf.* Mallach, *Exclusionary Zoning Litigation: Setting the Record Straight*, 9 REAL EST. L.J. 275, 310 (1981) (emphasis in original):

> It can readily be acknowledged that the relationship between eliminating exclusionary zoning restrictions and creating housing opportunities for lower-income families is not a simple one. The elimination of restrictive zoning will not, in and of itself, create those housing opportunities; *if restrictive zoning provisions are not eliminated, however, the additional steps needed to create housing opportunities can never be taken.*

[36] *See infra* text accompanying notes 40-44.

proposed unless the court grants broad affirmative relief. Such relief is far more likely if the scope of the litigation and the finding of liability encompass the general application of the defendant's land use practices, not merely their application to a particular project.[37] In the absence of such relief, the necessity for further litigation will remain a powerful deterrent to other developers. From both a legal[38] and a practical standpoint, it is more feasible for the Attorney General to pursue non-site-specific litigation than for private parties to do so. That consideration, like the resource consideration previously discussed, was an additional factor strongly suggesting that the Department of Justice focus on non-site-specific litigation, which it may be uniquely situated to undertake.[39]

C. *The Theory of Attorney General Litigation*

1. Standing

In *Warth v. Seldin*,[40] the Supreme Court held that a variety of individuals and organizations lacked standing to challenge the general application of a zoning ordinance. These plaintiffs included most of the types of private plaintiffs who could conceivably be injured by the challenged activity of the defendant.[41] *Warth* is a formidable obstacle to any attempt by private litigants to attack the general operation of a municipality's land use practices in federal court. However, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[42] the Court upheld a private plaintiff's standing to attack a site-specific denial of a particular project in which it had a demonstrable interest. *Warth* and *Arlington Heights* together may mean that private plaintiffs have standing only to bring site-specific litigation,[43] the limited utility

---

[37] The scope of the remedy is determined by the nature and extent of the violation. Hills v. Gautreaux, 425 U.S. 284, 293-94 (1976) (housing discrimination); Milliken v. Bradley, 418 U.S. 717, 744 (1974) (school segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (school segregation).

[38] *See infra* text accompanying notes 40-59.

[39] While non-site-specific challenges to exclusionary zoning have met with success under the law of some states, they have generally not been successful when attempted by private plaintiffs under federal constitutional or statutory law. *See generally Developments in the Law — Zoning*, 91 HARV. L. REV. 1427, 1624-1708 (1978) [hereafter *Developments*].

[40] 422 U.S. 490 (1975).

[41] *Id.* at 520 (Brennan, J., dissenting).

[42] 429 U.S. 252 (1977) [hereafter *Arlington Heights I*].

[43] *Compare* Sager, *Insular Majorities Unabated*: Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1394 n.77, 1398-1400 (1978) (discussing *Arlington Heights I* as a limited exception to the *Warth* doc-

HeinOnline -- 17 U.C. Davis L. Rev. 456 1983-1984

of which has already been noted.[44]

It is significant that neither *Warth* nor *Arlington Heights* was decided under the Fair Housing Act.[45] The broad standing which the Court has allowed under that Act[46] was not available in those cases. Whatever the prospects may be for any particular private litigant to establish standing in a particular case under the Fair Housing Act,[47] the argument that *Warth* does not limit the Attorney General's ability to bring non-site-specific cases under that statute is especially strong.

The Court stated in *Warth* that "[e]ssentially, the standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[48] In *Warth*, no statute specifically granted a right of action, and thus standing to seek relief, to persons in the plaintiffs' position.[49] By contrast, the Fair Housing Act expressly gives the Attorney General a right of action whenever he has reasonable cause to believe that a pattern or practice of discrimination exists, or that a denial of rights to a group of persons raises an issue of general public importance.[50] The Act confers upon the Attorney General precisely the kind of roving commission the plaintiffs in *Warth* lacked. The Attorney General has authority and discretion to prosecute

---

trine) *with Developments, supra* note 39, at 1664-66 (stating that systematic relief may be allowed within a site-specific litigation context).

[44] *See supra* text accompanying notes 36-37; *see also* Sager, *Questions I Wish I Had Never Asked: The Burger Court in Exclusionary Zoning*, 11 Sw. U.L. Rev. 509, 518 (1979) ("Confining exclusionary zoning litigation to a project-by-project process greatly reduces the likelihood of such litigation and narrows drastically the range of issues and relief which will be available.").

[45] *Warth*, 422 U.S. at 512-14; *Arlington Heights I*, 429 U.S. at 271.

[46] Havens Realty v. Coleman, 455 U.S. 363, 372-74 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 211-12 (1972). In these cases the Court found congressional intent to define standing under the Fair Housing Act as broadly as the Constitution permits.

[47] *See* Sager, *supra* note 43, at 1398 n.91; *Developments, supra* note 39, at 1684-86. In the context of private litigation, the minimum requirement for the plaintiff to show "that as a result of the defendant's actions he has suffered 'a distinct and palpable injury,' " Havens Realty v. Coleman, 455 U.S. 363, 372 (1982) (quoting *Warth*, 422 U.S. at 501); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 114 (1979), necessarily contemplates a demonstration of the plaintiff's personal connection to the injury in fact. It remains unclear what a private plaintiff would have to show in order to establish such a connection in a non-site-specific case.

[48] *Warth*, 422 U.S. at 500.

[49] *Id.* at 509-10.

[50] 42 U.S.C. § 3613 (1976).

HeinOnline -- 17 U.C. Davis L. Rev. 457 1983-1984

all instances of systemic discrimination or other important violations that he considers of sufficient magnitude to warrant his intervention.[51] The injury in fact to the Attorney General as law enforcement officer is nothing more than the violation of the law; he need not show the kind of personal injury a private plaintiff must establish.

If the overall operation of a municipality's land use practices makes housing unavailable because of race or national origin,[52] or interferes with the exercise or enjoyment of any right granted or protected by the Fair Housing Act,[53] the Attorney General has standing to attack such

---

[51] Neither the Attorney General's determination of "reasonable cause" nor his determination that an issue is of "general public importance" is judicially reviewable, although the actual existence of a pattern or practice of discrimination or a denial of rights is of course for the court to decide.

> Just as the Attorney General has discretion when to exercise the prosecutorial function in criminal cases, so too the Attorney General must have a wide discretion to determine when an issue of public importance justifying his intervention under § 3613 is raised. Once the Attorney General alleged that he had reasonable cause to believe that a violation . . . denied rights to a group of persons and that this denial raised an issue of general public importance, he had standing to commence an action in District Court and to obtain injunctive relief upon a finding of a violation of the Act.

United States v. Bob Lawrence Realty, 474 F.2d 115, 125 n.14 (5th Cir.) (citations omitted), *cert. denied*, 414 U.S. 826 (1973); *see also* United States v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 1, 438 F.2d 679 (7th Cir.) (employment discrimination), *cert. denied*, 404 U.S. 830 (1971).

By the terms of the Fair Housing Act, the Attorney General's authority to sue is not dependent upon his receipt of a complaint from a victim or a referral from another agency concerning the alleged unlawful practice. Nor must the Attorney General meet the class action requirements, FED. R. CIV. P. 23, applicable in comparable private litigation. *Cf.* General Tel. Co. v. EEOC, 446 U.S. 318, 327-29 (1980) (decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981) [hereafter Title VII], which prohibits discriminatory employment practices).

[52] 42 U.S.C. § 3604(a) (1976); *see* United States v. City of Parma, Ohio, 661 F.2d 562, 571-72 (6th Cir.), *reh'g denied*, 669 F.2d 1100 (1981), *cert. denied*, 456 U.S. 926 (1982); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 130 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288, 1294 (7th Cir. 1977) [hereafter *Arlington Heights II*], *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, Mo., 508 F.2d 1179, 1182, 1188 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United States v. City of Birmingham, Mich., 538 F. Supp. 819, 821-22, 831 (E.D. Mich. 1982), *modified as to relief and aff'd*, No. 82-1559, slip op. (6th Cir. Feb. 8, 1984).

[53] 42 U.S.C. § 3617 (1976); *see* United States v. City of Parma, Ohio, 661 F.2d 562, 571-72, *reh'g denied*, 669 F.2d 1100 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *Arlington Heights II*, 558 F.2d 1283, 1288 (7th Cir. 1977), *cert. denied*, 434

HeinOnline -- 17 U.C. Davis L. Rev. 458 1983-1984

practices under the Act.[54] Racially exclusionary land use practices make housing unavailable to *some* people and interfere with *some* people's rights. The Attorney General, unlike a private plaintiff, has standing to attack such practices which derives solely from his law enforcement authority. His standing is not dependent upon "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."[55] The Attorney General's "particularized personal interest"[56] in such a case is established and defined by the statute itself.

It has been suggested that the *Warth* rule derives not merely from considerations of standing, but from a generalized determination to avoid involvement by the federal courts in the substantive issues exclusionary zoning litigation seeks to address.[57] This concern might also result in rejection of the Attorney General's standing. However, this would be difficult to reconcile with the apparent scope of the Attorney General's statutory authority. The Court has drawn a firm line between constitutional and statutory adjudication in this area.[58] The Fair Housing Act provides broad authorization for the Attorney General to challenge, on a non-site-specific basis, exclusionary land use practices which amount to racial or national origin discrimination within the meaning of the Act.[59]

U.S. 1025 (1978); United States v. City of Black Jack, Mo., 508 F.2d 1179, 1188 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United States v. City of Birmingham, Mich., 538 F. Supp. 819, 821-22, 831 (E.D. Mich. 1982), *modified as to relief and aff'd*, No. 82-1559, slip op. (6th Cir. Feb. 8, 1984).

[54] 42 U.S.C. § 3613 (1976).

[55] *Warth*, 422 U.S. at 508 (emphasis in original).

[56] *Id.* at 508 n.18.

[57] *See id.* at 520 (Brennan, J., dissenting); Sager, *supra* note 43, at 1424-25; Sager, *supra* note 44, at 510-11, 521.

[58] *See* cases cited *supra* note 46.

[59] If the exclusionary zoning initiative discussed in this Article were viewed in part as a response to the restrictive impact of *Warth* on private litigation, it might then be analogized to the Justice Department's abortive effort to remedy systematic violations of constitutional rights by the Philadelphia police department in the wake of the unsuccessful private effort in Rizzo v. Goode, 423 U.S. 362 (1976). *See* United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980), *reh'g denied*, 644 F.2d 206 (1981). Any such analogy founders, however, on the express statutory authority under the Fair Housing Act discussed in the text. The absence of such statutory authority was precisely what made *Philadelphia* questionable. *Id.*

HeinOnline -- 17 U.C. Davis L. Rev. 459 1983-1984

2. Liability

Under what circumstances do exclusionary municipal practices constitute a violation of the Fair Housing Act in a site-specific or a non-site-specific context? The Civil Rights Division launched its initiative with the understanding that the Act is violated by practices having either a racially discriminatory purpose, or a racially segregative effect that is not adequately justified.

Racially motivated municipal practices are unconstitutional;[60] a fortiori, they violate the Fair Housing Act. The Supreme Court has never decided whether an unjustified segregative effect violates the Act.[61] The Division had been asserting such a position for years, however, and all circuits which have ruled on the issue have adopted some formulation of an effects test.[62] The most appropriate formulation of the test would be as follows: when a municipality's land use practices result in a racially segregative effect, they violate the Act unless they serve in theory and practice a bona fide, constitutionally permissible interest which is substantial enough to outweigh their discriminatory effect, and which cannot be achieved in an alternative manner with less segregative impact.[63] Such an effects test would apply to affirmative acts blocking a

---

[60] *Arlington Heights I*, 429 U.S. 252 (1977).

[61] *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (adopting an effects test under Title VII).

[62] Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); United States v. City of Parma, Ohio, 661 F.2d 562, 575-76, *reh'g denied*, 669 F.2d 1100 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); United States v. Mitchell, 580 F.2d 789, 791-92 (5th Cir. 1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Arlington Heights II*, 558 F.2d 1283, 1289-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, Mo., 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *cf.* Robinson v. 12 Lofts Realty, 610 F.2d 1032, 1036-39 (2d Cir. 1979) (moving away from prior Second Circuit decisions and toward an effects test via the concept of the prima facie case).

[63] This formulation is closest to that of the Third Circuit in Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). Unlike *Rizzo*, however, it does not necessarily place the burden of proof with respect to less discriminatory alternatives on the defendant. That burden might be on the plaintiff. *Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (decided under Title VII). However, such a conclusion might improperly confuse disparate treatment analysis with disparate effect analysis. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (Title VII). If alternative means are a part of the question of justification, the burden of proof on all aspects of that issue should remain on the defendant.

The formulation in the text seems more appropriate than the "compelling interest" formulation of United States v. City of Black Jack, Mo., 508 F.2d 1179, 1185 (8th Cir.

HeinOnline -- 17 U.C. Davis L. Rev. 460 1983-1984

particular project which would otherwise be able to proceed,[64] to refusals to grant a variance or other special consideration required for a particular project,[65] and to general policies and practices whose actual or predictable effect is to create or perpetuate racial segregation.[66] If the

---

1974), *cert. denied*, 422 U.S. 1042 (1975). Not only does the *Black Jack* formulation suggest an excessively heavy burden of justification more appropriate to cases of purposeful discrimination, *see Rizzo*, 564 F.2d at 148, it provides insufficient guidance to the parties and the courts. The latter difficulty also counsels against the amorphous four-factor test articulated in *Arlington Heights II*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). The lack of determinative guidance in that test is apparent from the Seventh Circuit's attempt to apply it in *Arlington Heights II. See id.* at 1293-94. In addition, one factor, purpose, cannot be determinative under an effects test, and another factor, relief sought, should not be determinative of liability.

[64] *E.g.*, United States v. City of Black Jack, Mo., 508 F.2d 1179 (8th Cir. 1974) (rezoning), *cert. denied*, 422 U.S. 1042 (1975).

[65] *E.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (refusal to build public housing in white area), *cert. denied*, 435 U.S. 908 (1978); *Arlington Heights II*, 558 F.2d 1283 (7th Cir. 1977) (denial of rezoning), *cert. denied*, 434 U.S. 1025 (1978).

[66] *Cf.* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (decision based on state constitutional law).

If the overall operation of a municipality's land use practices may be challenged under the Fair Housing Act on a non-site-specific basis pursuant to an effects test standard, then concepts of regionalism and fair share developed by New Jersey and other state courts may play a role in the analysis. These concepts are discussed illuminatingly in *Developments*, *supra* note 39, at 1635-59. A municipality is liable under these concepts if it has failed to assure within its boundaries an overall mix of residential uses that satisfies its fair share of regional housing needs, based on economic integration of the regional population.

