University of Miami Law Review

Volume 30 | Number 2 Article 10

1-1-1976

Compelling State Interest Test Applied to Denial of Rezoning Request

Raymond M. Paetzold

tices are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business purpose for their use. The rule of reason, however, calls for a balancing of the various harms occasioned to the public against the benefits likely to result from the activity. The test of the legality of a practice under the rule of reason is whether the effect upon competition in the marketplace is substantially adverse.[52] A court might conclude, for instance, that the greater public awareness of the availability of legal services, resulting from advertising and solicitation, may outweigh the various evils threatened by these activities, and forbid the bans to continue.

Thus, even though fee schedules are not immune from Sherman Act scrutiny, it remains to be seen whether the professional bans on solicitation and advertising will survive. If not, then it is likely that the economics, as well as the nature and character of the practice of law, will change dramatically.

ROBERT CORY SCHNEPPER

Compelling State Interest Test Applied to Denial of Rezoning Request

Metropolitan Housing Development Corp. ("Metropolitan"), organized for the purpose of developing low and moderate income housing, acquired a vacant 15-acre parcel for a proposed 190-unit, federally subsidized, townhouse development in the village of Arlington Heights, a suburb of Chicago. The property was part of an 80-acre parcel belonging to a Catholic religious order which had its novitiate and high school thereon. The larger parcel had always been zoned R-3, single-family, and was surrounded by single-family homes.[1] The proposed townhouses would require a rezoning of the 15-acre parcel to R-5, multifamily. Metropolitan took the necessary administrative steps to obtain that rezoning. The village's Plan Commission, after holding public hearings, recommended against the rezoning as, under its comprehensive plan, rezoning to R-5

52. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

1. The religious order's use of the land was a pre-existing, nonconforming use at the time the first zoning ordinance went into effect in 1959.

should only be permitted if the area represents a buffer zone between a single-family zone and a commercial or other high intensity zone. The board of trustees of the village, therefore, denied the rezoning request.

Alleging that the refusal to rezone perpetuated segregation and thereby violated the equal protection clause of the fourteenth amendment,[2] Metropolitan, and a number of individual plaintiffs[3] seeking to represent a class of moderate income minority members

2. Plaintiffs also alleged that the denial of the rezoning request violated the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 (1970); the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970); and the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.* (1970). However, the court's decision is based solely on the equal protection clause of the fourteenth amendment.

3. Whether Metropolitan and the individual plaintiffs had standing to bring this action was an issue not addressed by the appellate court. The trial court raised the issue but did not decide it. It merely assumed that the corporate plaintiff had sufficient interest in the property to have the requisite standing; but, on the basis of class action requirements, the court indicated that the individual plaintiffs did not have standing. Nevertheless, the court stated that, "[s]ince we intend to decide this issue on its merits, we see no purpose to be served by debating the question of standing any further." Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 210 (N.D. Ill. 1974).

It is questionable whether the individual plaintiffs would have standing, notwithstanding the class action question, under the most recent Supreme Court ruling on that issue. Warth v. Seldin, 95 S. Ct. 2197 (1975), held that, "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention." 95 S. Ct. at 2210 (emphasis in the original). In distinguishing a number of lower court cases involving specific housing projects, the *Warth* Court indicated that intended residents of such projects would have standing to challenge applicable zoning restrictions because they could show harm to their immediate and personal interests. The record in *Metropolitan Housing* does not indicate whether the individual plaintiffs were "intended residents" of the proposed project. Certainly the class those plaintiffs sought to represent, all moderate income minority members who could not find decent affordable housing in Arlington Heights, was intended to encompass a considerably larger group than those intended residents of the proposed project. An application of *Warth* to such a class, therefore, would likely result in a denial of standing. A redefining of the class to include only the intended minority residents of the proposed project might rectify the difficulty.

