UPDATE

The Arlington Heights Case: A Reprise

by David L. Callies and Clifford L. Weaver

> [I]t is important to note that the Supreme Court's decision does not require us to change our previous conclusion that the village's action had a racially discriminatory effect.
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> U.S. Court of Appeals for the 7th Circuit *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, July 7, 1977.

With these words, the 7th Circuit Court of Appeals commenced its dissertation upon Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), in which it concluded once again that Arlington Heights may have illegally refused to rezone 15 acres of land, resulting in racial discrimination. The U.S. Supreme Court has denied the village's petition for certiorari review (January 9, 1978), thus letting stand the latest appellate court decision in this now protracted litigation. The tests laid down by the 7th Circuit Court in that decision thus assume a national significance.

We set out the facts of the case at length in the Summer 1977 edition of *Real Estate Issues*. It is enough here to recall that the village of Arlington Heights refused to rezone 15 acres of land from a single-family to a multiple-family zoning classification so that the Metropolitan Housing Development Corporation (MHDC) could construct 190 townhouse units for senior citizens and low- or moderate-income families. MHDC brought suit in federal court and successfully convinced the 7th Circuit Court that the effect of the village's action was to discriminate on the basis of race and that, regardless of intent,

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the racially discriminatory effect was a violation of the Equal Protection Clause of the U.S. Constitution. The U.S. Supreme Court disagreed, reversing on the basis of *Washington v. Davis,* 426 U.S. 229 (1976), decided after the 7th Circuit's decision, and holding that an official action would not be held unconstitutional solely because it resulted in a racially disproportionate impact. But the Supreme Court did remand the case to the 7th Circuit to determine whether the Fair Housing Act had been violated. The issue, then, has shifted from deciding whether there has been a *constitutional* violation to deciding whether there has been a *statutory* one.

When the 7th Circuit Court again considered the case on remand, it wrote another long opinion, *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F2d 1283 (1977), in which it sent the case back to the district court, the finder of fact in the litigation, to determine:

1) Whether funds still existed to construct the subsidized housing. If they do not, the case is moot. The program under which the project was to be constructed no longer exists, but MHDC claims other subsidies are available.

2) Whether there is any other land in Arlington Heights that is both appropriately zoned and otherwise "suitable" (by which the circuit court seemed at very least to mean available at a price consistent with a subsidized project) for federally subsidized low-cost housing.

If MHDC can demonstrate it has the money, and if Arlington Heights fails to come up with an alternative "suitable" site, then, the circuit court says, "the village's refusal to rezone effectively precluded plaintiffs from constructing low-cost housing within Arlington Heights, and [the district court] should grant plaintiffs the relief they seek." The result for both MHDC and Arlington Heights would then be the same as if the U.S. Supreme Court had agreed with the 7th Circuit that the village's refusal to rezone was unconstitutional; only the legal technicalities along the way would be different.

In reconsidering the case, the 7th Circuit was stuck with the earlier determination that Arlington Heights did not *intend* to discriminate and had to decide whether, even absent that intent, its actions could be found to violate the Fair Housing Act. Given the Supreme Court's attitude about the importance of intent to establish a constitutional claim, it is understandable that the 7th Circuit approached the statutory issue with some caution.

The circuit court first noted that the portion of the Fair Housing Act making it unlawful to make unavailable or deny dwelling to any person because of race, color, religion, or national origin could be interpreted either narrowly or broadly:

The major obstacle to concluding that action taken without discriminatory intent can violate [the Act] is the phrase "because of race" contained in the statutory provision. The *narrow view* of the phrase is that a party cannot commit an act "because of race" unless he intends to discriminate between races. By hypothesis, this approach would excuse the village from liability because it acted without discriminatory intent. The *broad view* is that a party commits an act "because of race" whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent. Under this statistical, effect-oriented view of causality, the village could be liable since the natural and foreseeable conse-

quence of its failure to rezone was to adversely affect black people seeking low-cost housing and to perpetuate segregation in Arlington Heights. (Emphasis added.)

The 7th Circuit then reminded Arlington Heights (and the Supreme Court . . . ?) that although the Supreme Court had announced a new "intent" requirement for constitutional equal protection cases, it specifically reaffirmed other cases in which it had held that practices which produced racially discriminatory effects were invalid under a different section of the Civil Rights Act:

> Thus, a prima facie case of unemployment discrimination can still be established under Title VII by statistical evidence of discriminatory impact, without a showing of discriminatory intent.

Having thus rejected the "narrow view" espoused by Arlington Heights, the court was quick to say that it also saw no merit in the "broad view" that simple proof of discriminatory effect would suffice to show a Fair Housing Act violation in every case. It held instead that only "under some circumstances" would conduct that produces an "unintentional" discriminatory impact violate the Fair Housing Act:

1. *Is there some evidence of discriminatory intent?* The court held that while there appeared to be little evidence of such intent, it considered this criterion to be "the least important of the four factors that we are examining."

2. *What is the defendant's interest in taking the action complained of?* The court noted that when a governmental body (as opposed to a private group) is acting "within the ambit of its legitimately derived authority, we will less readily find that its action violates the Fair Housing Act." The court found that as the village was acting within the scope of its authority to zone, and given the wide discretion "traditionally afforded" municipalities in zoning, "this factor weakens plaintiff's claim for relief."

3. *How strong is plaintiff's showing of discriminatory effect?* In terms of future precedent, the court's discussion of this criterion is of critical importance. It started by noting that there are two types of "racial impact":

> There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.

The court acknowledged that there was only weak proof of the first type of impact in this case but went on to stress the importance of the second type:

> What was present in [earlier cases finding a violation of the Act] was a strong argument supporting racially discriminatory impact in the second sense. In each case the municipality or section of the municipality in which the proposed project was to be built was overwhelmingly white. Moreover, in each case construction of low-cost housing was effectively precluded throughout the municipality or section of the municipality which was rigidly segregated. Thus, the effect of the municipal action in both cases was to foreclose the possibility of ending racial segregation in housing within those municipalities.

The court said it wasn't clear whether the refusal to rezone here "would necessarily perpetuate segregated housing in Arlington Heights." It noted its earlier findings relating to the apparent patterns of segregation in the village but acknowledged Arlington's claims that other sites for low-income housing were available and zoned in the village. It remanded with instructions that the village would have the burden to prove that claim and that, if it could not, it would lose:

> We hold that, if there is no land other than plaintiffs' property within Arlington Heights which is both properly zoned and suitable for federally subsidized low-cost housing, the village's refusal to rezone constituted a violation of section 3604(a). Accordingly, we remand the case to the district court for a determination of this question subject to the guidelines which we shall lay down. Since the village's zoning powers must give way to the Fair Housing Act, the district court should grant plaintiffs the relief they request if it finds that the Act has been violated.

4. *Does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing?* The court decided that "this factor favors the plaintiffs in this case" inasmuch as they were not asking Arlington Heights to do anything except get out of the way:

> To require a defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing is a massive judicial intrusion on private autonomy. By contrast, the courts are far more willing to prohibit even nonintentional action by the state which interferes with an individual's plan to use his own land to provide integrated housing.

Having gone that long way around, it is clear that the 7th Circuit got right back to the place where it had started and the message to municipal governments is the same: If a municipality that historically has been segregated—even unintentionally—does nothing affirmative to promote low-income housing and if a developer proposes such a project to "help" the community break down its patterns of segregation, the federal courts (or at least one of them), are going to require the community to accept the project unless it has very compelling reasons to show why it should not.