It has been suggested that any workable effects test in the land use area must include these concepts. *See* Sager, *supra* note 44, at 529-30, 530 n.68. But these concepts and the cases such as *Mt. Laurel* from which they derive focus on economic discrimination, while the Fair Housing Act deals with racial and national origin discrimination. Just as discrimination against the poor does not in itself violate the fourteenth amendment, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971), so economic discrimination does not necessarily constitute a violation of Title VIII, even though, due to the correlation between race and poverty, it has a racially disparate effect. *See* Boyd v. Lefrak Org., 509 F.2d 1110, *reh'g denied*, 517 F.2d 918 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975) (discussed *infra*). This consideration poses the greatest potential barrier to infusing Title VIII with the concepts of regionalism and fair share. Also, it is the strongest reason why limiting principles are necessary in attacking land use practices on an across the board, non-site-specific basis pursuant to an effects test under that statute. Liability under Title VIII may not be predicated on economic discrimination alone. However, factual information on regional housing needs and fair share assessments may well be useful elements of an overall evidentiary analysis of racially segregative effect and the justifications asserted for it.

The crucial limiting principle is that the challenged practice must be shown in fact to

HeinOnline -- 17 U.C. Davis L. Rev. 461 1983-1984

effect of a zoning scheme is to perpetuate racial segregation, its foreclo-

---

have a racially segregative ultimate effect on the community as a whole, not just a theoretical or even real disparate impact, *cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII), on one racial group as opposed to another. *See* United States v. City of Black Jack, Mo., 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Arlington Heights II*, 558 F.2d 1283, 1291 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). This principle should serve both to distinguish racial from purely economic discrimination, and to avoid the defects of a *Griggs* test of disparate impact in this area.

A test which looks at racially disparate impact alone can be both overinclusive and underinclusive in the housing context. An overinclusive mechanistic application would find an income test that excludes all welfare recipients from an apartment building unlawfully discriminatory when the majority of such recipients are black or Puerto Rican, notwithstanding that the racial composition of the building mirrors the racial composition of the area where it is located. *See Boyd*, 509 F.2d at 1112-13. In such a context, the discrimination is economic, not racial, and therefore not a violation of the Fair Housing Act. *Boyd* reaches the correct result on its facts, although the legal standard that it articulates incorrectly rejects even a properly applied effects test. A disparate impact test which looks only at racial impact could be underinclusive in the land use context. For example, it might lead to the conclusion that no racially segregative effect is present when the class of persons who would have occupied the housing project in question includes 29% of the white population as well as 32% of the black population, even though the ultimate effect of blocking the project would be to retain the municipality's all-white character and foreclose 85% of the blacks living in the metropolitan area from obtaining housing in the municipality. *Black Jack*, 508 F.2d at 1186. Racially segregative ultimate effect — not racially disparate impact per se — must be the touchstone in this area.

Thus, to challenge the overall operation of a municipality's land use practices successfully under the Fair Housing Act, the plaintiff must show that the practices have actually and unjustifiably caused or contributed to the creation or perpetuation of racial segregation, and that in the factual context presented, they have played a role in unjustifiably causing the municipality to remain excessively white while nearby areas became excessively nonwhite, i.e., in artificially skewing the population distribution on a racial basis without sufficient countervailing justification.

Under such an analytically sound approach, regionalism and fair share data may enter into the factual equation under Title VIII without obliterating the essential nexus between the effects of the challenged practices and the prohibited racial or national origin discrimination. So long as the proper focus is maintained, that the outcome of such litigation will also have an effect on economic discrimination and incidentally benefit portions of the white population as well as minorities does not mean that it is no longer soundly rooted in the Fair Housing Act. "The fact that the conduct complained of adversely affected white as well as nonwhite people . . . is not by itself an obstacle to relief under the Fair Housing Act." *Arlington Heights II*, 558 F.2d at 1291; *accord Black Jack*, 508 F.2d at 1186.

The potential application of fair share concepts was considered and debated within the Civil Rights Division during the formulation of the exclusionary land use initiative. The subject was controversial because of the danger of sliding impermissibly into the area of economic discrimination not covered by Title VIII, the spectre of quotas or

HeinOnline -- 17 U.C. Davis L. Rev. 462 1983-1984

sure in advance of potential proposals for integrated housing must be just as unlawful as the prevention of a particular project after it has been proposed.[67]

The vitality of the effects test under the Fair Housing Act is not undermined by the now clearly articulated requirement of an improper purpose as a necessary element of a racial discrimination claim under the fourteenth amendment.[68] In Title VIII cases, as in Title VII employment discrimination cases, unrebutted proof of discriminatory effect alone may establish a statutory violation.[69] While the sparse legislative history of Title VIII is not determinative, it suggests that judicial adoption of an effects test is an appropriate interpretation which advances the essential goals of the legislation.[70] A statutory effects test is available for cases in which racially discriminatory purpose is absent or difficult to prove. Thus, decisions refusing to find racial discrimination[71] or other actionable violations of constitutional rights[72] in cases in which

---

racial balance as an element of liability, and the fact that there is no apparent necessity to incorporate such concepts into the legal theory of liability. However, no decision was reached on whether to include such theoretical concepts in the legal analysis, and the initiative was curtailed before an occasion ever arose to present such concepts to a court. While the subject was controversial from the standpoint of the formulation of legal theory, there was no disagreement with respect to the desirability of including all pertinent factual data in evidence.

[67] *Arlington Heights II*, 558 F.2d 1283, 1292-93 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

[68] *See Arlington Heights I*, 429 U.S. 252, 270-71 (1977); Washington v. Davis, 426 U.S. 229, 246-48 (1976) (employment discrimination).

[69] Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

[70] *See id.* at 147-48; Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. 199, 207-12 (1978); *Developments*, *supra* note 39, at 1681.

[71] *E.g.*, *Arlington Heights I*, 429 U.S. 252 (1977); James v. Valtierra, 402 U.S. 137 (1971); Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Mahaley v. Cuyahoga Metropolitan Hous. Auth., 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975); Acevedo v. Nassau County, N.Y., 500 F.2d 1078 (2d Cir. 1974).

[72] *E.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); James v. Valtierra, 402 U.S. 137 (1971); Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926); Citizens Comm. for Faraday Wood v. Lindsay, 508 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Mahaley v. Cuyahoga Metropolitan Hous. Auth., 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975); Acevedo v. Nassau County, N.Y., 500 F.2d 1078 (2d Cir. 1974).

HeinOnline -- 17 U.C. Davis L. Rev. 463 1983-1984

land use or analogous practices have been challenged under the fifth or fourteenth amendment would not limit the Attorney General's litigation under the Fair Housing Act.[73]

Neither the Division's initiative nor the effects test contemplated that any land use practice would be determined unlawful per se because it has an exclusionary effect. Each case would be judged in light of all the pertinent facts and circumstances, including justifications the municipality may advance. While criteria must emerge on a case by case basis,[74] and while the fundamental criterion would be a rule of reason, the resulting judicial intervention would not be heedless of legitimate local interests. Disingenuous and factually unsupported justifications would readily be rejected.[75] More complicated questions of justification would receive careful consideration. The more stringent the restrictions imposed and the more dramatic the segregative effect, the more difficult

---

[73] As it developed, the most ambitious and potentially far-reaching portion of the Division's initiative foundered in the Carter administration, when the decision was made not to authorize cases which depended entirely on an effects test. *See infra* text accompanying notes 207-15. In the Reagan administration, the Division has not even been permitted to make the effects test argument in pending litigation. *See infra* notes 128, 171, 193.

Notwithstanding the strong arguments and substantial authority favoring application of an effects test under the Fair Housing Act, the issue will remain controversial until resolved by the Supreme Court. In the zoning context, the principal objection is that the test is both insufficiently defined and inherently overbroad, and that it subjects local land use decisions, including many legitimate ones, to federal judicial scrutiny under amorphous standards. *See* Sager, *supra* note 44, at 530. While legitimate concerns remain and there will be difficult cases, fear of the unknown should be no more dispositive in this area than it has been in the employment discrimination context. Unquestionably, the effects test should not be applied in such a way that the line between racial discrimination and economic discrimination is obliterated. *See supra* note 66. However, it is inappropriate to assume that the task is so elusive as to be beyond the competence of the federal judiciary. When remedial legislation does apply to a subject matter area, it is the duty of the courts to effectuate it as best they can. Unless subject matter coverage is removed by amendment or repeal, the argument that federal courts should not be interfering in local land use matters at all is merely an argument against enforcement of the statute, not a useful guide to interpretation or analysis.

[74] Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

[75] *See, e.g.*, *id.* at 149-50; United States v. City of Black Jack, Mo., 508 F.2d 1179, 1186-88 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *cf.* UFW Hous. Project, Inc. v. City of Delray Beach, Fla., 493 F.2d 799, 809-11 (5th Cir. 1974) (articulated fourteenth amendment liability standard supervened by Washington v. Davis, 426 U.S. 229, 244-45 & n.12 (1976), but decision retains validity under Title VIII); Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y., 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (same).

HeinOnline -- 17 U.C. Davis L. Rev. 464 1983-1984

the practices would be to defend. The issues would be capable of principled adjudication, and there is no inherent inconsistency between intelligent developmental and environmental controls and compliance with the Fair Housing Act.

3. Remedy

The range of potential remedies in land use cases affords ample opportunities for creativity.[76] The available remedies are not limited to invalidation of particular actions or ordinances. A proper remedy in any case should include affirmative steps to overcome the effects of the unlawful discrimination.[77] Such steps may encompass anything appropriate to a particular situation and commensurate with the violation. The court may require, through incentives to developers, that the municipality encourage development of a sufficient number of units of racially integrated low-cost housing to overcome the effects of its past unlawful prevention of the development of such housing.[78] The use of goals and timetables in this context need not raise concerns about reverse discrimination and harm to innocent third parties as it has in the employment context.[79]

Exclusionary zoning cases have frequently spawned interminable litigation over the design and implementation of relief, with concomitant dissipation of the intended impact on the problems they sought to address. Specific, comprehensive remedies should generally be afforded at the outset in these cases with a view toward maximizing tangible results.[80]

---

[76] *See Developments*, *supra* note 39, at 1694-1707.

[77] *See, e.g.*, Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 228 (5th Cir. 1971); *cf.* Louisiana v. United States, 380 U.S. 145, 154 (1965) (voting discrimination).

[78] *See* United States v. City of Parma, Ohio, 504 F. Supp. 913, 923 (N.D. Ohio 1980) (Remedial Order to *Parma*, 494 F. Supp. 1049), *aff'd as to liability, aff'd in part, vacated in part, rev'd in part as to remedy*, 661 F.2d 562, 577-78, *reh'g denied*, 669 F.2d 1100 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). When the appropriate number of units may not be derived solely from specific projects the municipality has unlawfully blocked, the court might consider a quantified fair share requirement. *See generally supra* note 66. *Parma* takes this approach.

[79] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979).

[80] In a recent unanimous 100 page opinion redolent with frustration over the lack of effective impact of its groundbreaking efforts to remedy exclusionary land use practices under state constitutional law, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), discussed *supra* note 66, the Supreme Court of New Jersey declared that it had "learned from experience . . . that unless a

HeinOnline -- 17 U.C. Davis L. Rev. 465 1983-1984

Expert assistance from developers and city planners will frequently be necessary to design complex remedies. The defendant may be in the best position to propose a workable remedial plan, and should be given the opportunity to do so.[81] However, the inherently uncertain effectiveness of remedies in this area, and the lengthy time periods involved in implementation, suggest the need for involvement of both parties and the court in the initial formulation of relief. Even with such efforts, and appropriate expert assistance, relief may founder because of factors beyond the parties' and the court's control, such as general economic conditions, the availability of federal or state housing subsidies, and the policies of federal and state agencies whose cooperation is necessary or desirable. Although it may be difficult for the private construction industry to produce housing at reduced cost without financial assistance,[82] a municipality may provide such assistance.[83] It seems appropriate that the municipality be required to do so when it has engaged in a pattern or practice of unlawful discrimination.[84]

D. *The Strategy for Attorney General Litigation*

Having formulated its theories of standing, liability, and remedy, the Civil Rights Division was prepared to develop new cases directed at racially exclusionary municipal practices. The Division had little experience in land use litigation, and no experience in the kind of non-site-specific litigation contemplated. The size and complexity of the potential cases were of a higher order of magnitude than most of the Divi-

---

strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals." Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 199, 456 A.2d 390, 410 (1983). The court modified its prior rulings to make them more stringent and universal in application. It embraced the kind of quantification of the fair share requirement that it had previously rejected, emphasized that affirmative governmental devices, including incentive zoning and mandatory set-asides, should be used to encourage the construction of low-cost housing when elimination of unnecessary cost-producing requirements and restrictions is insufficient, and required that effective remedies normally be imposed at the conclusion of the initial round of litigation. *Id.* at 214-20, 456 A.2d at 418-21.

[81] *Cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971) (court may fashion school desegregation remedy when school authorities fail to do so). Despite the theoretical advantages of placing the initial responsibility for the design of a remedy on the defendant, in the school desegregation context this procedure has frequently spawned years of dilatory litigation. *Id.* at 13-14.

[82] *See* Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1016 (1976).

[83] *See, e.g., id.*; *see also infra* text accompanying notes 198-99.

[84] *See infra* text accompanying notes 117, 129-34.

HeinOnline -- 17 U.C. Davis L. Rev. 466 1983-1984

sion's previous housing discrimination cases, and the Division had to be prepared for extended litigation. These cases would not be as readily settled by consent decree as private sector cases, in which political considerations and restraints on settlement are absent and the expense and annoyance of trial frequently outweigh any business disadvantages anticipated from the restrictions contained in a consent decree. Moreover, any land use cases brought were likely to be both highly visible and controversial. For all of these reasons, the Division needed to choose its ground carefully in this area. To the extent that cases involving racially discriminatory purpose could be identified, they would be vigorously pursued, along with cases that depended entirely on the application of an effects test. The goal was to bring a substantial number and variety of cases.

The Division needed to target promising subjects of investigation, as well as to pursue site-specific or more general complaints called to its attention. The most pertinent information for such purposes would have been a study comparing land use practices in the various suburbs of an urban area with the relative presence or absence of minorities and/or low cost housing. If such studies or other data had existed, they would have provided an ideal point of reference. In any case, the selection of targets for land use litigation involved sophisticated judgments. Most importantly, the Division needed to be satisfied, particularly in a non-site-specific context, that the practices to be challenged were in fact a cause of racial segregation, and that in their absence the history of racial separation would have been materially different. In addition, the Division had to consider whether, given the pertinent market forces and economic conditions, the remedy to be sought — modification of the exclusionary practices —would likely lead to the development of housing accessible to minorities. The answers to these inquiries would necessarily be somewhat speculative, but sources of pertinent information did exist.