If the individual plaintiffs' standing had been denied, could Metropolitan have raised the equal protection issue alone? Arguably it could on the basis of Barrows v. Jackson, 346 U.S. 249 (1953). *Barrows* involved a white home owner who tried to sell her property to a non-Caucasian in violation of a restrictive covenant. In the suit for damages by neighboring homeowners, she was permitted to raise the equal protection issue, even though it involved the rights of persons not before the Court. On the other hand, in *Warth*, the Court noted that when an individual or association is asserting the legal rights of a third party, it is within a court's "prudential authority" to deny these plaintiffs access to the courts, 95 S. Ct. at 2213. If *Warth* is to be an indication of the difficulty of obtaining standing to challenge exclusionary zoning practices in the future, it is hoped that such "prudential authority" will be exercised sparingly in order that the merits of these cases might be heard. For a full discussion of *Warth* see the note on that decision appearing in this issue, *supra* at 453.

who could not find decent affordable housing in Arlington Heights,[4] brought suit in the United States District Court for the Northern District of Illinois against the village to, in effect, force it to rezone the 15-acre parcel. The district court denied the plaintiffs any relief, holding that the refusal to rezone was based on good faith reasons[5] and had no racially discriminatory effect.

On appeal, the United States Court of Appeals for the Seventh Circuit *held*, reversed and remanded: (1) Arlington Heights' denial of the rezoning request had racially discriminatory effects and could be upheld only upon a showing of compelling public interest; (2) maintaining the integrity of the buffer policy and protecting the values of the neighboring property did not constitute a compelling public interest; and therefore, (3) the village's action violated the equal protection clause of the fourteenth amendment. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir. 1975).

For five decades, zoning in the courts has been dominated by one Supreme Court decision—*Village of Euclid v. Ambler Realty Co.*[6] *Euclid* required that, in order to attack a zoning ordinance on constitutional grounds, there must be a showing that the ordinance was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[7] The judicial attitude in zoning matters, therefore, became one of deference to the judgment of local administrators and legislative bodies,[8] affirming whatever choice the locality made without investigating

4. The class action issue, like the standing issue, was not addressed by the appellate court. The trial court, however, treated the two issues as one, indicating that, although it would decide the case on its merits, it did not feel the individual plaintiffs represented a definable or manageable class. "Manageability," however, is a standard required for a 23(b)(3) class under the Federal Rules of Civil Procedure, and not for a 23(b)(2) class, which the plaintiffs sought to represent. *See* 7A WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1775-76 (1972).

5. Those reasons, according to the district court, were (1) the integrity of the zoning plan (buffer policy), (2) the protection of the value of surrounding property (which, the court found, would be substantially decreased if the housing project was built on that parcel), and (3) the availability of other vacant land already zoned for multifamily use.

6. 272 U.S. 365 (1926).

7. *Id.* at 395.

8. *See, e.g.*, Zahn v. Board of Pub. Works, 274 U.S. 325, 328 (1927):

> The Common Council of the city, upon these and other facts, concluded that the public welfare would be promoted . . . and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable . . . . In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

the motive for the choice or its secondary or tertiary effects.[9]

This state of affairs readily lent itself to abuse. Communities would, out of a parochial motivation, use zoning powers to keep out undesired classes of people (thus the term "exclusionary zoning"). Through such means as minimum floor area[10] and lot size[11] requirements, a community could drive up housing costs and property values and effectively price available housing out of the reach of low income families. Ordinances totally excluding mobile homes, which are sometimes the only source of good, new, inexpensive housing for low to moderate income families, have been upheld.[12] Additionally, various restrictions on apartments, including limiting the number of bedrooms (and thus limiting families with school age children), and using apartments as buffer zones between single family zones and commercial zones, have become nearly universal practices which are subject to manipulation to provide exclusionary results.[13]

The end result of such exclusionary zoning practices, of the decades of laissez faire judicial attitudes in zoning matters, and of other factors has been a critical shortage of low and moderate income housing in the suburbs.[14] That shortage, in turn, has exacer-

---

9. *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

10. *See, e.g.*, Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953), upholding the validity of substantial minimum floor space requirements.

