The Arlington Heights Case: The Exclusion of Exclusionary Zoning Challenges

by David L. Callies and Clifford L. Weaver

On January 11, 1977 the Supreme Court of the United States delivered its long-awaited decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 45 U.S.L.W. 4073 (Case No. 75-616). Stripped to its essentials, the decision means that a land use policy carried out through zoning may be discriminatory in effect and yet be immune from constitutional challenge in the federal courts under the Equal Protection Clause of the 14th Amendment unless there is ample proof of a racially discriminatory intent or purpose. The decision does not, however, mean that such a policy is legal. This apparent anomaly we will discuss later. First, the facts.

THE FACTS: PASSIVE DISCRIMINATION AND PLANNING

In 1971, the Metropolitan Housing Development Corporation (MHDC) sought rezoning of a 15-acre parcel of land in the village of Arlington Heights, Illinois from a single-family to a multiple-family zoning classification. With the aid of federal financial subsidies provided under Section 236 of the National Housing Act, MHDC planned to construct 190 townhouse units in 20 two-story townhouse buildings: 100 single-bedroom units for senior citizens and 90 two, three, and four-bedroom units for families with low or moderate incomes. The development was to be called Lincoln Green.

Following a recommendation of the Arlington Heights Plan Commission, the village board of trustees denied the zoning request. MHDC and other named plaintiffs brought suit in the United States District Court alleging that the denial was racially discriminatory, violating the 14th Amendment as well as

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the Fair Housing Act of 1968. The District Court upheld the decision of the board of trustees but was reversed by the Seventh Circuit Court of Appeals in June of 1975 which was, in turn, reversed by the U.S. Supreme Court. So much for the bare bones.

The village of Arlington Heights is a suburb of Chicago located approximately 26 miles northwest of the downtown. It is primarily a bedroom suburb, zoned largely for single-family detached houses. According to the 1970 census the village's population was 64,000, only 27 of whom were black. The 15 acres in question are owned by the Clerics of St. Viator, part of an 80-acre parcel just east of the center of the village. While part of the site is occupied by St. Viator's High School and a three-story novitiate building, much of the site is vacant. The entire site and all of the surrounding area was, and is, zoned R-3, single-family detached. Single-family homes abut the property on two sides; on the other two sides is the vacant St. Viator's property. The proposed 15-acre development would have maintained much of the open space, with shrubs and trees screening the homes directly abutting the property, but would have required rezoning to the R-5 multiple-family classification to permit townhouses at the density proposed.

During the spring of 1971, the plan commission considered the proposal at three public meetings. At the hearings, MHDC submitted studies demonstrating the need for housing of the type proposed. Evidence offered at trial indicated many of those attending the plan commission were vocal and demonstrative in opposition to Lincoln Green, while others testified in its favor. Some of the comments from both opponents and supporters of the rezoning petition addressed the "social issue" of introducing low and moderate-income housing, that would probably be racially integrated, into Arlington Heights. But the Supreme Court found that most of the opponents focused on the zoning aspects of the petition, stressing the single-family character of the neighborhood, the reliance by neighboring citizens upon that character, and, perhaps most important, Arlington Heights' policy concerning multiple-family zoning. Adopted by the village board in 1962 and amended in 1970, the policy was that R-5 zoning should constitute a buffer between single-family and commercial, industrial, or other high intensity land uses. Lincoln Green did not meet this requirement, since the property is completely surrounded by single-family zoned property.

The trial court held that Arlington Heights was motivated by neither racial discrimination nor an intent to discriminate against low-income groups when it denied rezoning, but rather by a desire to protect property values and the integrity of the village's zoning plan. The Court of Appeals reversed.

THE COURT OF APPEALS DECISION: ACT AFFIRMATIVELY OR TAKE WHAT YOU GET

While sustaining the trial court's finding that Arlington Heights was "concerned with 'the integrity of the zoning plan,'" the Appeals Court decided, in the words of the Supreme Court, that "whether refusal to rezone was dis-

criminatory in effect was more complex." The Court of Appeals first noted that the zoning denial would have a disproportionate effect on blacks because of their disproportionate representation in the low and moderate income group. It held, however, that the Supreme Court's earlier decision in *James v. Valtierra,* 402 U.S. 137 (1971), precluded a reversal of the village's decision based on that disparity alone.

The Appeals Court, however, then went on to assess the disparate impact on racial minorities in light of "its historical context and ultimate effect." It found that northwest Cook County was enjoying rapid growth in employment opportunities and population while continuing to exhibit a high degree of residential segregation. In a finding that has been unfairly overlooked in some of the publicity surrounding this case, the Appeals Court conceded that "no direct action attributable to Arlington Heights created the segregated housing pattern. . . ." However, the court also noted that Arlington Heights, like nearly every other suburb in existence, had done nothing affirmative to deal with the problem. The court observed that the village had never participated in or sponsored any low-income housing developments and had no current plans for building low and moderate-income housing.