The Division first explored available census information and demographic studies. Information regarding relative population and economic growth as between city and suburbs, and analyses from a racial standpoint, were helpful background for understanding and evaluating the effects of land use practices. In addition to census data and demographic and other planning studies, the Division used the following sources of information: developers who had worked on subsidized or other low-cost housing, federal and state government personnel who had knowledge of plans and proposals for such housing projects, Housing Assistance Plans and other information submitted and reviewed in connection with the HUD-administered Community Development

HeinOnline -- 17 U.C. Davis L. Rev. 467 1983-1984

Block Grant Program,[85] state, city, and suburban planning departments, academic and other experts, and fair housing organizations, attorneys, and enforcement agencies. In addition, in a number of ongoing northern and western school desegregation investigations, land use practices were reviewed with an eye to developing joint cases and remedies affecting both schools and housing.[86]

A number of factors other than targeting considerations, such as unsolicited information received and the productivity of one investigation versus another, were equally important in identifying new cases. When a provable violation with significant impact was uncovered, the impetus was to pursue it rather than to wait for a better case to materialize. So long as the Division's rigorous standards of evidentiary sufficiency were satisfied in a particular case, excessive selectivity with regard to palpable violations was inappropriate. The goal was to establish a presence and bring as many cases as possible in an area in which the Division had been insufficiently active.

III. Cases

In the years prior to the Carter administration, the Department of Justice filed only three lawsuits challenging exclusionary municipal housing practices.[87] During the Carter administration, eight such suits

---

[85] *See* 42 U.S.C. §§ 5301-5317 (1976 & Supp. V 1981).

[86] This effort was inspired by the difficulty of achieving interdistrict school desegregation based solely on evidence of school board practices, and the possibility that evidence of housing discrimination by suburban jurisdictions would be a basis for including them in a school desegregation remedy. *See* Milliken v. Bradley, 418 U.S. 717, 755 (1974) (Stewart, J., concurring).

[87] In chronological order, these cases were Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y., 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); United States v. City of Black Jack, Mo., 372 F. Supp. 319 (E.D. Mo.), *rev'd*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United States v. City of Parma, Ohio, 494 F. Supp. 1049, Remedial Order, 504 F. Supp. 913 (N.D. Ohio 1980), *aff'd as to liability, aff'd in part, vacated in part, rev'd in part as to remedy*, 661 F.2d 562, *reh'g denied*, 669 F.2d 1100 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). These cases are discussed *infra* text accompanying notes 96-134.

This figure does not include five amicus curiae briefs filed in private lawsuits. Two of these briefs were in cases related to Justice Department suits against the same defendants: Cornelius v. City of Parma, Ohio, 506 F.2d 1400 (6th Cir. 1974) (unpublished opinion); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972), *on remand*, 454 F. Supp. 1223 (1978), *rev'd and remanded*, 605 F.2d 1033 (1979), *cert. denied*, 445 U.S. 905 (1980). The other three were in James v. Valtierra, 402 U.S. 137 (1971); Ranjel v. City of Lansing, 397 U.S. 980 (1970), *denying cert. to* 417 F.2d 321 (6th Cir. 1969); and Gautreaux v. Chicago Hous. Auth., 304 F. Supp.

HeinOnline -- 17 U.C. Davis L. Rev. 468 1983-1984

were filed[88] and one was set to be filed but elimination of the impediment to be challenged rendered it unnecessary.[89] Seven of these nine cases were developed during the initiative discussed in this Article. Seven more cases were fully developed in this initiative but were not filed.[90] To date[91] during the Reagan administration, two new cases challenging municipal practices have been instituted.[92] These cases will be discussed in chronological order, beginning with those predating the 1978-1980 initiative and continuing through the accomplishments and the disappointments of that initiative.

When these cases are considered against the conceptual background discussed above, two particularly significant observations emerge. First, the history of the Civil Rights Division's involvement in this area vividly illustrates the difficulties of attempting to fit the litigation program of a law enforcement agency into a predetermined theoretical design. When litigation must be preceded and justified by extensive investigation, solid cases that are developed will be brought even if they rely on

---

736 (N.D. Ill. 1969).

[88] In chronological order, these cases were United States v. City of Sault Ste. Marie, Mich., No. M78-33 (W.D. Mich. Feb. 8, 1979) (Consent Decree) (discussed *infra* text accompanying notes 135-36) (copy on file at U.C. Davis Law Review office); United States v. Housing Auth. of Chickasaw, Ala., 504 F. Supp. 716 (S.D. Ala. 1980) (discussed *infra* text accompanying notes 137-48); Angell & United States v. Town of Manchester, Conn., 3 Eq. Opp'ty Hous. Cas. ¶ 15,398 (D. Conn. 1981) (discussed *infra* text accompanying notes 149-72); United States v. City of Dunkirk, N.Y., No. 80-144 (W.D.N.Y. filed Feb. 13, 1980) (discussed *infra* text accompanying notes 173-74) (copy on file at U.C. Davis Law Review office); Lummi Indian Tribe v. Hallauer, No. C79-682R (W.D. Wash. Dec. 8, 1982) (Consent Decree) (discussed *infra* text accompanying notes 175-76) (copy on file at U.C. Davis Law Review office); United States v. City of Birmingham, Mich., 538 F. Supp. 819 (E.D. Mich. 1982), *modified as to relief and aff'd*, No. 82-1559, slip op. (6th Cir. Feb. 8, 1984) (discussed *infra* text accompanying notes 177-96); United States v. Town of Glastonbury, Conn., No. H-80-770 (D. Conn. Nov. 17, 1982) (Consent Decree) (discussed *infra* text accompanying notes 197-202) (copy on file at U.C. Davis Law Review office); United States v. Yonkers Bd. of Educ., 518 F. Supp. 191 (S.D.N.Y. 1981) (ruling on motions; case as yet unresolved) (discussed *infra* text accompanying notes 203-05).

[89] *See* text following note 136 (discussing unfiled Milford, Ohio case). These figures do not include two amicus curiae briefs filed in private suits. One brief was in a case related to a Justice Department suit against the same defendant: Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). The other was in Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

[90] *See infra* text accompanying notes 206-27.

[91] References *passim* "to date," "at this writing," and "to the present" are to July, 1983.

[92] *See infra* text accompanying notes 228-31.

HeinOnline -- 17 U.C. Davis L. Rev. 469 1983-1984

traditional legal theories and will not necessarily advance the more far-reaching precedential goals of the initiative. Not to bring them would be a significant waste of the resources invested in their development. Second, cases which would have far-reaching significance may not be brought because of practical impediments, or because of bureaucratic considerations which unduly emphasize caution at the expense of innovation. The most significant innovations contemplated by the 1978-1980 initiative were a focus on non-site-specific cases, and a reliance on an effects test rather than a showing of racially discriminatory purpose. So far, however, only one of the eight cases in this area filed during the Carter administration has produced useful effects test precedent,[93] and the only non-site-specific land use case filed as a result of the 1978-1980 initiative was unsuccessful.[94] On the other hand, for various reasons six solidly documented cases in which no evidence of racially discriminatory purpose would have been offered were, regrettably, not brought by the Carter administration despite its asserted commitment to the concepts of the 1978-1980 initiative, and five of these would have been important, precedent setting, non-site-specific cases.[95]

A. *The First Ten Years*

During the first decade after enactment of the Fair Housing Act, the Civil Rights Division filed three lawsuits challenging racially exclusionary municipal practices.

Kennedy Park Homes Association v. City of Lackawanna, New York

On January 17, 1969, the United States moved to intervene[96] as a plaintiff in *Kennedy Park Homes Association v. City of Lackawanna, New York* .[97] Its motion was granted on February 5, 1969.[98] The defendant city had prevented the construction of a racially integrated low-

---

[93] *See* United States v. Housing Auth. of Chickasaw, Ala., 504 F. Supp. 716, 727, 729-32 (S.D. Ala. 1980) (discussed *infra* text accompanying notes 137-48).

[94] *See* Angell & United States v. Town of Manchester, Conn., 3 Eq. Opp'ty Hous. Cas. ¶ 15,398 (D. Conn. 1981) (discussed *infra* text accompanying notes 149-72).

[95] *See infra* text accompanying notes 206-27.

[96] The intervention was pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2 (1976), which authorizes the Attorney General to intervene in private actions seeking relief from denials of equal protection under the fourteenth amendment, as well as pursuant to the Fair Housing Act.

[97] 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

[98] *Id.* at 671-72.

HeinOnline -- 17 U.C. Davis L. Rev. 470 1983-1984

income housing project in a virtually all-white area of Lackawanna.[99] The city first rezoned the tract of land involved as a park and recreation area, and then declared a moratorium on new subdivisions.[100] After the United States intervened in the case, the city rescinded these actions. However, the Mayor then continued to block the project by refusing to allow a sewer tie-in.[101] The city's actions perpetuated the racial isolation of its ten percent nonwhite residents, ninety-nine percent of whom were concentrated in the thirty-five percent nonwhite First Ward.[102] It was clear that the housing project, sponsored by the Colored People's Civic and Political Organization, would be racially integrated and integrative if constructed as planned in the virtually all-white Third Ward.[103]

The district court and the Court of Appeals for the Second Circuit found that the city's actions were racially motivated.[104] The justifications offered — relating to park and recreational needs and sewerage problems — were found disingenuous, pretextual, or otherwise unpersuasive.[105] Both courts found that the city's actions were responsive to citizen desire to maintain segregation.[106] The relief ordered enjoined the defendants from impeding the project, and required that they take the necessary steps to allow the subdivision to begin construction.[107] This early site-specific case is noteworthy as a successful attack on racially motivated uses of zoning and other municipal powers.

---

[99] *Lackawanna*, 436 F.2d at 110-11.

[100] *Id.* at 109.

[101] *Id.* at 111.

[102] *Id.* at 110.

[103] *Id.* at 110-11.

[104] *Lackawanna*, 318 F. Supp. at 695, 696; 436 F.2d at 109. "[T]he Lackawanna City officials attempted to respond to the [racially] discriminatory sentiments of the [white] community." *Lackawanna*, 318 F. Supp. at 695. Both courts also articulated and applied an effects test analysis. *See id.* at 694, 696-97; 436 F.2d at 114. This analysis was not necessary to the decisions, since racially discriminatory purpose was also found. To the extent that the effects test was used under the fourteenth amendment, the decisions are supervened by Washington v. Davis, 426 U.S. 229, 244-45 & n.12 (1976). However, since the case was also brought under the Fair Housing Act, the effects test analysis remains viable as an application of a statutory standard.

[105] *Lackawanna*, 318 F. Supp. at 695-96; *see also* 436 F.2d at 113-14.

[106] *Lackawanna*, 318 F. Supp. at 695; 436 F.2d at 114-15.

[107] *Lackawanna*, 318 F. Supp. at 697-98.

HeinOnline -- 17 U.C. Davis L. Rev. 471 1983-1984

United States v. City of Black Jack, Missouri

The Division's next zoning case was *United States v. City of Black Jack, Missouri*,[108] filed on June 14, 1971. This case involved the response of a virtually all-white unincorporated area of St. Louis County to a proposal to build racially integrated federally subsidized housing for low and moderate-income persons. Residents of the area persuaded the county council to incorporate them into a new city, Black Jack. Black Jack then promptly enacted a zoning ordinance prohibiting the construction of multi-family dwellings, blocking the project.[109]

The district court found that the United States had failed to establish the presence of either a racially discriminatory purpose or a racially discriminatory effect.[110] The Court of Appeals for the Eighth Circuit declined to reverse the district court's finding on the purpose question, although it noted that "[t]he uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone."[111] The court reversed the district court because the zoning ordinance had the unjustified racially segregative ultimate effect of preventing eighty-five percent of the blacks living in the St. Louis metropolitan area from obtaining housing in Black Jack.[112] Examining proffered justifications relating to road and traffic control, school capacities, and property values of adjacent single-family homes, the court found that there was no factual basis for the contention that the zoning ordinance furthered any of these three interests. The court found the other interests asserted insubstantial in relation to the housing opportunities foreclosed.[113]

Black Jack, like *Lackawanna*, could have been decided in the United States' favor on the basis of the evidence of racially discriminatory purpose. Instead, *Black Jack* stands as an important early appellate decision applying an effects test under the Fair Housing Act. It properly defines the test in terms of racially segregative ultimate effect, rather than focusing solely on racially disparate impact.[114] Although the case was site-specific, the impact of the relief — enjoining the enforcement

---

[108] 508 F.2d 1179 (8th Cir. 1974), *rev'g* 372 F. Supp. 319 (E.D. Mo.), *cert. denied*, 422 U.S. 1042 (1975).

[109] *Black Jack*, 508 F.2d at 1182-83.

[110] *Black Jack*, 372 F. Supp. at 328-30.

[111] *Black Jack*, 508 F.2d at 1185 n.3.

[112] *Id.* at 1186.

[113] *Id.* at 1186-88.

[114] *See supra* note 66.

HeinOnline -- 17 U.C. Davis L. Rev. 472 1983-1984

of the ordinance prohibiting multi-family dwellings[115] — would in theory facilitate other proposed developments.

Black Jack is also an example of a case in which, because of increased construction costs, the original project was no longer feasible by the time the final favorable order was entered.[116] No other similar housing was built during the more than four years before the zoning ordinance was finally enjoined, or for more than four years thereafter. Tangible results occurred only after the court of appeals held in the companion private litigation that intervening economic factors did not relieve the district court of the authority and responsibility to fashion relief calculated to eliminate as much as possible the continuing effects of the city's original violation. The court of appeals directed that the city take affirmative steps, along with the plaintiffs, to bring low-cost housing to Black Jack.[117]

United States v. City of Parma, Ohio

The complaint in *United States v. City of Parma, Ohio*,[118] was filed on April 27, 1973, but the case was not tried until late 1979, during the Carter administration's exclusionary land use initiative. Parma is Cleveland's largest suburb, and its population of more than 100,000 is over ninety-nine percent white.[119] The district court upheld the United States' contention that Parma had followed a consistent and successful policy of making housing unavailable to blacks and perpetuating the city's virtually all-white character.[120] The comprehensive pattern or practice of discrimination found included both site-specific and non-site-specific elements: refusal to enact a fair housing resolution welcoming "all persons of goodwill" as residents, consistent opposition to all forms of public and low-income housing and refusal to allow or partici-

---

[115] *Black Jack*, 508 F.2d at 1188; *see also* Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033, 1038 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980).