11. *See, e.g.*, Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952), sustaining a minimum lot size requirement of five acres as applied to 85 percent of a municipality. *See generally* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 47 (1971).

12. Vickers v. Township Committee, 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963). A vigorous dissent by Justice Hall, however, foreshadowed a changing judicial attitude:

> [The] legitimate use of the zoning power . . . does not encompass the right to erect barricades . . . where the real purpose is to prevent feared disruption with a so-called chosen way of life. Nor does it encompass provisions designed to let in as new residents only certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners. When one of the above is the true situation . . . courts must not be hesitant to strike down purely selfish and undemocratic enactments.

Id. at 264-65, 181 A.2d at 147 (footnote omitted).

13. *See generally* Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963), a dated but still useful and comprehensive article examining the historic and the then current (1963) legal status of the multifamily dwelling, the reason for the increased pressure for apartments outside the metropolitan area, and the reaction of suburban communities to this pressure.

14. *See* Burns, *Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor*, 2 HASTINGS CONST. L.Q. 179 (1975).

bated the present unemployment crisis. Decaying central cities are losing their tax base through the migration of industry and jobs to the suburbs, leaving behind the low and moderate income workers who cannot find housing in the suburbs within their reach and who cannot afford to commute.[15]

Although judicial response was slow at first, the 1970's have witnessed the beginnings of change in the traditional attitudes. In Pennsylvania, for example, a number of decisions have invalidated minimum lot size ordinances as not being related to the public interest.[16] The practice of permitting multifamily uses only by allowing a variance (because none of the available land was zoned for multifamily residences) has also been invalidated by the Pennsylvania Supreme Court as an unreasonable use of the police power.[17]

The New Jersey courts have also taken an active role in striking down exclusionary zoning practices. Their efforts culminated in *Southern Burlington County NAACP v. Township of Mount Laurel*,[18] in which the New Jersey Supreme Court held that each community has a duty to assume its fair share of the regional housing needs. That duty is based on the court's interpretation of "general welfare"[19] as an affirmative requirement to which all zoning regulations must conform, and as a term which includes regional as well as local housing needs. Mount Laurel was therefore compelled to take affirmative steps to alleviate the shortage of low-income housing within its boundaries—a shortage due in large part to its past economically discriminatory zoning practices.[20]

---

15. *Id.*

16. *In re* Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). In the latter precedent-setting decision, the Pennsylvania Supreme Court invalidated a four-acre minimum lot size requirement, announcing its policy that a township cannot "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live." *Id.* at 532, 215 A.2d at 612.

17. *In re* Girsh, 437 Pa. 237, 263 A.2d 395 (1970). *See also* Township of Williston v. Chesterdale Farms, Inc., 341 A.2d 466 (Pa. 1975), holding unconstitutional, on the basis of *Girsh*, a zoning ordinance which limited apartment construction to only 80 of the nearly 12,000 acres in the township.

18. 67 N.J. 151, 336 A.2d 713 (1975).

19. The *Mount Laurel* court was interpreting provisions of the New Jersey Constitution and zoning enabling act. As the court noted, states are not prohibited from examining state (or municipal) legislation on substantive due process grounds. Federal courts, on the other hand, are limited by Ferguson v. Skupra, 372 U.S. 726 (1963), which essentially eliminated substantive due process as a ground for holding state legislation unconstitutional. *See also* North Dakota State Board of Pharmacy v. Snyder's Drugstores, Inc., 414 U.S. 156 (1973).