The court then went on to hold:

> "Because the village has totally ignored its responsibilities in the past we are faced with evaluating the effects of governmental action that has rejected the only present hope of Arlington Heights making even a small contribution toward eliminating the pervasive problem of segregated housing. We therefore hold that under the facts of this case Arlington Heights' rejection of the Lincoln Green proposal has racially discriminatory effects. It could be upheld only if it were shown that a compelling public interest necessitated the decision."

The Court of Appeals decided that neither the buffer policy nor the desire to protect property values met the "compelling public interest" standard and that, therefore, the Equal Protection Clause of the 14th Amendment was violated.

THE SUPREME COURT DECISION: IMPACT WRITEOUT PROVABLE INTENT

The Supreme Court did not agree. Relying primarily on its decision in *Washington v. Davis,* 426 U.S. 229 (1976), decided after the Court of Appeals decision but before oral argument in this case, the court reiterated that official action would not be held unconstitutional solely because it resulted in a racially disproportionate impact. In as plain words as can be imagined, the court held:

> "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

Absent that showing, the high court said, the Court of Appeals' finding of a "discriminatory 'ultimate effect' is without independent constitutional significance."

If, then, secret motive rather than discernible effect is the critical factor, how is that motive to be shown? The court offers five possible approaches to this difficult problem.

First, the court suggests that while racial impact is not the ultimate test, proof of racial impact may in some cases be helpful in proving the required racial motive: "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." However, it is clear that the pattern must be "stark" and that "impact alone is not determinative."

Second, the court suggests that motive might be demonstrated by an historical background which "reveals a series of official actions taken for invidious purposes." Apparently, however, the type of historic pattern of inaction and indifference to segregation found by the Appeals Court is unpersuasive to the Supreme Court.

Third, the court says the specific sequence of events leading to the challenged decision may be persuasive of racial motive if it betrays a departure either from normal procedures or from substantive standards usually considered important.

Fourth, if contemporaneous statements of the decision-makers reveal racial motive that, of course, would be relevant. Statements of citizens addressing the decision-makers seem, however, if relevant at all, to carry much less weight.

Finally, the court said:

> "In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."

Once the Supreme Court determined that the key fact is proof of discriminatory intent, its reversal of the Court of Appeals was a foregone conclusion. Indeed, both the District Court and the Court of Appeals agreed that the plaintiff's evidence did not warrant a finding that Arlington Heights was administering its zoning policies in an *intentionally* discriminatory manner. As the Supreme Court observed, statements by the plan commission and village board members reflected in the official minutes focused almost exclusively on the traditional zoning aspects of the MHDC petition.

Of course, it is not surprising that the plaintiffs had failed to carry a burden of proof that was first defined *after* they had tried their case on a completely different and, at the time, apparently sound theory. Indeed, after saying that motive was the critical element in the case, the Supreme Court, in footnote 20 of its opinion, sidestepped the plaintiff's argument that they had tried to prove motive in the trial court but were precluded from doing so by rulings based on what the law used to be. This anomaly seems in large part responsible for the dissents of three justices who argued that the whole case should

have been sent back to the Court of Appeals, and possibly to the federal trial court, for additional proceedings to be conducted in light of the newly announced rules applicable to such cases.

As it was, the majority of the court decided to review the evidence itself in light of the new standards and, not surprisingly, found the evidence insufficient to sustain a Constitutional claim of racial discrimination. The court did, however, remand the case to the Court of Appeals for the limited purpose of determining whether the evidence was sufficient to show a violation of the Federal Housing Act of 1968.

ANALYSIS: DIFFERENT ROADS TO OLD GOALS— AND MAYBE A SILVER LINING

As with many opinions of the Supreme Court, it is tempting to analyze this one on a narrow and technical basis and to point out the logical leaps and lack of tight reasoning. Perhaps the most glaring example is the difficulty of explaining why, in an area of such importance as the right to be free of racial discrimination, legislative motive is the test, when in other areas the rule has always been that motive is completely irrelevant and that governmental acts will be judged solely on the reasonableness of their observable impacts on constitutionally protected rights.

However, despite the temptation to analyze their legal logic, most Supreme Court opinions are more fruitfully analyzed as statements of policy and direction than as pieces of legal scholarship. In that context, then, what does this decision mean in terms of the direction of land use law and real estate development in the coming years?

Federal Law and Discrimination as a Bar to Land Development

The Arlington Heights opinion signals, above all, that the Supreme Court is not interested in having lower federal courts use the general language of the 14th Amendment of the Federal Constitution as a tool for "opening up the suburbs." In general, even before *Arlington Heights,* federal courts had not been as receptive as many state courts to claims of exclusionary zoning. Nevertheless, the reluctance of lower federal courts in this area never approached that evidenced in recent Supreme Court opinions, culminating in *Arlington Heights.* Indeed, a number of lower federal courts had shown some willingness to invalidate allegedly discriminatory ordinances based largely on proof of discriminatory impact on racial minorities.