[116] Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033, 1037-39 (1979). For the complete history of this protracted litigation, see *Park View Heights Corp.*, 335 F. Supp. 899 (E.D. Mo. 1971), *rev'd and remanded*, 467 F.2d 1208 (8th Cir. 1972), *on remand*, 454 F. Supp. 1223 (1978), *rev'd and remanded*, 605 F.2d 1033 (1979), *cert. denied*, 445 U.S. 905 (1980).

[117] Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033, 1036-40 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980).

[118] 494 F. Supp. 1049, Remedial Order, 504 F. Supp. 913 (N.D. Ohio 1980), *aff'd as to liability, aff'd in part, vacated in part, rev'd in part as to remedy*, 661 F.2d 562, *reh'g denied*, 669 F.2d 1100 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

[119] *Parma*, 494 F. Supp. at 1051-52.

[120] *Id.* at 1095-97.

HeinOnline -- 17 U.C. Davis L. Rev. 473 1983-1984

pate in any public or subsidized housing programs, denial of a building permit to a particular federally subsidized low-income development, refusal to submit an adequate Housing Assistance Plan in connection with a Community Development Block Grant application, and passage of four land use ordinances imposing height, parking, and voter-approval limitations on development.[121]

The court rejected Parma's contention, which was the subject of conflicting expert testimony, that its racial composition was solely a result of economics and associational preferences of whites and blacks.[122] The court held that a violation of the Fair Housing Act may be established by a showing of either racially discriminatory purpose or unjustified discriminatory effect.[123] The court found overwhelming evidence that the discriminatory purpose of public officials and the electorate was responsible for all elements of the pattern or practice except two of the land use ordinances.[124] With respect to these two ordinances, the court found an unjustified discriminatory effect.[125] The evidence of racial purpose included public statements by the City Council President that "I do not want Negroes in the City of Parma," and by the Mayor that he considered Parma integrated when it had three black families.[126]

The district court's opinion contains a detailed review of the extensive evidence of site-specific and non-site-specific patterns of discrimination. The Court of Appeals for the Sixth Circuit affirmed the liability findings in all respects,[127] and affirmed the district court's use of the effects test in evaluating the practices with respect to which no discriminatory purpose was found.[128] It held that a pattern of massive discrimination had been proved, and endorsed the entire spectrum of legal positions advanced by the United States. *Parma* represents a high point of the Division's exclusionary land use initiative.

---

[121] *Id.* at 1052, 1065-94.

[122] *Id.* at 1057-65.

[123] *Id.* at 1053-55.

[124] *Id.* at 1068, 1072-74, 1081, 1083, 1086, 1088, 1093-97.

[125] *Id.* at 1089-90, 1100 n.69.

[126] *Id.* at 1065-66.

[127] *Parma*, 661 F.2d at 574-76.

[128] *Id.* at 575-76. In an appellate brief filed in May, 1981, during the Reagan administration but before the formal tenure in office of Assistant Attorney General Wm. Bradford Reynolds, the Civil Rights Division supported (albeit as quietly as possible) the application of the effects test in this case (and advocated that the district court's judgment as to both liability and remedy be affirmed in all respects). *See* Brief for the United States at 34, 37, *Parma*, 661 F.2d at 562 (copy on file at U.C. Davis Law Review office). The Division was not permitted to advocate an effects test at all in any housing case after Mr. Reynolds became Assistant Attorney General.

HeinOnline -- 17 U.C. Davis L. Rev. 474 1983-1984

The remedy ordered in *Parma* is equally significant. In addition to a general injunction and appropriate modifications of the zoning ordinances found unlawful, the district court's order required the city to implement a fair housing educational program for responsible officials and employees, to enact a welcoming resolution, to conduct an advertising program to ameliorate its racially exclusionary reputation, and to establish a fair housing committee to develop and implement a program of specific acts encouraging and assisting minorities to move to Parma, assisting and supplying incentives to developers, and otherwise fostering an increase in the supply of racially integrated low-income housing.[129] This latter program was to include steps to develop public housing, to participate in federal housing subsidy programs, and to participate in the Community Development Block Grant Program.[130] In addition, the city was specifically ordered to facilitate the development of at least 133 units of low and moderate-income housing annually, with the ultimate goal of meeting a quantified low-income housing need.[131] The Sixth Circuit affirmed the district court's remedial order in most significant respects,[132] but vacated the provision fixing a goal of 133 units of low and moderate-income housing per year. The basis for the court of appeals' decision on the latter point was not that such a goal would be inappropriate. Rather, the court held that the fixing of this particular goal by the district court was premature, and that the fair housing committee should set a goal of meeting the city's quantified low-income housing needs within a reasonable time.[133] The appellate court emphasized that the city was responsible for carrying out the district court's order in a timely fashion.[134]

B. 1978-1980: Actions Taken

During the Carter administration, action was taken to initiate nine new cases challenging racially exclusionary municipal practices — three times the number of cases in the preceding ten years. This Article next discusses these cases chronologically and notes how they related to the goals of the initiative.

---

[129] *Parma*, 504 F. Supp. at 918-22.

[130] *Id.* at 922-23.

[131] *Id.* at 923; *see supra* note 78 and accompanying text.

[132] *Parma*, 661 F.2d at 576-79.

[133] *Id.* at 577-78.

[134] *Id.* at 578. This does not mean that the city must actually build the housing required; rather, the city must do what is necessary to facilitate such action by private developers. *Parma*, 504 F. Supp. at 923; 661 F.2d at 578.

HeinOnline -- 17 U.C. Davis L. Rev. 475 1983-1984

United States v. City of Sault Ste. Marie, Michigan

On April 18, 1978, suit was filed in *United States v. City of Sault Ste. Marie, Michigan.*[135] This site-specific land use case predated the initiative discussed in this Article, and was resolved by a consent decree.[136]

Milford, Ohio

On July 20, 1978, Assistant Attorney General Days authorized the filing of a Fair Housing Act suit against the Village of Milford, Ohio, a small, virtually all-white suburb of Cincinnati. The suit was to challenge Milford's denial of a pre-annexation sewer tie-in for a federally subsidized sixty-five unit apartment complex. The denial occurred after the developer's affirmative action plan, which projected twenty-three percent black occupancy in the complex, became public knowledge and citizen opposition developed. There was some evidence that the citizen opposition and the village's action were at least in part racially motivated. However, the case was authorized with the understanding that the evidence of discriminatory purpose was not overwhelming, and that the application of an effects test might well be necessary for the United States to prevail. Since the village's decision to require annexation prior to any sewer tie-in was inconsistent with the treatment of two prior projects, and Milford's Public Service Commission had previously approved the tie-in for the project in question, it would have been extremely difficult for the village to justify its refusal to allow a pre-annexation tie-in in this case.

Within a week of being notified of the United States' intention to file suit and to move for preliminary relief in the absence of an immediate settlement, Milford changed its position on the sewer tie-in and agreed to all the relief that would have been sought from the court. This removed the only impediment to completion of the project. Thus, there was no need to proceed by way of a complaint and consent decree in this entirely site-specific case, and the suit was not filed.

While this case, like *Sault Ste. Marie*, was site-specific and predated

[135] No. M78-33 (W.D. Mich. filed Apr. 18, 1978).

[136] The complaint alleged that the defendant's refusal to provide water and sewer service to a low-rent housing project to be built by an Indian Housing Authority on trust land was racially discriminatory and in violation of the Fair Housing Act. The consent decree removed the challenged impediments to the project. *Id.* (W.D. Mich. Feb. 8, 1979) (Consent Decree) (copy on file at U.C. Davis Law Review office). The case did not involve segregative impact as such, but it did involve racially discriminatory action that interfered with efforts to provide housing to Indians.

HeinOnline -- 17 U.C. Davis L. Rev. 476 1983-1984

the initiative discussed here, it would have been significant as the first Carter administration land use case to rely heavily on an effects test. It is also a noteworthy example of a well-documented case, representing a substantial amount of investigative work, which could not be brought for reasons beyond the control of the Department of Justice.

United States v. Housing Authority of Chickasaw, Alabama

The first case to be developed during the initiative discussed in this Article was *United States v. Housing Authority of Chickasaw, Alabama*,[137] filed on March 5, 1979. Unlike most of the other cases developed during this initiative, it did not involve land use as such, but rather another governmental practice which had the effect of perpetuating a city's all-white character. The *Chickasaw* decision is a significant effects test precedent.

Chickasaw is an all-white city of about 8000 persons located in Mobile County, which is more than thirty percent black. It borders the fifty percent black city of Prichard, and is only five miles from downtown Mobile.[138] Since World War II, Chickasaw has had no black residents other than one family which lived there for two weeks in 1978 and left because of racial harassment.[139] The 309 units of public housing had never had a black tenant, because of a requirement adopted in 1962 that only "citizens" — persons who had already lived in Chickasaw — were eligible to reside there.[140] While nonresident whites could easily satisfy this requirement as applied, by temporarily moving in with friends or relatives without any intention of staying in Chickasaw if they failed to obtain public housing, it was virtually impossible for otherwise qualified blacks to do so.[141]

An inference of racially discriminatory purpose could have been drawn in this case from the historical context of the citizenship requirement, the manner in which it was applied, and the manner in which the justification for it was articulated: to prevent the use of the public housing as a "dumping ground for social undesirables."[142] Although the United States urged it to do so, the district court declined to draw this

---

[137] 504 F. Supp. 716 (S.D. Ala. 1980). In the interest of disclosure, it should be noted that the author was a counsel of record in this case.

[138] *Id.* at 718.

[139] *Id.* at 718, 724-25.

[140] *Id.* at 717-18.

[141] *Id.* at 718, 721-22.

[142] *Id.* at 720, 723-25, 728-29.

HeinOnline -- 17 U.C. Davis L. Rev. 477 1983-1984

inference.[143] However, the court found that the segregative effect of the requirement was clear. Applying an effects test, which the United States also advocated, the court held that the Fair Housing Act's goals outweighed the justifications offered for the citizenship requirement.[144] While the court gave credence to the justifications proffered and held that this was a close case because they weighed heavily in the defendant's favor,[145] in fact the justifications seemed insubstantial. The desire to provide housing for those who already lived within the city was hardly advanced by allowing persons to satisfy the requirement by moving in for a single day with friends or relatives.[146] There were no doubt alternative means of meeting the asserted need to screen out drug addicts, prostitutes, and troublemakers.[147] Nevertheless, the court's analysis stands as an important precedent applying an effects test under Title VIII to determine the lawfulness of a racially exclusionary municipal practice. The court's remedial order enjoined any citizenship requirement or preference, required advertisement of the changed policy, and provided a ninety day period within which black applicants would be granted retroactive application date priority.[148]

Angell & United States v. Town of Manchester, Connecticut

The second case brought as a result of the 1978-1980 initiative also did not deal directly with land use as such. It was an ambitious and potentially important case, because it was non-site-specific, because it challenged the actions of voters in a legally binding referendum, and because it challenged a town's withdrawal from a federal program in which participation is normally voluntary. As of this writing it is the Justice Department's only unsuccessful Title VIII suit against exclusionary municipal practices. The case foundered on the crucial issue of the nexus between the allegedly discriminatory practice and a demonstrable segregative effect.

On October 5, 1979, the United States moved to intervene as a plain-

---

[143] *Id.* at 728-29.

[144] *Id.* at 728, 730-32.

[145] *Id.* at 731-32. The court's application of the *Arlington Heights II* four-factor balancing test further illustrates the lack of dispositive guidance provided by such an analysis. *See supra* note 63.

[146] *See Chickasaw*, 504 F. Supp. at 721-22. The United States contended that acceptance of such a justification would contravene the constitutional right to travel. *Id.* at 732-33. At least with respect to a requirement as opposed to a preference, prior residency rather than intended domicile is a stringent exclusionary standard.

[147] *See id.* at 731-32.

[148] *Id.* at 733-36.

HeinOnline -- 17 U.C. Davis L. Rev. 478 1983-1984

tiff in *Angell v. Zinsser*,[149] and the complaint in intervention in what became *Angell & United States v. Town of Manchester, Connecticut* was filed on October 23, 1979.[150] The central allegation was that Manchester, a ninety-seven percent white suburb of Hartford, which is almost fifty percent nonwhite, had adversely affected the opportunity for blacks and hispanics to live in the town by withdrawing from the Community Development Block Grant (CDBG) program pursuant to a racially inspired referendum.[151] The referendum and the attempted withdrawal from the CDBG program closely followed the town's establishment of a fair housing office and distribution of a brochure encouraging minorities to consider it an equal housing opportunity community, in response to HUD conditions for Manchester's continued participation in the program. The suit alleged that the referendum was a reaction to these fair housing efforts and enacted an official policy of maintaining segregation in violation of the fourteenth amendment and the Fair Housing Act.[152]

Several factors combined to make *Manchester* an unusually difficult case. First, the CDBG program is voluntary. Under normal circumstances, a community is as free to withdraw from the program as it is to decline to participate initially.[153] This fact does not preclude a finding that a withdrawal motivated by a racially discriminatory purpose violates the fourteenth amendment, or that a withdrawal having an unjustified racially segregative effect violates the Fair Housing Act. However, the court was understandably hesitant to find that the loss of a voluntarily undertaken program could constitute a discriminatory effect violative of Title VIII.[154] Second, the core action challenged in *Manchester* was the vote of the electorate in a referendum. The majority of the town's officials supported participation in the CDBG program and campaigned against the referendum, but the referendum was

---

[149] 473 F. Supp. 488 (D. Conn. 1979) (granting preliminary injunction).

[150] Angell & United States v. Town of Manchester, Conn., 3 Eq. Opp'ty Hous. Cas. ¶ 15,398, at 15,998.246 (D. Conn. 1981). The author was a counsel of record in this case.

[151] *Id.* at 15,998.246-.247.

[152] *Id.* The United States intervened in the case pursuant to Title IX of the 1964 Civil Rights Act as well as pursuant to the Fair Housing Act. *Id.* at 15,998.246; *see also supra* note 96; Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 671-72 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

[153] *Manchester*, 3 Eq. Opp'ty Hous. Cas. at 15,998.275-.277.

[154] *Id.*

HeinOnline -- 17 U.C. Davis L. Rev. 479 1983-1984

legally binding on the town once approved by the voters.[155] Referenda are subject to the restrictions of the fourteenth amendment,[156] and the Supreme Court has made it clear that the constitutional inquiry requires a finding as to the motivation of the voters' actions.[157] Difficult and distasteful as this inquiry may be,[158] the Court has supplied guidelines to aid in the decisionmaking process.[159] It was not surprising, however, that the *Manchester* court found the question of voter intent murky[160] and was reluctant "to charge the thousands of voters who favored a moratorium on CDBG participation with the racist motives of [a] few."[161] Finally, the connections between Manchester's withdrawal from the CDBG program and the alleged impact on housing opportunities for minorities were indirect. The CDBG program is not a housing program, and community development grants may not be used directly to build new housing.