20. *See also* Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971), invalidating an entire zoning act which effectively excluded low and moder-

While state courts have invalidated exclusionary zoning ordinances on substantive due process and other grounds, federal decisions have been based, for the most part, on the equal protection clause of the fourteenth amendment. Under the equal protection clause, if an ordinance or zoning decision operates more harshly on one class of people than on others, it may be found unconstitutional unless the city can show a rational relationship of the ordinance to a legitimate purpose—health, safety, morals, and general welfare.[21] Furthermore, if the class discriminated against is one based on race, the court must make a strict judicial scrutiny of the facts.[22]

Thus, where courts have found a statute to be racially discriminatory on its face or in its effect, that statute has been invalidated as a denial of equal protection.[23] Additionally, courts have invalidated ordinances and zoning decisions on the basis of racially discriminatory motives where such ordinances and decisions also had the effect of excluding minority members while not excluding others.[24] However, the Supreme Court has said that a racially discriminatory motive behind a statute is not in and of itself a violation of equal protection.[25] The equal protection analysis of a zoning deci-

---

ate income families through minimum lot size and floor space requirements. The test, according to the court, was whether the ordinance promoted a reasonably balanced and well-ordered plan for the entire municipality, and whether it met both local housing needs and the fair proportion of regional housing needs.

21. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *See generally* Note, *supra* note 9.

22. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944): "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."

23. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

24. United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (holding the city's refusal to permit a tie-in with the existing water and sewer system as racially discriminatory against the minority farmworkers); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (holding the denial of a rezoning request was prompted by a desire to keep blacks from moving into the white area of a racially segregated city); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (holding the mayor's refusal, in response to the discriminatory sentiments of the community, to grant the necessary permit for a tie-in with the existing sewer system for a low-income housing project in an all-white Boston suburb, denied plaintiff's equal housing opportunity under the equal protection clause and the 1968 Fair Housing Act). *See also* Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating on equal protection grounds an amendment to the California State Constitution which prohibited state interference with private restrictive covenants in housing. The Supreme Court relied on the California Supreme Court's finding that the motive of the electorate was to authorize private discrimination).

25. Palmer v. Thompson, 403 U.S. 217 (1971).

sion must therefore concentrate on the differential treatment and the discriminatory effect of that decision, although courts would be hard pressed to ignore blatant racially discriminatory motivation.

The analysis of the equal protection issue becomes more complex when, in addition to motive and effect, the nature of the governmental action is considered. Should a relatively passive act (such as a denial of rezoning) be differentiated from active government participation (such as legislative enactment of an exclusionary zoning ordinance)?[26] Although the answer is not yet entirely clear, courts that have found a strong showing of racial discrimination in the motive and effect factors have held that a refusal to act is a denial of equal protection.[27]

Metropolitan Housing, however, is unique in the zoning area in finding a violation of the equal protection clause through a refusal to act, itself not discriminatory on its face,[28] with no showing of racially discriminatory motive,[29] but with an ultimate effect, several stages removed from the action, which perpetuates segregation.[30]

The court's method of analysis in *Metropolitan Housing* involved a four step process. First, the court placed the action in its historical context. It cited various demographic data to conclude that Arlington Heights is a nearly all-white suburb, where only about one percent of its jobs are filled by blacks, and where most of the blacks who do have jobs there are forced to commute from the

26. A further refinement in analysis is possible. Was there a refusal to act in an area where there existed (and was followed) an administrative procedure to request government action, as there was in the rezoning request in *Metropolitan Housing*; or was there a refusal to act after, say, a citizen's or group's request without such a procedure being available? For example, would the court have reached a different result if the same plaintiffs had petitioned Arlington Heights to build a public housing project instead of requesting rezoning to build their own? The racially discriminatory effect of the denial of that request would seem to be no different than the effect of the denial of the rezoning request. Furthermore, the very idea that the equal protection clause may require a community to acquire public housing is not all that farfetched. In Southern Alameda Spanish Speaking Org. v. City of Union City, 314 F. Supp. 967 (N.D. Cal. 1970), the court required the city to take all steps "necessary and reasonably feasible" to accommodate the needs of its low income residents, including acquisition of public housing, if necessary.

27. *See, e.g.*, cases cited in note 24 *supra*.

28. On the evidence, the trial court found that the rezoning request had been treated no differently by the zoning board than other requests, and that the denial of the request was based in part on the buffer policy.