However, before the Court of Appeals decision in *Arlington Heights,* most federal courts, unlike state courts, had refused to invalidate ordinances that discriminated merely against poor people—even though those poor people were usually also members of racial minorities. That tendency was made national law by the Supreme Court's opinion in *James v. Valtierra,* 402 U.S. 137 (1971). Most federal courts also showed a tendency to rely more on federal civil rights legislation than on the broad language of the 14th Amendment. Federal courts also tended to look very narrowly at the effect of zoning or-

dinances on people already living within a community; they did not demand that every community take "a fair share" of the region's minority population.

Against this background of federal reluctance, the Seventh Circuit Court of Appeals' invalidation of the Arlington Heights ordinance was quite a bold step. It specifically rejected statutory claims and rested its opinion squarely on the Constitution; it danced lightly, but effectively, around the Supreme Court's opinion in *Valtierra* and in essence found racial discrimination based on proof of economic discrimination; it went out of its way to say that proof of discriminatory effect was sufficient even with no proof whatever of bad motives; and, finally, it looked not simply at the local community but, rather, at the entire region to determine whether the local zoning ordinance had a racially discriminatory effect.

Seen in that light, the Supreme Court's curt rejection of the Seventh Circuit's effort carries a clear message—the federal judicial system is not going to open its doors to problems of local land use and zoning based upon vague allegations of economic or racial discrimination. The court seems to be saying that unless your proof of racial discrimination is so strong as to wipe out all other considerations, the federal courts are not the place to try zoning cases.

That probably makes good sense in light of the traditional roles and competencies of state and federal courts. In fact, one must wonder if some of the celebrated zoning cases recently lost in the U.S. Supreme Court when presented as civil rights cases could not have been easily won if presented in the state courts as routine zoning cases.

Despite the good sense of not opening federal courts to a flood of zoning cases cast in the mold of civil rights claims, the Supreme Court's approach to *Arlington Heights* and some of the other zoning cases that it has decided in the last two or three years is unfortunate. Instead of basing its opinions squarely on notions of the proper role of the federal judicial system in cases where federal claims are really secondary to local land use issues, the court has based its reversals on contorted constitutional logic and has seemed to sanction denial of important constitutional rights in the name of local zoning autonomy. That is less than might have been expected from a court that should function as the staunchest protector of those rights.

The State Courts and Discrimination

The retreat of the U.S. Supreme Court from this area comes at a time when many state courts are charging with renewed vigor into the exclusionary zoning fray. Most state constitutions have due process and equal protection provisions similar to those found in the U.S. Constitution and state supreme courts are showing an increasing willingness to ignore federal court interpretations of the federal constitution and to use state constitutional provisions to strike down local zoning ordinances on the basis of proofs and theories that clearly do not pass muster under *Arlington Heights.*

Among the most recent and famous of these are *Township of Williston v. Chesterdale,* 341 A.2d 46 (Pa. 1975), decided in Pennsylvania; *Berenson v.*

Town of New Castle (N.Y. 1975), decided in New York; and, perhaps most celebrated, the New Jersey Supreme Court's opinion in *S. Burlington County NAACP v. Township of Mount Laurel,* 336 A.2d 713 (N.J. 1975).

While each state has taken a slightly different approach, the tenor of the decisions was fairly captured by Justice Hall in his *Mt. Laurel* opinion:

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

The existence of such opinions from the state courts would seem to assure that the limited foreclosure of federal remedies wrought by the *Arlington Heights* case—primarily with respect to cases raising constitutional questions under the 14th Amendment—will by no means end the inquiry into whether communities can so zone themselves as to exclude all development within price ranges affordable by persons with low and moderate incomes. The forum will no doubt change from federal to state and the issues may be framed more like zoning issues than civil rights issues, but the debate will go on.

The Effect on Land Use Planning Procedures

It is arguable that the *Arlington Heights* decision at least in part rehabilitates the local comprehensive planning process, which had just been dealt a considerable blow by the Supreme Court's decision in the *City of Eastlake v. Forest City Enterprises,* 49 L. Ed. 2d 132 (1976). Elevating the local referendum to near constitutional status, the Supreme Court in that case declared it not unreasonable to require referendum approval before any land use decisions of the city's elected officials could take effect. In *Eastlake,* the court largely ignored opinions from the highest courts in a number of states which had found the comprehensive planning process to be the most reasonable means for making land use decisions, to which a referendum could have no possible application.

However, in reviewing the evidence for and against the allegation of racial motivation in *Arlington Heights,* the Supreme Court placed considerable emphasis on the regularity of Arlington Heights' planning and zoning procedure and on the fact that Arlington Heights had a buffer policy that on several prior occasions had formed the basis for the local legislative body's decision to deny other rezoning proposals. The court was apparently much moved by the trial court's findings of fact that the Plan Commission and Village Board, as reflected in the official minutes:

". . . focused almost exclusively on the zoning aspect of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the village's rezoning decisions . . . the village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case."

To the extent that one believes in rationality in the process of making land use decisions at the governmental level, and comprehensive plans and planning as the embodiment of that rationality, there may be a silver lining, however tattered, in the United States Supreme Court's most recent foray into the field of zoning.