> [A]lthough it is an important purpose of the program to *encourage* the development of subsidized housing through the requirement that the participating town submit a Housing Assistance Plan (HAP) setting forth *goals* for the development of housing, and, although the program may fund some housing-related activities, CDBG does not necessarily or directly affect the amount of housing available in the community for low and moderate income people.[162]

The United States and the private plaintiffs in *Manchester* sought to respond to the foregoing difficulties with the evidence presented. The court, however, was not persuaded. The crucial issue on which the case foundered was the connection between the town's withdrawal and a demonstrable segregative effect. The failure to persuade the court on this point underlines the crucial importance of this factor in non-site-

---

[155] *Id.* at 15,998.247, 15,998.258-.259, 15,998.283.

[156] *Id.* at 15,998.285; *see also* Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

[157] *Arlington Heights I*, 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[158] *Arlington Heights I*, 429 U.S. 252, 266-68, 268 n.18 (1977); Palmer v. Thompson, 403 U.S. 217, 224-25 (1971).

[159] *See, e.g.*, *Arlington Heights I*, 429 U.S. 252, 264-68 (1977).

[160] *But see* United States v. City of Birmingham, Mich., 538 F. Supp. 819, 825, 828-30 (E.D. Mich. 1982), *modified as to relief and aff'd*, No. 82-1559, slip op. (6th Cir. Feb. 8, 1984); United States v. City of Parma, Ohio, 494 F. Supp. 1049, 1088, Remedial Order, 504 F. Supp. 913 (N.D. Ohio 1980), *aff'd as to liability, aff'd in part, vacated in part, rev'd in part as to remedy*, 661 F.2d 562, *reh'g denied*, 669 F.2d 1100 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

[161] *Manchester*, 3 Eq. Opp'ty Hous. Cas. at 15,998.283-.284.

[162] *Id.* at 15,998.275-.276; *see also id.* at 15,998.250.

HeinOnline -- 17 U.C. Davis L. Rev. 480 1983-1984

specific litigation.[163]

The United States offered various evidence to establish the segregative effect of the CDBG withdrawal. The most significant evidence concerned the impact of the referendum on developers of low and moderate-income housing. The activities of a town staff person whose salary was paid by CDBG funds to encourage and assist developers of such housing to build in Manchester came to an abrupt halt with the passage of the referendum. Several witnesses, including developers with concrete plans involving Manchester prior to the referendum, testified that the referendum was interpreted by developers as establishing the town's hostility to subsidized housing. Thus the referendum had the segregative effect of deterring the construction of subsidized housing. In light of the disproportionately greater need of minorities, the racial occupancy statistics of existing subsidized housing in the town, and federal affirmative marketing requirements, such housing would have been expected to contain substantial numbers of minorities.[164] The court found the evidence concerning the discouragement of developers to be speculative and unpersuasive. In the court's view, the testimony of one developer who had initiated a proposal for subsidized housing with the encouragement and assistance of town officials shortly before the case went to trial effectively rebutted this evidence.[165]

The other evidence emphasized by the United States concerned the impact on potential minority residents of the referendum and the racially-oriented atmosphere in which it was enacted. These factors, the United States contended, reinforced Manchester's racially exclusive reputation among Hartford-area minorities, deterring even those with the financial ability to do so from taking advantage of existing housing opportunities in Manchester.[166] The court found this evidence to be insufficiently concrete and unpersuasive.[167] Other evidence offered also

---

[163] *See supra* text accompanying notes 34-35; note 66.

[164] *See Manchester*, 3 Eq. Opp'ty Hous. Cas. at 15,998.261; Post-Trial Brief of the United States at 49-56, *Manchester*, No. H-79-229 (D. Conn. July 6, 1981) (copy on file at U.C. Davis Law Review office).

[165] *Manchester*, 3 Eq. Opp'ty Hous. Cas. at 15,998.262, 15,998.277-.278.

[166] *See id.* at 15,998.260-.261; Post-Trial Brief of the United States at 60-69, *Manchester*, No. H-79-229 (D. Conn. July 6, 1981) (copy on file at U.C. Davis Law Review office). This kind of evidence was considered significant in United States v. City of Parma, Ohio, 494 F. Supp. 1049, 1065-66, Remedial Order, 504 F. Supp. 913 (N.D. Ohio 1980), *aff'd as to liability, aff'd in part, vacated in part, rev'd in part as to remedy*, 661 F.2d 562, *reh'g denied*, 669 F.2d 1100 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

[167] *Manchester*, 3 Eq. Opp'ty Hous. Cas. at 15,998.278-.279.

HeinOnline -- 17 U.C. Davis L. Rev. 481 1983-1984

failed to convince the court that a sufficient showing of discriminatory effect — a causal connection between the referendum and attempted CDBG withdrawal and decreased housing opportunities for minorities — had been made.[168]

The court's conclusion on this issue was, as a practical matter, dispositive of the entire case. Once the court had found that Manchester's actions had no demonstrated impact on the availability of housing opportunities for minorities, it made little difference whether the actions were motivated by a racially discriminatory purpose, or whether an effects test would be used in the court's analysis. The court nevertheless addressed these issues, concluding first that "although there is some evidence of the influence of racism in the referendum, it is far from conclusive."[169] The court held that liability could be established pursuant to an effects test,[170] but this did not aid the plaintiffs in view of the dispositive finding that no segregative effect had been shown.[171] Neither the United States nor the private plaintiffs appealed the adverse decision in this case.[172]

United States v. City of Dunkirk, New York

On February 13, 1980, suit was filed in *United States v. City of Dunkirk, New York.*[173] This case, which has yet to be resolved, was based both on a purpose theory and on an effects test theory. While the evidence of liability was site-specific, the relief sought was not confined to the particular site which was allegedly the subject of the unlawful discrimination.[174]

---

[168] *See id.* at 15,998.277-.285.

[169] *Id.* at 15,998.284; 15,998.254-.258, 15,998.283-.284.

[170] *Id.* at 15,998.272, 15,998.274.

[171] Although Civil Rights Division attorneys were not permitted to argue for adoption of an effects test in the post-trial brief which was filed in the Reagan administration, *see* Post-Trial Brief of the United States at 81, *Manchester*, No. H-79-229 (D. Conn. July 6, 1981) (copy on file at U.C. Davis Law Review office), this had no influence on the outcome of the case for the reason stated in the text.

[172] Although the United States decided not to appeal during the Reagan administration, the decision was based on the unanimous recommendations of the Civil Rights Division attorneys who tried the case and other career Division attorneys, including the author. Although these attorneys believed that the district court's adverse factual findings on the issues of intent and effect were incorrect, they did not believe that the factual findings would be reversed as clearly erroneous, FED. R. CIV. P. 52(a). As noted in the text, the private plaintiffs also decided not to appeal.

[173] No. 80-144 (W.D.N.Y. filed Feb. 13, 1980) (copy on file at U.C. Davis Law Review office). The author was a counsel of record in this case.

[174] Dunkirk, unlike Black Jack, Parma, and Manchester, for example, has a signifi-

HeinOnline -- 17 U.C. Davis L. Rev. 482 1983-1984

Lummi Indian Tribe v. Hallauer

The United States moved to intervene as a plaintiff in *Lummi Indian Tribe v. Hallauer* on February 22, 1980.[175] This case, which included an allegation of racially discriminatory purpose, was resolved by a consent decree.[176]

---

cant minority population. The complaint in this case alleged that the city had discriminated against blacks and hispanics by preventing the construction of low and moderate-income housing in white neighborhoods. The violations alleged in the complaint were site-specific, relating to actions by the city in 1972 and 1978 — rezoning and denial of building permits — that blocked two different proposed housing developments on a parcel of land in a white area. The complaint alleged that these actions had the "purpose or effect" of perpetuating residential segregation in Dunkirk. The relief prayed for, which was not limited to the particular site at issue, included a request that the city be required to take "such affirmative steps as will lead to the construction in Dunkirk of an appropriate number of units of low- and moderate-income housing the location(s) of which will be reasonably calculated to reduce residential segregation in Dunkirk." Complaint at 1-4, United States v. City of Dunkirk, N.Y., No. 80-144 (W.D.N.Y. filed Feb. 13, 1980) (copy on file at U.C. Davis Law Review office). At this writing, the case has not yet been tried or otherwise resolved.

A private suit by developers had been filed before the United States' suit, and a suit by the NAACP was filed thereafter. NAACP v. City of Dunkirk, N.Y., No. 80-360 (W.D.N.Y. filed Apr. 28, 1980) (copy on file at U.C. Davis Law Review office); Hutchens v. City of Dunkirk, No. 78-785 (W.D.N.Y. filed Nov. 22, 1978) (copy on file at U.C. Davis Law Review office).

[175] No. C79-682S (W.D. Wash. filed Feb. 22, 1980) (copy on file at U.C. Davis Law Review office). The motion to intervene was granted on March 20, 1980.

[176] The complaint challenged interference by the State of Washington and Whatcom County Sewer and Water Districts with the Tribe's ability to provide sewer facilities, and thereby with its ability to provide housing, for Indian residents of the Lummi Reservation. The actions involved were alleged to violate the fourteenth amendment and the Fair Housing Act. Consent decrees removing the challenged impediments to the provision of sewer facilities resolved this case. Lummi Indian Tribe v. Hallauer, No. C79-682R (W.D. Wash. Nov. 7, 1980) (Order Granting Joint Motion for Partial Judgment on Consent Agreement) (copy on file at U.C. Davis Law Review office); Lummi Indian Tribe v. Hallauer, No. C79-682R (W.D. Wash. Dec. 8, 1982) (Consent Decree) (copy on file at U.C. Davis Law Review office). The case did not involve segregative practices as such, but it did involve governmental actions which prevented the development of Indian housing because of race, in violation of the Fair Housing Act. The question of the Tribe's authority to operate the portion of the system lying within the Whatcom County Sewer and Water Districts, as opposed to its ability to complete construction of the system, was resolved in the Tribe's favor by the court, whose order on that issue was appealed. *See id.*

HeinOnline -- 17 U.C. Davis L. Rev. 483 1983-1984

United States v. City of Birmingham, Michigan

On March 7, 1980, *United States v. City of Birmingham, Michigan*,[177] was filed. This site-specific case was decided on the basis of a finding of racially discriminatory purpose. It has considerably less precedential significance than it would have had if it had been decided on the basis of an effects test. Nevertheless, it stands as a fascinating precedent on the question of attributing a discriminatory purpose to municipal actions taken in response to citizen pressure that was, at least in part, racially motivated.

The case involved actions taken by a virtually all-white suburb of Detroit to prevent the nonprofit Baldwin House Corporation from developing racially integrated senior citizen and family housing.[178] Of Birmingham's approximately 22,000 citizens, forty-four are black.[179] This situation was perpetuated by the city's actions in blocking Baldwin House's plans for subsidized housing, of which approximately sixteen percent of the residents would have been black.[180]

The somewhat complex events which led to the evolution and demise of the Baldwin House proposal are reviewed in detail in the district court's opinions.[181] The most interesting aspect of *Birmingham* is the way in which the court determined that the city had acted with racially discriminatory intent. The court based its conclusion primarily on the fact that the city's actions were intended to appease citizen opposition which it knew was at least in part racially motivated. The court held that:

> The government need not prove that the [City] Commission itself intended to discriminate on the basis of race in order to establish that the City acted with a racially discriminatory intent. In order to demonstrate a city's racially discriminatory intent, it is sufficient to show that the decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the

---

[177] 538 F. Supp. 819 (E.D. Mich. 1982), *modified as to relief and aff'd*, No. 82-1559, slip op. (6th Cir. Feb. 8, 1984). The district court's supplemental findings of fact and discussion of its remedy, *Birmingham*, No. 80-70991 (E.D. Mich. June 10, 1982) (Memorandum (Findings of Fact and Conclusion of Law)) (copy on file at U.C. Davis Law Review office), are not reported. The author was a counsel of record in this case.

[178] *Birmingham*, 538 F. Supp. at 821-22, 826.

[179] *Birmingham*, No. 80-70991 at 9 (E.D. Mich. June 10, 1982) (Memorandum (Findings of Fact and Conclusions of Law)) (copy on file at U.C. Davis Law Review office).

[180] *Birmingham*, 538 F. Supp. at 827.

[181] *See supra* note 177.

HeinOnline -- 17 U.C. Davis L. Rev. 484 1983-1984

motivations of the private citizen.[182]

One of the city commission's actions was to hold an advisory referendum on the Baldwin House proposal.[183] The court found that this procedure, which had never before been used in Birmingham, was undertaken solely to appease racially motivated opponents of the proposal.[184] Unlike in the *Manchester* case,[185] the negative outcome of the Birmingham referendum was not legally binding on city officials. Therefore, in examining voter motivation, the court was not required to reach a conclusion as to the intent of a majority of the voters acting in a legislative capacity. Rather, voter motivation was examined to gather additional information about the basis of the opposition to the proposal, in reaction to which city officials took the steps which the court held unlawful.[186]

There were a number of significant statements by opponents of Baldwin House, including some city commission members, which the court correctly identified as expressing racial motivation on the part of those opponents.[187] The court emphasized that it did not base its finding of discriminatory intent solely upon the bigoted comments of a few citizens.[188] The court was correct in holding that city officials may not lawfully "place [their] official stamp of approval on private racial discrimination" or "practice racial discrimination with impunity by the simple expedient of adopting all discriminatory policies by popular vote."[189] However, in assessing the citizen motivations to which city officials were responding, the court was necessarily drawn into a determination of the intent of a significant percentage of citizen opponents, rather than a probably impossible effort to divine the motivations of a quantified majority, or to identify the dominant or primary concern of the responding city officials.[190] It was sufficient that discriminatory purpose was shown to be one motivation for the official actions.[191] The court's analysis was appropriate under the governing legal standards, and its subsidiary and ultimate factual findings were affirmed on ap-

---

[182] *Birmingham*, 538 F. Supp. at 828.

[183] For a summary of the actions that ultimately derailed the proposal, see *id.* at 827.

[184] *Id.*

[185] *See supra* text accompanying note 155.

[186] *Birmingham*, 538 F. Supp. at 829; *see infra* note 192.

[187] *Birmingham*, 538 F. Supp. at 824-26.

[188] *Id.* at 828.

[189] *Id.*

[190] *Id.* at 827, 828, 830.

[191] *Arlington Heights I*, 429 U.S. 252, 265-66 (1977).