29. At least, on the weight of the evidence, no such motive was shown.

30. An interesting analogy could be made to the school desegregation cases where the courts have found a duty to act but where the line has been drawn at de jure segregation. *See* note 40 *infra*.

city because they cannot find housing near their jobs.[31] Second, it noted the crucial fact that "this suburb has not sponsored nor participated in any low income housing developments, nor does the record reflect any such plans for the future."[32] Third, since 40 percent of the eligible applicants for the proposed housing development were black, the court found that the approval of the rezoning request would have resulted in a substantial increase in the village's minority population. And fourth, the court stated that, since Metropolitan was unable to find an economically feasible and suitable alternative site,[33] in all probability, no low income housing would be built. In other words, the court saw the proposed housing development as the only project presently contemplated to ease the de facto segregation existing in Arlington Heights. The denial of the rezoning request, therefore, operated to perpetuate segregation, thereby invoking application of the equal protection clause and, since a suspect class was involved, the compelling state interest test.[34] That test, developed under the Warren Court, required that a statute which curtailed a "fundamental interest" or discriminated against a "suspect class" must be based on a compelling state interest, and further, the statute, as applied, must be *necessary* to further that interest. Once a statute has been pigeon-holed within one of the two factors and does not meet the resultant test, it will be held unconsti-

31. Although the court did not discuss other reasons for the low percentage of blacks in jobs in Arlington Heights, it is not unreasonable to assume that lack of available housing may be a major factor in a practically all-white suburb the size of Arlington Heights (over 70,000) in a metropolitan area the population of which is 18 percent black. Furthermore, minority unemployment, although related to lack of available housing in the suburbs (*see* text accompanying note 15 *supra*), is not the only criteria for invoking the court's protection if a plaintiff's equal protection rights are being violated. The mere imbalance in available housing may be sufficient in and of itself.

32. 517 F.2d at 414. It is difficult to see how crucial this factor really is unless there is an *affirmative duty* to sponsor or participate in such developments. Although the court appears to work under an assumption that such a duty exists, no authority or justification is provided. Apparently, the duty is related to the court's attempt to break up white suburbia.

33. Although this was an important basis for its decision, the majority cites no evidence in the record. This is particularly peculiar because the trial court had based its decision to uphold the village's denial of the rezoning request in part on the fact that vacant land already zoned R-5 was available to the plaintiff. 373 F. Supp. at 211. On the appellate level, dissenting Chief Judge Fairchild, in reviewing the record, noted at least nine undeveloped tracts of land in excess of 15 acres zoned R-5. FED. R. CIV. P. 52(a) requires an appellate court to uphold a finding of fact by the trial court unless that finding was "clearly erroneous." Chief Judge Fairchild could not say that the finding of the availability of alternative land was clearly erroneous, and would, therefore, have affirmed the lower court.

34. *See In re* Griffiths, 413 U.S. 717 (1973); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974). *See generally* Note, *supra* note 9.

tutional under the equal protection clause.[35] Having reached that point, the court had no difficulty in finding that maintaining the integrity of the zoning plan (buffer policy) and protecting neighborhood property values did not constitute compelling justification. Therefore, the denial of the rezoning request violated the equal protection clause of the fourteenth amendment.

If *Metropolitan Housing* remains good law, are zoning boards and courts forced to apply the compelling state interest test to all zoning disputes which ultimately are found to have racially discriminatory effects? The test, it seems, is inappropriate for the delicate task of weighing all the factors involved in resolving such disputes equitably.[36] One can hardly imagine an interest that could justify discrimination on the basis of race, yet good city planning must be more flexible than it would be if that which promotes integration must be given priority over all other considerations (safety, health, etc.). A straightforward balancing test may prove more desirable: the housing opportunities offered lower income minorities by the proposed project, in light of existing opportunities, needs, and alternatives, weighed against the legitimate interests of the community in controlling growth in an orderly manner. The outcome in the present case would likely be the same. The difficulties presented by

35. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Where neither "fundamental interests" nor "suspect classes" are involved, the "rational basis test" is applied: the statute must have some rational relationship to a legitimate state interest to meet equal protection requirements.