HeinOnline -- 17 U.C. Davis L. Rev. 485 1983-1984

peal.[192] Nevertheless, the type of analysis necessary to find discriminatory purpose on the part of city officials in this kind of case is not altogether satisfying. Precisely because of the difficulties of applying an intent test to this kind of evidence, and because of the absence of any credible or sufficient justification for the city's actions in this case beyond the existence of citizen opposition, the application of an effects test would have been an equally suitable and perhaps more satisfying way of reaching the same result.[193]

The relief granted in *Birmingham* may be of limited practical use. It is focused entirely on the Baldwin House Corporation, although the United States had argued for relief that would encourage and assist other developers as well.[194] The court found that, as a result of the

---

[192] *Birmingham*, No. 82-1559, slip op. (6th Cir. Feb. 8, 1984). In upholding these findings, the court found it unnecessary to pass on the question, raised by the city, of the propriety of examining the motivation of voters in the advisory referendum. *Id.*, slip op. at 7-8; *cf. supra* text accompanying note 186.

[193] Civil Rights Division attorneys were not permitted to argue for the application of an effects test in the post-trial briefs filed in the Reagan administration. *See supra* notes 128, 171; *Birmingham*, 538 F. Supp. at 827 n.9. Assistant Attorney General Reynolds' deletion of this argument from the United States' post-trial submissions was particularly anomalous in light of his approval of the inclusion of the argument two months earlier in the Pre-Trial Memorandum of the United States at 12-13, 19-23, *Birmingham*, 538 F. Supp. at 819, at a time when Mr. Reynolds effectively was functioning as the Division's final reviewing authority. The court noted in its opinion that "[p]rior to trial, the government argued that it need only prove that the City's actions had a proscribed discriminatory effect. However, following trial, the government abandoned its efforts to impose liability on the basis of discriminatory effects alone . . . ." *Birmingham*, 538 F. Supp. at 827 n.9 (citations omitted). That the United States would prevail in the district court under an intent test was not predictable with any confidence at the time post-trial briefs were filed.

[194] *See Birmingham*, 538 F. Supp. at 831-32; *Birmingham*, No. 80-70991 at 6-7 (E.D. Mich. June 10, 1982) (Memorandum (Findings of Fact and Conclusions of Law)) (copy on file at U.C. Davis Law Review office).

On appeal, the United States agreed with the city's argument that the district court exceeded its remedial authority when it enjoined the city "from engaging in *any conduct* that interferes with Baldwin House's efforts to construct low-income family and senior citizen housing" in Birmingham. *Birmingham*, 538 F. Supp. at 831 (emphasis added). The Reagan administration contended that this injunction is overbroad to the extent that it reaches any conduct not motivated by a discriminatory purpose, since in its view only such conduct violates the Fair Housing Act. *See* Brief for the United States at 38, *Birmingham*, No. 82-1559 (6th Cir. Jan. 5, 1983) (copy on file at U.C. Davis Law Review office). This contention, derived from an antipathy to the effects test which is the law in the Sixth Circuit, *see supra* note 128 and accompanying text; *supra* note 193, goes beyond the question of the standard of liability. It seems to imply that, even in the face of a series of unlawful actions such as those found in this case, the court's remedial authority is limited to prohibiting future violations of the Act, which

HeinOnline -- 17 U.C. Davis L. Rev. 486 1983-1984

decreased availability of federal and state subsidies, there was little likelihood that Baldwin House could obtain financing for low-income family housing in the immediate future.[195] It would be ironic if senior citizen housing were built in Birmingham without family housing, since it was the possibility of family housing that engendered the unlawful actions of the city in the first place.[196]

United States v. Town of Glastonbury, Connecticut

On December 1, 1980, suit was filed in *United States v. Town of Glastonbury, Connecticut.*[197] This case provides an important illustration of the manner in which the Reagan administration has unduly restricted the scope of relief sought, even in those cases which it has pursued. The complaint, filed during the Carter administration, alleged that a virtually all-white suburb of Hartford had, with racially discriminatory intent, prevented the development of low and moderate-income multi-family housing anticipated to have substantial numbers of black and hispanic residents, while approving higher-income multi-family developments whose residents were anticipated to be exclusively or predominantly white. The primary focus of this site-specific case was the town's use of its zoning authority to block two federally subsidized multi-family developments. Glastonbury, unlike Birmingham, contains large areas of undeveloped land. The complaint prayed for relief requiring affirmative steps toward construction of an appropriate number of units of racially integrated low and moderate-income housing in the town.

This case was settled during the Reagan administration.[198] The con-

---

are of course already prohibited by the Act itself. The United States' brief cited no case authority for this proposition, or for its argument that the district court's injunction is overbroad. The injunction would obviously be interpreted only to prohibit conduct that interferes unjustifiably with Baldwin House's efforts; it is certainly not intended, for example, to exempt Baldwin House from compliance with fire safety laws.

In response to the United States' "concession," the court of appeals modified the injunctive provision quoted *supra*, inserting the phrase "because of race or with discriminatory motive on account of race" after the phrase "from engaging in any conduct." *Birmingham*, No. 82-1559, slip op. at 10 (6th Cir. Feb. 8, 1984).

[195] *Birmingham*, No. 80-70991 at 2-3 (E.D. Mich. June 10, 1982) (Memorandum (Findings of Fact and Conclusions of Law)) (copy on file at U.C. Davis Law Review office).

[196] *See Birmingham*, 538 F. Supp. at 822-25.

[197] No. H-80-770 (D. Conn. filed Dec. 1, 1980) (copy on file at U.C. Davis Law Review office). The author was a counsel of record in this case.

[198] *Glastonbury*, No. H-80-770 (D. Conn. Nov. 17, 1982) (Consent Decree) (copy on file at U.C. Davis Law Review office).

HeinOnline -- 17 U.C. Davis L. Rev. 487 1983-1984

sent decree includes a general injunction, a requirement that the town enact a fair housing "welcoming" resolution, and a fair housing program to promote equal housing opportunities for low and moderate-income families. The latter program is to involve provision of information with respect to potential sites and other pertinent matters to developers of low or moderate-income housing, expeditious review and evaluation of proposals for such housing, and consideration of possible incentives for the development of such housing consistent with applicable town ordinances and upon a demonstration of need. The incentives that may be considered include increased densities, relaxation of other cost-increasing land use or zoning controls, tax abatements, and support for efforts to obtain federal, state, or private financing or subsidies. The incentives may also be used to encourage developers of multi-unit rental housing to set aside fifteen to twenty percent of their units for rental to low and moderate-income tenants at a below-market rent. These incentives were all theoretically available independently of the decree, which provides that "[n]othing in this decree is to be construed as preventing the Town from exercising its discretion, consistent with the purpose of this decree and applicable state laws and town ordinances, as to which incentives, if any, shall be granted in any particular case."[199] Affirmative marketing efforts are also to be undertaken to attract tenants of all races to public and assisted housing.[200]

A decision by the town to encourage aggressively the development of low-cost housing through the kinds of devices mentioned in the decree could have a significant beneficial effect. However, apart from requiring the town to disseminate information about housing opportunities, the decree actually requires little more than nondiscriminatory exercise of the town's present authority, rules, and procedures. Conspicuously absent from the decree are any specific commitment to provide housing incentives, and any goal for the development of a specific number of units of low and moderate-income housing. In addition, the decree is of unusually short duration. It provides, with no contingencies or reservations other than in the event of outright violations by the defendant, that it shall automatically dissolve two years after entry, divesting the court of any further jurisdiction.[201] In view of the nature and difficulties of the housing development process, two years is too short a time for any remedy to have much impact.[202]

---

[199] *Id.* at 2-8.

[200] *Id.* at 7-8.

[201] *Id.* at 10.

[202] The cited inadequacies of the *Glastonbury* consent decree resulted from Assistant

HeinOnline -- 17 U.C. Davis L. Rev. 488 1983-1984

United States v. Yonkers Board of Education

United States v. Yonkers Board of Education,[203] filed on December 1, 1980, and as yet unresolved, is the first case in which the Department of Justice has exercised its Fair Housing Act and school desegregation enforcement authorities in a single judicial proceeding.[204] In addition to alleging that the Yonkers, New York, public school system is unlawfully segregated, the complaint alleged that decisions by the City of Yonkers and the Yonkers Community Development Agency concerning the location of public and subsidized housing both violated the Fair Housing Act and contributed to racial segregation in the schools. The complaint alleged that:

> [The city and the community development agency] have intentionally followed a systematic pattern of selecting sites for public and subsidized housing projects that has effectively perpetuated and seriously aggravated residential [racial] segregation . . . . As a direct result . . . over 97% of all subsidized housing units and 100% of all subsidized family units constructed in Yonkers are located . . . in or immediately adjacent to residential areas of high minority concentration.[205]

The trial of this case commenced in August, 1983.

Attorney General Reynolds' rejection of the recommendations of the career Civil Rights Division attorneys who worked on the case. For example, Mr. Reynolds declined to include mention of any specific number of units in the United States' proposals, notwithstanding that the violation alleged in the case involved the blocking of a specific number of units of housing. Mr. Reynolds was also unwilling to consider any mention of a specific number of units even if included in one of the town's proposals. No nonideological reason for this position was apparent. The two year limit on retention of jurisdiction was inconsistent with normal Division policy in Fair Housing Act cases and, as noted in the text, particularly inappropriate in a zoning case.

[203] 518 F. Supp. 191 (S.D.N.Y. 1981) (ruling on motions).

[204] This is the only such combined housing and school desegregation case to be filed as a result of the effort to focus on the interrelationship between these two problems. *See supra* notes 19, 86 and accompanying text. However, some Fair Housing Act cases resulted from investigations which began as part of larger investigations of possible combined or interdistrict school and housing cases: *see* United States v. Town of Cicero, Ill., No. 83-C-0413 (N.D. Ill. filed Jan. 21, 1983) (copy on file at U.C. Davis Law Review office); United States v. Town of Glastonbury, Conn., No. H-80-770 (D. Conn. Nov. 17, 1982) (Consent Decree) (copy on file at U.C. Davis Law Review office); United States v. City of Birmingham, Mich., 538 F. Supp. 819 (E.D. Mich. 1982), *modified as to relief and aff'd*, No. 82-1559, slip op. (6th Cir. Feb. 8, 1984); Angell & United States v. Town of Manchester, Conn., 3 Eq. Opp'ty Hous. Cas. ¶ 15,398 (D. Conn. 1981).

[205] *Yonkers*, 518 F. Supp. at 197 (quoting paragraph 24 of complaint); *see also id.* at 193-94.

HeinOnline -- 17 U.C. Davis L. Rev. 489 1983-1984

C. 1978-1980: Actions Not Taken

The record of the Carter administration was impressive: nine new actions challenging racially exclusionary municipal practices were initiated as compared to a total of three in previous years, and the *Parma* case was successfully tried. The record might have been almost twice as impressive, however, for seven more cases were fully developed but not filed. Additionally, several of these cases would have used and tested the innovative concepts developed by the 1978-1980 initiative far more effectively than those cases which were actually filed.

Case One

The first land use case[206] developed under the initiative described in this Article was not filed because of factors beyond the control of the Department of Justice. It would have provided an excellent opportunity both to pursue a non-site-specific violation and to argue for liability based purely on an effects test.

The case involved a virtually all-white suburb of a city with a very large black population. The city's zoning ordinances did not and had never permitted the construction of any multi-family dwellings, and all residential structures consisted of single-family homes on large lots. A developer submitted a proposal for a zoning change permitting multi-family development on a parcel of land in which he had an interest and on which he proposed to build a substantial number of multi-family apartment units. Twenty-five percent of the units would have been designated for rent-subsidized low or moderate-income tenants. For various reasons it was anticipated that a large number of the residents of this proposed development would be black.

The United States' complaint would have alleged that the city's rejection of the developer's proposal, without any effort to negotiate modifications to ameliorate possible objections, and its rigidly enforced single-family only zoning ordinance, had an inadequately justified segregative effect. No concrete evidence of racially discriminatory purpose was available.

This case would have been site-specific as it related to the particular proposal in question, and non-site-specific as it related to the zoning

[206] Any purpose which might be served by identifying the subjects of the investigations here discussed is outweighed by the potential unfairness to the subjects of such identification. This is true even in those instances when the existence of the investigation had become a matter of public knowledge, because the discussion here adverts to evidentiary matters and comments on the merits of the considered litigation.

HeinOnline -- 17 U.C. Davis L. Rev. 490 1983-1984

ordinance permitting no multi-family housing whatsoever. The city's absolute prohibition of such housing was among the most thoroughly exclusionary zoning policies that could be hypothesized. It had a demonstrable segregative effect in the context of the particular metropolitan area.

During Assistant Attorney General Days' consideration of this proposed suit, and before he had decided whether to authorize it, the parcel of land in question was sold by its owner to a developer who intended to build single-family homes. That parcel was the last sizeable undeveloped tract of land in the entire city. This turn of events deprived the proposed lawsuit, which would have been an excellent vehicle for pursuing the concepts of the Division's exclusionary land use initiative, of any practical utility, and it was withdrawn from further consideration.

Case Two

In June, 1980, Assistant Attorney General Days was presented with a proposed lawsuit ideal for implementation of the most creative aspects of the Civil Rights Division's exclusionary land use initiative. As described below, however, Mr. Days ultimately declined to authorize the lawsuit. This suit would have been the first realization of the desire to bring a completely non-site-specific zoning case, challenging the general operation of a municipality's zoning ordinances wholly apart from any rejected development proposal. When zoning provisions are sufficiently exclusionary, the likelihood that any developer will attempt to gain approval for a nonconforming project is slight. In the absence of any such proposal, the Attorney General may be the only party with standing to challenge the zoning ordinances.[207] *Case Two* was a paradigm of this situation. Additionally, it had two particularly attractive characteristics as a vehicle for advancing the law and the Division's initiative: it involved a total prohibition of multi-family housing, rather than focused opposition to subsidized housing, and there was no direct evidence of racially discriminatory purpose. In these two respects, it was like *Case One*. Unlike *Case One*, it could have been brought, and the prospects for relief were not limited to one parcel of land.

Case Two involved a developing municipality which, by its system of land use regulation, had made it physically and economically impossible to provide low or moderate-income housing within its borders.[208]

---

[207] *See supra* text accompanying notes 40-59.

[208] In this respect it was similar to the town of Mt. Laurel, New Jersey. *See supra*

HeinOnline -- 17 U.C. Davis L. Rev. 491 1983-1984

The town was a virtually all-white suburb of a city with a twenty-five percent black population. Almost ninety percent of the blacks in the city population, and more than eighty percent of the blacks in the county, lived in multi-unit housing. A statewide comparative study identified the town as having one of the most highly restrictive sets of land use policies, which prevent the construction of low-cost housing, in the state. The town's zoning ordinances included a total prohibition of multi-family homes and mobile homes, a 40,000 square foot minimum lot size requirement, and restrictive minimum floor area requirements. These zoning ordinances unquestionably had a racially segregative effect. One block from the town line one could observe an area which included several medium to large apartment buildings with large numbers of black residents. On the town side of the line, there was nothing but single-family homes and commercial and industrial development. While the population and work force in the twenty-five percent black city were in decline, both were increasing in the town. The town was an example of suburbanization of employment opportunities in an area where housing is inaccessible to most black families.

The extremely restrictive nature of the town's zoning ordinances seemed impossible to justify. The highly exclusionary requirements were in excess of any standards necessary to maintain public health and safety, and far more restrictive than necessary to effectuate an acceptable plan for reasonable growth and development. The area's official regional planning agency had criticized the ordinances as unduly restrictive. The town had even rejected proposals by its own retained consultants to loosen the restrictions. From the standpoints of racially segregative effect and attempted justifications, there is a significant theoretical and practical distinction between zoning portions — even very large portions — of a town as single-family only, and precluding multi-family housing entirely. Efforts to control and limit the amount and location of multi-family housing seem far more subject to justification and corresponding judicial deference than complete exclusion of that category of housing.

Notwithstanding *Case Two*'s strengths as a test case for the Division's theories and goals for exclusionary land use litigation, such a lawsuit could not fail to be controversial. Unlike all of the Division's previous land use cases, there was no evidence of demonstrable racially discriminatory purpose. In addition, the case raised the question

---

notes 66, 80; Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 173, 336 A.2d 713, 724 (1975). Under any kind of fair share analysis, this town would be found wanting.

HeinOnline -- 17 U.C. Davis L. Rev. 492 1983-1984

whether the desire to exclude potential residents on an economic basis can, without more, be a sufficient justification for practices challenged under the Fair Housing Act.[209] On the other hand, the dramatically provable racially segregative effect in this case made it impossible to characterize the impact of the zoning ordinances as unalloyed economic discrimination.

Assistant Attorney General Days had substantial difficulty deciding whether to authorize this case and *Case Three*,[210] and did not announce a final negative decision until December, 1980, during his last days in office. In his view, the cases were valid and the theories to be advanced were consistent with the law under the Fair Housing Act. However, two reservations led him to decide against filing. First, he believed that the courts had not yet reached the point at which these theories would be readily accepted, and that presenting them prematurely might produce highly unfavorable results. Second, his experience during the unsuccessful efforts to obtain passage of the proposed Fair Housing Amendments Act of 1980 caused him to think that these two cases might serve as centerpieces in a renewed attempt by certain members of Congress to gut Title VIII.[211] For both of these reasons, Mr. Days con-

---

[209] *See supra* note 66.

[210] *See infra* text accompanying note 215.

[211] The Fair Housing Amendments Act of 1980, the "liberal" Edwards-Drinan bill passed by the House, contained the following provision amendatory to § 807 of the Fair Housing Act, 42 U.S.C. § 3607 (1976): "Nothing in this title shall prohibit a minimum lot size requirement for residences unless such requirement is imposed with intent to discriminate against a class protected by this title." H.R. REP. NO. 865, 96th Cong., 2d Sess. 36 (1980) (accompanying H.R. 5200) (italicized in original). The committee report stated that this "provid[es] a limited exception to the so-called 'effects test' . . . . With respect to zoning and land use practices which impose 'minimum lot size for residences,' there is no violation of title VIII unless an 'intent to discriminate . . .' is proven." *Id.* at 14. The "liberal" bill reported out by the Senate Judiciary Committee contained the same amendatory provision. *See* S. REP. NO. 919, 96th Cong., 2d Sess. 3 (1980) (accompanying S. 506).

This provision was an attempt to respond to congressional concerns arising in part from the Civil Rights Division's land use initiative and the publicity surrounding it. These concerns were derived both from cases filed and from statements made by Attorney General Civiletti and Assistant Attorney General Days. *See, e.g.*, *U.S. to Check on Bias in Local Zoning: Attorney General to Focus on Suburban Housing*, Wash. Post, Jan. 18, 1980, at A2, col. 3; Rep. John Wydler (R-N.J.), *Keep Bureaucrats' Hands Off Suburbanites*, Newsday, Mar. 12, 1980, at 49; *see also* sources cited *infra.*

While these House and Senate Committee amendments were limited to minimum lot size requirements, the impact of successful litigation challenging other requirements might be blunted by the exemption for minimum lot size restrictions.

Influential opponents of the House and Senate Committee bills believed that the

HeinOnline -- 17 U.C. Davis L. Rev. 493 1983-1984

cluded that filing these cases would create a significant risk of weakening, rather than strengthening, legal precedents and standards under the Fair Housing Act.[212]

The first of Mr. Days' reservations seemed unpersuasive. The effects test, like any other legal doctrine, is of value to a law enforcement program only to the extent that it is actually used. In most of the Division's routine Fair Housing Act cases, racially discriminatory purpose is present and provable. The nature of most routine violations is such that if they are identified, proof is not dependent on an effects test. The effects test is most necessary in precisely those instances when the results of its application are inherently controversial. In the land use area, that means cases such as *Case Two*, not those like *Parma*, in which the evidence of racial intent is substantial. Since *Case Two* presented a highly favorable context in which to pursue a non-site-specific, effects test zoning case, it seems that the risk of losing was worth taking. If such cases are not brought, the result is not much different than if the effects test were unavailable. The degree of judicial receptivity to such a case was as high in 1980 as it was likely to be in the foreseeable future.[213]

Concerns about possible adverse congressional action should also have been tempered to some extent because it did little good to have an effects test if the Division were not prepared to use it. It should be noted, however, that the potential legislative backlash which worried Mr. Days was not hypothetical. The Fair Housing Amendments Act's proposed enforcement changes were held hostage, and ultimately defeated, by those who wished to incorporate an intent test into the Act. One focus of these opponents' arguments was exclusionary land use practices. It would be difficult to disagree with the prognosis that the

---

minimum lot size provision did not go far enough in restricting the effects test, and wished to amend the Act to require a showing of discriminatory intent in all cases. Many of these opponents expressed particular concern about the implications of the effects test in the area of exclusionary land use practices, and some made specific reference to recent Justice Department actions in this area. *See* S. REP. NO. 919, *supra*, at 11; *id.* at 61, 65 (minority views of Sens. Thurmond, Laxalt, Hatch and Cochran). For senatorial debate expressing this concern, see 126 CONG. REC. 32,336 (1980) (Hatch); *id.* at 32,351-53 (Jepsen); *id.* at 32,363-64 (Hayakawa); *id.* at 32,365-70 (Thurmond); *id.* at 32,367-71 (Simpson); *id.* at 32,372-76 (Humphrey); *id.* at S15852 (daily ed. Dec. 9, 1980) (Stevens).

No fair housing bill was passed by the Senate in the 96th Congress; a filibuster prevailed over attempted cloture. *See* 126 CONG. REC. S15853 (daily ed. Dec. 9, 1980).

[212] This description of Mr. Days' reasoning is derived from a memorandum which he wrote concerning his decision.

[213] *See supra* note 62 (appellate cases adopting an effects test).

HeinOnline -- 17 U.C. Davis L. Rev. 494 1983-1984

filing of a suit like *Case Two* or *Case Three* would provide a further spur, if one were needed, to legislative efforts to weaken the Fair Housing Act.[214] Nevertheless, the weight that should have been attached to this consideration was open to serious question.

The decision to reject *Case Two* and *Case Three* was a regrettable and disappointing denouement to the Division's initiative. The Division's unwillingness to pursue a pure effects test case also makes it highly unlikely that a truly non-site-specific comprehensive zoning case will be brought, since evidence of discriminatory purpose will be lacking in most such cases.

Case Three

Proposed *Case Three*, considered together with *Case Two* and rejected for the same reasons,[215] would have challenged restrictive density requirements both on a non-site-specific basis and in relation to a particular parcel of land. The developer of the land was willing, ready, and able to make twenty-five percent of his units eligible for rent subsidy if a higher density classification could be obtained for the property.

As in *Case One* and *Case Two*, there was no direct evidence of ra-

---

[214] *See supra* note 211.

The effects test continues to occupy a prominent place on the agenda of those who believe that the reach and interpretation of the civil rights laws should be narrowed. *See* Hammond, *The Department of Justice*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 403, 449 (C. Heatherly ed. 1981) (Heritage Foundation).

> Executive Orders could be issued to the Departments of Justice, Labor, and Education directing that . . . [n]o 'pattern of discrimination case' may be filed *unless there is clear proof of an intent to discriminate,* based upon substantial evidence other than a) evidence of non-intentional discriminatory impact or b) statistical or census evidence that shows unequal results, unless there is also substantial evidence of discriminatory intent.

Id. (in discussion of employment and government contracts) (emphasis in original). "Another approach to the same problem would be to direct the Justice Department not to file any 'pattern or practice' cases unless based on proof of an intent to discriminate, not simply on statistical evidence of unequal results or unintentional discriminatory impact." Boggs, *Epilogue*, *id.* at 1077, 1083-84; *see also supra* notes 128, 171, 193-94, 211.

[215] This suit would have focused on density restrictions, and it would probably have become untenable if the minimum lot size amendment to the Edwards-Drinan bill, *see supra* note 211, had become law, either before suit was filed, or thereafter. *See* Bradley v. School Bd., 416 U.S. 696 (1974). Although the House passed the Edwards-Drinan bill as amended during the preparation of this suit, the bill never became law, and the 96th Congress' consideration of Fair Housing Act amendments had concluded without any final legislation by the time the decision was made not to file this suit.

HeinOnline -- 17 U.C. Davis L. Rev. 495 1983-1984

cially discriminatory purpose, but the city's low-density zoning had a demonstrable and unjustified racially segregative effect. The city, whose population was at most three percent hispanic and three percent black, was located in a metropolitan area with large hispanic and black populations. The city's low-density requirements effectively precluded the construction of any low or moderate-income housing, and the cost of the housing which did exist in the city — primarily single-family homes, with some expensive condominiums or high-rent apartments, and no significant number of low-rent units — rendered it largely inaccessible to the nearby hispanic and black populations. It was reliably estimated that if low or moderate-income units could be built in the city, at least twenty-five percent of such units would probably be occupied by minorities.

Under the city's development plans, most housing on undeveloped land was projected to be single-family homes, with some high cost multi-family units. Most undeveloped land was zoned at one or two units per acre or less, with only twenty acres in the entire city zoned at more than six units per acre. Three different state agencies which had examined the city's zoning and attempted to press for changes had concluded that the density requirements were unnecessary to preserve open spaces, to protect potentially vulnerable scenic areas, or to comply with exacting environmental requirements. The judgment of these agencies that provision could be made for low and moderate-income housing in the city without any undue impact on other legitimate values or policies made it extremely difficult to justify the city's complete exclusion of this kind of housing. The decision not to file *Case Three* was made together with the decision not to file *Case Two.*

Case Four

Another proposed suit essentially similar to *Case Two* and *Case Three* but not presenting as thoroughly compelling a factual setting was prepared and was a viable candidate for litigation. It was never presented to Assistant Attorney General Days for consideration because a negative decision on it would have followed a fortiori from a negative decision on *Case Two* or *Case Three.*

Case Five

Proposed *Case Five*, which Assistant Attorney General Days enthusiastically supported, became the occasion for another major disappointment in the exclusionary land use initiative. While this suit was traditional in the sense that it was based on solid evidence of racially

HeinOnline -- 17 U.C. Davis L. Rev. 496 1983-1984

discriminatory purpose, its impact in terms of the size of the municipality and the potential number of people affected would have exceeded that of any previous Civil Rights Division land use case. The Department of Housing and Urban Development and the Civil Division of the Justice Department blocked the filing of *Case Five*.

Case Five would have challenged a long-standing pattern of intentionally discriminatory practices with regard to the location of public and other subsidized low-income housing by a large city with a forty percent black population. The city had engaged in a series of actions designed to keep any form of public housing or other subsidized low-income family housing out of white areas, and to place any such housing in black or racially transitional areas. By manipulations of its authority to influence site selections, the city had successfully thwarted every attempt to construct public housing outside of areas of heavy black concentration or areas in the path of black migration, and in recent years had effectively prevented the construction of any new low-income family housing whatsoever. The city's actions both deprived black residents of sorely needed housing opportunities and perpetuated and increased the city's extensive racial segregation. The evidence that the city intended to prevent blacks from living in white areas was stronger even than the evidence of racial motivation in *Parma*, and included a number of documented statements by the Mayor and other city officials. The city's commitment to this longstanding discriminatory policy was demonstrated by its willingness to go without new low-income housing despite pressing needs rather than to allow any such housing to be built in predominantly white areas.

The Civil Division and the Department of Housing and Urban Development (HUD) adamantly opposed the filing of *Case Five*. The Civil Division was representing HUD in a lawsuit filed by private plaintiffs which challenged the city's site selection practices and claimed that HUD had unlawfully participated in or approved the results of these practices. The Civil Division and HUD asserted that HUD's actions were defensible, disclaimed any desire to support or defend the city's racially discriminatory actions, and expressed no disagreement with the conclusion that the city's actions had been unlawfully discriminatory. Nevertheless, the Civil Division and HUD insisted that the proposed Civil Rights Division suit would create an inevitable conflict of interest and place the Department of Justice in the untenable position of being on opposing sides of the same case. The Civil Rights Division took the position that it was factually and legally possible for the Department to prosecute the city and to defend HUD. The Division believed HUD's best interest was to avoid aligning itself with the city

HeinOnline -- 17 U.C. Davis L. Rev. 497 1983-1984

in the private litigation.[216] Even if some of HUD's actions were not fully defensible, the interest of the United States in enforcing the Fair Housing Act was a higher priority than the obligation to minimize potential prejudice to HUD's defense. In the Civil Rights Division's view, the interest of the federal government as a whole did not demand the most effective defense imaginable for every alleged past unlawful HUD action, if that were inconsistent with eliminating the city's pervasive violations of the Fair Housing Act.[217]

Conflicts between litigating Divisions in the Justice Department are resolved at the departmental level. Assistant Attorney General Days and other high Division officials vigorously pursued the Civil Rights Division's position. During the last days of the Carter administration, however, the Civil Rights Division was informed that the Associate Attorney General would not be willing to resolve the conflict in its favor.[218] The private lawsuit has been partially tried, but at this writing remains unresolved.

Cases Six and Seven

Another facet of the Division's exclusionary land use initiative which did not involve the Fair Housing Act was also blocked by HUD. This was an effort to address the same minority housing problems in a different way through the Attorney General's litigation authority under the Housing and Community Development Act of 1974.[219] That Act requires recipients of Community Development Block Grants to submit to HUD a Housing Assistance Plan (HAP) with numerical annual goals for meeting the housing needs of lower-income people and reduc-

---

[216] *Cf.* Hills v. Gautreaux, 425 U.S. 284 (1976) (relief ordered against HUD affirmed).