36. As Metropolitan's proposed housing development was to be a cluster of two-story townhouses no higher than surrounding single-family homes, with adequate open spaces, it would be difficult to find *any* public interest sufficiently compelling to permit the racial discrimination which resulted from the disapproval of such a project. A much more difficult problem would be presented to the court if, instead of townhouses, the proposed project consisted of high-rise apartments planted in an area of single-family homes. All other conditions remaining equal, would maintaining the integrity of the zoning plan and protecting neighboring property values then become compelling state interests? Would the added traffic congestion and increased burden on the water and sewage systems be enough to swing the decision the other way? It may well be that only when the property undeniably cannot carry a higher density, will a compelling state interest be found. The court provides no guidance, nor do other federal cases, where the balance is often tipped by one or two factors.

While the compelling state interest test may be too blunt a weapon to fight exclusionary zoning, the "rational basis test" is practically no test at all (*see* Note, *supra* note 10 and text accompanying note 35, *supra*) as a rational basis can be found for almost all exclusionary zoning practices. (Environmental facts are among the most popular reasons given by proponents of such practices.) For a discussion of a "sliding scale of rationality tests" in the context of a municipality's responsibility under federally assisted housing programs, see Note, *The United States Housing Act: Municipal Rights and the Equal Protection Clause*, 50 NOTRE DAME LAW. 711 (1975).

the nearly insurmountable compelling state interest test, however, would be ameliorated. Although lack of guidance and uniformity of application could still pose problems, balancing equities is nothing new to the courts, and the results would be far more justifiable than the product of the application of the compelling state interest test to every zoning question involving possible racially discriminatory effects.

In addition to finding that the village's denial of the rezoning request violated the equal protection clause, the *Metropolitan Housing* court found that Arlington Heights has an "affirmative duty" to alleviate the problem of segregated housing, whether or not it helped to create the problem. Although it cited no authority for this duty, some state courts have found, through a broad reading of the term "general welfare," a duty to assume a fair share of the regional (rather than just local) housing needs,[37] and a duty to plan for apartments if the community is located where apartment living is in demand.[38] Also, some federal courts have found, through equal protection reasoning, that a city has a duty to take all necessary and reasonably feasible steps to accommodate the needs of its low income residents.[39] The *Metropolitan Housing* court, however, limited the village's duty to alleviating the racially segregated housing problem,[40] a problem that arose, according to the court, through no fault of the village.

If the village does not take action itself (through, e.g., initiating public housing projects), it is apparently subject to the compelling state interest test each time it opposes a project that might alleviate segregated conditions. The idea, of course, is to force it to take action on its own; to enlist the cooperation of developers, of non-

37. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

38. *In re* Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

39. Southern Alameda Spanish Speaking Org. v. City of Union City, 314 F. Supp. 967 (N.D. Cal. 1970). *See also* Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

40. The court cited its own earlier decision in Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), in which a builder of homes in black areas was not permitted to exploit the prevailing market prices, inflated by the segregated housing situation. *But see* Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964), holding a school board is not under a constitutional duty to take remedial steps to correct the racial imbalance in the schools created by shifts in population, where the school board, in establishing the district boundaries, has acted in good faith with no intention or purpose of segregating students by race.

For an attack of the de jure-de facto distinction in school desegregation cases, see Justice Powell's concurring opinion in Keyes v. School District No. 1, 413 U.S. 189 (1973).

profit corporations organized to build low-income housing, and of private landowners; to use low-cost leasing programs; and, if necessary, to use its fiscal and eminent domain powers to build public housing.[41] By taking action to provide for its share of the regional low and moderate income housing needs, the community can plan more logically and comprehensively for growth. By its inaction, it becomes subject to court rulings which may force upon it little islands of high intensity residential areas. Aggressive, affirmative action may be the only insurance for maintaining local control over zoning matters if *Metropolitan Housing* stands.