[217] Under the circumstances of this case, the Civil Rights Division did not believe it appropriate to base a decision with respect to the United States' law enforcement interests on an assumption that private plaintiffs would be able to vindicate those interests independently.

[218] If the conflict had been resolved within the Justice Department in the Civil Rights Division's favor, it would also have been possible for HUD to raise the matter in Cabinet.

[219] *See* 42 U.S.C. §§ 5301-5317 (1976 & Supp. V 1981); *see also* discussion of Angell & United States v. Town of Manchester, Conn., 3 Eq. Opp'ty Hous. Cas. ¶ 15,398 (D. Conn. 1981), *supra* text accompanying notes 149-62. *Manchester* did not involve any attempt to use the Attorney General's litigation authority under the Housing and Community Development Act. *Manchester* challenged the town's withdrawal from the CDBG program, but did not seek specific performance of contractual obligations. *Id.* *See generally Developments*, *supra* note 39, at 1682-83.

HeinOnline -- 17 U.C. Davis L. Rev. 498 1983-1984

ing the isolation of income groups on an area-wide basis.[220] HUD regulations make applicants responsible for implementation of the Housing Assistance Plan and achievement of the numerical goals in an expeditious manner.[221]

The Act's provisions speak in economic rather than racial terms and focus on performance of certain actions that become binding contractual assurances.[222] The Act may be enforced administratively by HUD,[223] or through a civil action by the Attorney General to recover grant funds not expended in accordance with the Act's requirements or to obtain mandatory or injunctive relief.[224] This mandatory or injunctive relief could presumably include an order for specific performance of contractual obligations, including HAP performance. The Attorney General's authority to institute such a civil action depends upon a request by HUD that a suit be filed.[225]

This source of litigation authority could enable the Department of Justice to attack exclusionary land use practices and other municipal actions or inactions that do not amount to the kind of racial or national origin discrimination proscribed by the Fair Housing Act, but that nevertheless restrict the availability of low and moderate-income housing in suburban areas. However, HUD has never referred a case to the Attorney General under this provision, preferring instead to enforce or not enforce[226] the Act on its own. As part of its initiative during the

---

[220] 42 U.S.C. §§ 5301(c)(6), 5304(c)(1) (1976 & Supp. V 1981). These provisions incorporate notions of regionalism and fair share, *see supra* note 66, into federal law. *See Developments*, *supra* note 39, at 1682.

[221] 24 C.F.R. § 570.306(a)(3) (1983).

[222] *See* 24 C.F.R. §§ 570.300, 570.306, 570.307 (1983).

[223] 42 U.S.C. § 5311(a) (1976).

[224] 42 U.S.C. § 5311(b)(2) (1976).

[225] 42 U.S.C. § 5311(b)(1) (1976). The Act also gives the Attorney General authority, with or without a referral from HUD, to sue to enjoin a pattern or practice of discrimination in programs funded thereunder. 42 U.S.C. § 5309(a), (c) (1976 & Supp. V 1981). Unlike the previous section, this grant of self-starting pattern or practice authority adds nothing new to the Attorney General's arsenal of weapons to attack exclusionary housing practices, since any such practice which is racially discriminatory may already be attacked under the Fair Housing Act.

It should be noted that for the United States to prevail in a suit for specific performance under 42 U.S.C. § 5311(c), it would not be necessary to show the kind of segregative effect of which proof was held insufficient in *Manchester*. *See supra* text accompanying notes 163-68. Rather, it would be sufficient to show that the defendant did not take the actions encompassed within its contractual obligations.

[226] *See, e.g.*, City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn.) (holding certain HUD actions unlawful), *aff'd sub nom.* City of Hartford v. Town of Glastonbury, 561 F.2d 1032 (2d Cir. 1976), *rev'd on other grounds*, 561 F.2d 1048 (1977) (en banc),

HeinOnline -- 17 U.C. Davis L. Rev. 499 1983-1984

Carter administration, the Division vigorously encouraged HUD to make such referrals. Declarations of increased interest by HUD officials appeared to enhance the prospect that these efforts might be successful.

After waiting for some time for such a referral without results, the Division decided to compensate for HUD's bureaucratic inertia by engaging in its own investigations and preparing cases which it would then present to HUD officials for them to review and refer back for litigation. However, these efforts were also unsuccessful, as HUD again refused to act. Two cases which the Division developed in 1980 for referral and litigation were well documented and meritorious.

In *Case Six*, a city had initially taken insufficient action to implement its HAP goals for new construction of low and moderate-income rental units. Because of citizen opposition to the inclusion of family housing in addition to elderly housing in the HAP, the city then ceased taking any action at all. The result was that no low or moderate-income housing was constructed. A developer's proposal for subsidized low-income family housing was effectively killed by lack of support from the city. The city ultimately withdrew from the CDBG program, having spent large amounts of federal funds on community improvements while breaching its contractual HAP obligations. There was no real potential for a Fair Housing Act suit, due to the absence of evidence either of racially discriminatory purpose or of racially segregative effect; the city had a fifteen percent minority population consistent with the population in the county where it was located. However, the existence of contractual obligations that go beyond the requirements of the Fair Housing Act is a principal attraction of litigation under the Housing and Community Development Act. The prospects for a suit under that Act were promising, since the city had made explicit its opposition to low or moderate-income family housing and its unwillingness to meet its family housing goals, and had clearly breached its contractual obligations. A successful suit would have increased the availability of low and moderate-income housing in the city for minorities as well as nonminorities.

Case Six was presented to HUD with the Division's recommendation that it be referred to the Attorney General for litigation. HUD decided in July, 1980, not to make the necessary referral. A detailed discussion of HUD's reasons for its decision is beyond the scope of this Article.

---

cert. denied, 434 U.S. 1034 (1978). Under the Carter administration, HUD did take administrative action in an increased number of cases to enforce greater compliance with the objectives of the Housing and Community Development Act.

HeinOnline -- 17 U.C. Davis L. Rev. 500 1983-1984

However, the Division did not consider HUD's reasoning persuasive. The Division pressed the matter, and the resulting interagency discussions left the distinct impression that HUD's real reservations were neither factual nor legal, but political. HUD's deference to the concept of local government control seemed inconsistent in this context with the effectuation of important statutory goals of the CDBG program.

The disposition of *Case Seven* confirmed the impression that political considerations were controlling. *Case Seven* was similar to *Case Six* in many respects, but lacked the principal nonpolitical problem HUD had emphasized in declining to refer *Case Six*. In addition, in *Case Seven* the city had made its intention to violate its contractual obligations even more explicit than had the city in *Case Six*: at one point it actually adopted a formal moratorium on any participation in the development of low or moderate-income housing and on the processing of any HUD notices of fund availability for construction of such housing. While there was more evidence of racially discriminatory purpose and segregative effect in *Case Seven* than in *Case Six*, the evidence was not sufficient to support a Fair Housing Act suit. A suit under the Housing and Community Development Act, however, would have been particularly compelling.

HUD agreed with this assessment of *Case Seven*, saw no factual or legal problems with the proposed lawsuit, and considered it to be the best candidate that had been proposed for referral for CDBG litigation. However, HUD informed the Division in December, 1980, that it had decided not to refer the case for fear of the political reaction to the filing of any suit of this nature under the Housing and Community Development Act. HUD officials stated that the potential reaction might jeopardize HUD's administrative efforts to implement the goals of the CDBG program. This timidity scuttled two years of extensive efforts by the Department of Justice to make constructive use of a statutory litigation authority which has never been employed.[227]

[227] One final proposal for an exclusionary land use case under the Fair Housing Act was developed in 1980 but was not forwarded for the Assistant Attorney General's consideration. At this writing, this case is still under review in the General Litigation Section; a final decision has not been reached as to whether to recommend it to the Assistant Attorney General. The author is not personally familiar with the facts of this case, or with the questions that have been under review or the subject of further development.

The statistics for new housing suits filed by the Civil Rights Division for the fiscal years (FY) from October 1, 1977 to the present (July 1983) are as follows: FY 1978 — 19; FY 1979 — 26; FY 1980 — 12; FY 1981 — 4 (all in 1980); FY 1982 — 2 (both in 1982); FY 1983 — 3 (to June 1983). The reduction in absolute numbers in fiscal

HeinOnline -- 17 U.C. Davis L. Rev. 501 1983-1984

D. *1981 to the Present*

Case One

One proposed exclusionary land use case prepared in 1981 was not presented to the Assistant Attorney General because of the uncertainties and paralyzing effects of the transition to a new administration. This transition took more than the usual time to be effectuated, and involved policy changes of a scope and degree unprecedented in the history of the Civil Rights Division. The extent to which changes in leadership and policy would affect Fair Housing Act litigation were not immediately clear.[228] *Case One* involved a town which was a defendant in a private lawsuit. The situation in the Division did not present a realistic opportunity to obtain the necessary authorization for this case prior to the time the private suit went to trial.[229]

United States v. Town of Cicero, Illinois

Suit was filed in *United States v. Town of Cicero, Illinois* on January 21, 1983.[230] The complaint alleged that Cicero, a ninety-nine per-

years 1980 and 1981 reflects the policy of deemphasizing routine private sector cases, referring small routine cases to United States Attorneys' offices, and emphasizing more complex and time consuming exclusionary land use litigation. *See supra* text accompanying notes 14-20. The figures for fiscal year 1980 and fiscal year 1981 (in 1980) would of course have been larger if the seven cases discussed *supra* text accompanying notes 206-27 had been filed. Substantial resources were invested in these cases.

[228] As a result of the disappointing denouement in the Carter administration of the initiative to bring non-site-specific effects test cases, *see supra* text accompanying notes 210-14, and the Reagan administration's complete opposition to the effects test, *see supra* notes 128, 171, 193-94, 214, and its constricted view of the limits of proper relief in cases against municipalities, *see supra* notes 194, 202, the Division's emphasis under the Fair Housing Act has now shifted back to private sector intentional discrimination litigation. The General Litigation Section leadership has directed attorneys to redouble efforts to produce such cases (which will likely be approved by Assistant Attorney General Reynolds), to employ a lower size/impact threshold than during the last two years under Assistant Attorney General Days, and to continue to propose exclusionary land use litigation when there is strong evidence of racially discriminatory purpose. The slow pace of production of new cases after 1980, *see supra* note 227, has been due in large part to the disruptive effect of changing gears. A delayed start-up was inherent in the necessary efforts to resuscitate sources of private sector cases. Another ubiquitous problem is the time consuming and demoralizing aspects of attempting to conduct pending school desegregation and housing litigation in the face of overbearing review by a determinedly negative Division leadership.

[229] *See* Smith v. Town of Clarkton, N.C., 682 F.2d 1055 (4th Cir. 1982) (modifying and affirming district court judgment in plaintiff's favor).

[230] No. 83-C-0413 (N.D. Ill. filed Jan. 21, 1983) (copy on file at U.C. Davis Law

HeinOnline -- 17 U.C. Davis L. Rev. 502 1983-1984

cent white suburb of forty percent black Chicago, had a policy of excluding blacks, and that this intentionally discriminatory policy had denied equal housing opportunity. The complaint alleged that town officials had verbally and physically harassed blacks who attempted to move to Cicero, and had refused for discriminatory motives to participate in the Community Development Block Grant Program. Cicero has a long and well-known history of private and official racially motivated hostility to blacks which has included violent interference with civil rights.

Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Watersmeet Township

The United States moved to intervene in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Watersmeet Township* on March 28, 1983, and was granted leave on April 13, 1983.[231] The United States' complaint alleged that the township had refused to extend solid waste disposal and fire protection services to a proposed Indian Housing Authority low-rent housing project because the expected occupants would be predominantly Indian. It alleged that this refusal would delay and might prevent the construction of the project.

Cicero and *Watersmeet*, the two land use cases brought by the Reagan administration, are each based on an allegation of racially discriminatory purpose. *Cicero* appears to be non-site-specific, and *Watersmeet* appears to be site-specific.

CONCLUSION

Effective use of the Attorney General's authority to attack racially exclusionary municipal practices should be a high priority. During the Carter administration, a creative law enforcement initiative succeeded in raising such litigation to a high water mark in the history of the Civil Rights Division. The record of achievement during that period

---

Review office). The complaint also charged Cicero with violating Title VII of the 1964 Civil Rights Act by enforcing a durational residency requirement restricting eligibility for municipal employment to those who have resided in the town for one year. The complaint alleged that this requirement had "operated in conjunction with other exclusionary municipal policies so as to effectively ensure that blacks are not employed by the Town of Cicero." *Id.* at 1, 4-5.

[231] No. M82-161 (W.D. Mich. filed Mar. 28, 1983) (copy on file at U.C. Davis Law Review office). The intervention was pursuant to Title IX of the 1964 Civil Rights Act and the Fair Housing Act, and the complaint alleged violations of the fourteenth amendment and the Fair Housing Act. *Id.*; *see supra* note 96.

HeinOnline -- 17 U.C. Davis L. Rev. 503 1983-1984

will not be surpassed in the foreseeable future, surely not during the tenure of the Reagan administration.[232] Yet even during the Carter period, some of the more imaginative and controversial aspects of this initiative did not reach fruition. This failure under the most favorably disposed leadership in recent years underlines the contemporary limits on advances in civil rights law enforcement. The likelihood of federal action engendering profound changes in the pattern of housing segregation caused by exclusionary zoning and other land use practices is not great. The Department of Justice may not again assume the initiative unless and until the perception of a hostile legislative climate is dissipated.[233]

---

[232] In dividing this overview into the pre-Carter, Carter, and post-Carter periods, the author does not intend to suggest that the Justice Department's civil rights enforcement policies should be politically determined. To the contrary, the most disturbing aspect of the Reagan administration's stewardship of the Civil Rights Division has been the unprecedented extent to which it has undermined the Division's tradition of incrementally progressive, nonpolitical law enforcement. The difficulties of the early Nixon years pale in comparison to the negative ideological agenda, and the failure to appreciate the obligations of responsible law enforcement, that now hold sway. This Article singles out the Carter years for special focus because that is when the creative initiative occurred under the impetus of Assistant Attorney General Days' leadership.

[233] It is extremely unlikely that the fair housing legislation presently before Congress will address these issues in a positive fashion. The question of increased administrative authority for HUD (favored by "liberals") versus increased Justice Department and court enforcement (favored by "conservatives") is essentially irrelevant to the subject matter of this Article. Regardless, HUD's record of performance does not inspire confidence that it could or would deal with exclusionary municipal practices more efficaciously than the Department of Justice.

HeinOnline -- 17 U.C. Davis L. Rev. 504 1983-1984