The United States Supreme Court has granted certiorari to review *Metropolitan Housing*.[42] A recent decision by that Court may prove the plaintiffs' victory shortlived. *Warth v. Seldin*[43] held that none of the plaintiffs, some of whom were in much the same position as those in *Metropolitan Housing*, had standing to challenge the allegedly exclusionary zoning ordinance of Penfield, New York. That ordinance had designated 98 percent of the town's available acreage for single-family dwellings and only three-tenths of one percent for multifamily dwellings. The effect was to maintain a predominantly white, upper-class suburb. The only explanation for denying standing to all plaintiffs, as Justice Brennan pointed out in a stinging dissenting opinion, is "an indefensible hostility to the claim on the merits."[44]

Another indication of the Court's possible treatment of *Metropolitan Housing* is its denial of certiorari to *Construction Industry Association v. Petaluma*[45] in which the Ninth Circuit upheld an anti-growth ordinance limiting new housing construction to 500 units a year. Although a denial of certiorari is technically of no

41. These were some of the actions outlined in Southern Alameda Spanish Speaking Org. v. City of Union City, 314 F. Supp. 967 (N.D. Cal. 1970). *See* note 27 *supra*.

42. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., *cert. granted*, 96 S. Ct. 560 (1975). Questions presented were:

> (1) Does failure to grant rezoning request for multiple-family housing for low and moderate income families in midst of single-family area violate Fourteenth Amendment, even though Village was admittedly maintaining integrity of its zoning plan and protecting neighborhood property values? (2) Does alleged discriminatory housing pattern in Chicago metropolitan area impose upon suburban municipality affirmative duty to ignore its admittedly proper zoning ordinance to permit construction of multi-family low and moderate income housing?

44 U.S.L.W. 3323 (U.S. Nov. 25, 1975).

43. 95 S. Ct. 2197 (1975). *See* note 3 *supra*.

44. 95 S. Ct. at 2216.

45. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

precedential value, the Court's decision not to take the case has been viewed as a silent endorsement of the anti-growth statute, possibly resulting in a profusion of such statutes among smaller communities in the near future.[46]

If *Warth* and *Petaluma* are any indication of the Court's attitude toward the merits of those cases, *Metropolitan Housing* may well be reversed as a misapplication of the equal protection clause. Such a reversal, however, would be a mistake and a serious blow to the chances of equitable treatment of minority housing needs. What is needed is guidance for communities and courts in the application of equal protection to the zoning area—a topic the Court has not directly addressed in the 50 years since *Euclid*.[47] If communities are to be able to plan effectively for their growth, especially for the housing needs of those desiring to live in them, they cannot be fettered by the compelling state interest test. At the same time, low and moderate income classes, minority and otherwise, must be planned for in those housing needs. The courts must therefore have the tools to force communities to accept their fair share of the regional housing needs when they do not do so on their own. The Supreme Court's review of *Metropolitan Housing* is an excellent opportunity to provide the necessary guidance to the lower courts.

RAYMOND M. PAETZOLD

The Right To Treatment Case—That Wasn't

In 1957 Kenneth Donaldson was civilly committed to a state hospital in Chattahoochee, Florida for "care, maintenance, and treatment" as a "paranoid schizophrenic."[1] For nearly 15 years Donaldson demanded his release, claiming that he was neither dangerous nor mentally ill, and that he was receiving no treatment. But his requests for release were continually denied by the hospital su-

46. The Miami Herald, Feb. 25, 1976, § A, at 15, col. 1. *See* 5 GOLDEN GATE L. REV. 485 (1975), *noting* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974).

47. *See* text accompanying note 6 *supra*.

1. Donaldson, who had been suffering from delusions, was committed by his father pursuant to FLA. STAT. § 394.22(11) (1955) (repealed by Fla. Laws 1971, ch. 71-131, effective July 1, 1972). Essentially the Act provided that a mentally incompetent person who requires confinement to prevent self-injury or violence to others should be committed for care, maintenance and treatment.