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CHANGING SHAPE OF LAND USE LITIGATION: FEDERAL COURT CHALLENGES TO EXCLUSIONARY LAND USE PRACTICES

*Martin E. Sloane**

I. Introduction

Over the past decade, a new and forceful weapon has been added to the fair housing arsenal. The new weapon is exclusionary land use litigation, and the focus of its attack has been exclusion of lower-income minorities from suburban neighborhoods by zoning or other local land use authority.[1] The federal courts have been the principal forum for this litigation, although recently some state courts have been more receptive.[2]

Exclusionary land use litigation is not a recent phenomenon. Indeed, a voluminous body of case law has evolved from challenges to municipalities' efforts to control the use of land.[3] Recent cases, however, differ substantially from the traditional line in two ways.

First, the federal courts traditionally were not the forum for challenges to exclusionary zoning or other restrictive land use regulations. Between 1926, when the Supreme Court, in *Village of Euclid v. Ambler Realty Co.*,[4] declared local zoning to be a valid exercise of state police power under the Constitution, and 1974, when the Court, in *Village of Belle Terre v. Boraas*,[5] upheld a municipal zoning ordinance prohibiting residence in a single housekeeping unit of more than two unrelated persons, the Supreme Court decided only one case dealing with the constitutionality of zoning.[6] During this nearly 50-year period, litigants looked principally to state courts when seeking to challenge the validity of land use controls.

Second, the issues involved in the traditional exclusionary land use cases typically were not fair housing issues. Rather, these cases involved the clash between land developers seeking more intensive use of land and neighboring landowners seeking less intensive use. The interests of homeseekers who would benefit

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1 Exclusionary land use litigation is by no means the sole or even most effective way to attack exclusion or confinement of lower-income minorities. For a discussion of other techniques, both tried and proposed, see NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING, FAIR HOUSING AND EXCLUSIONARY LAND USE 10-11 (1974).

2 *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975); *In re* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970).

3 For a detailed and encyclopedic survey of the development of zoning law in the United States, see N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER (1975).

4 272 U.S. 365 (1926).

5 416 U.S. 1 (1974).

6 Nectow v. Cambridge, 277 U.S. 183 (1928).

from more concentrated use of land were not central to this litigation, and the issue of racial discrimination seldom arose.[7]

By contrast, the new form of exclusionary land use litigation has occurred principally in federal courts and has involved charges of illegality under federal law. Further, the plaintiffs usually have been lower-income minorities or organizations that represent their interests. These cases have focused on the rights of the poor, particularly the minority poor; and the decisions have usually turned on issues of racial discrimination.

The new form of exclusionary land use litigation has a brief but turbulent history. Early cases were surprisingly successful, and plaintiffs carried with relative ease their theoretically difficult burden of proving that the challenged conduct was racially discriminatory. Later cases, however, in which plaintiffs sought to build on these early successes, were less successful. Efforts to achieve a major breakthrough on the key issue of plaintiffs' burden of proof have so far been rebuffed, once by the Supreme Court.[8] Recent decisions have been mixed and their rationales elusive. The federal courts are still struggling with both the procedural and substantive issues and have not yet articulated a consistent rule of law to govern these cases.[9] The Supreme Court has recently added to the uncertainty by its decision on standing in *Warth v. Seldin*.[10]

Recent federal legislation,[11] furthermore, has thoroughly revamped the nature and operation of federal housing and community development programs. The substantial changes effected by this legislation necessarily require adjustments in the strategy and tactics of exclusionary land use litigation. In short, exclusionary land use litigation is in a state of flux.[12]

7 This is not to say that federal courts were never the forum for challenges to exclusionary land use regulations or that racial discrimination was never the issue. *See, e.g.*, Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961) (an unsuccessful challenge to use of eminent domain powers to prevent construction of a housing subdivision in which some minority families would live); Wiley v. Richland Water Dist., 5 RACE REL. L. REP. 788 (D. Ore. 1960) (a black family successfully challenged condemnation of property they had acquired to construct a home on).

8 James v. Valtierra, 402 U.S. 137 (1971).

9 Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, Civil No. 74-1326 (7th Cir., filed June 10, 1975); Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974); Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 95 S. Ct. 1629 (1975); United Farmworkers of Fla. Housing Project, Inc., v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975). Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Banks v. Perk, 473 F.2d 910 (6th Cir. 1973) (unreported opinion); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); SASSO v. Union City, 424 F.2d 291 (9th Cir. 1970); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

10 95 S. Ct. 2197 (1975).

11 Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633.

12 A number of experienced and respected commentators are convinced that use of the federal courts as the forum for exclusionary land use challenges is ill-advised and that much more emphasis should be placed on state courts. *See, e.g.*, Babcock, *On Land-Use Policy*, in Al PLANNING 12 (1975); Williams, *Anti-Exclusionary Litigation—In What States?* in NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING, EXCLUSIONARY LAND USE LITIGATION: POLICY AND STRATEGY FOR THE FUTURE 40 (1975). In light of the recent decision by the New Jersey supreme court in Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), as compared with the Supreme Court's decision in Warth v. Seldin, 95 S. Ct. 2197 (1975), they may well be right. Treatment of state court challenges, however, is beyond the scope of this article.

II. Advent of Exclusionary Land Use Litigation

Without question, 1968 was the most significant year in the nation's housing-civil rights history. Between April and August of that year, the legislative and judicial branches of the federal government took three actions of far-reaching import:

1) Enactment by Congress on April 11, 1968, of a sweeping federal fair housing law, Title VIII of the Civil Rights Act of 1968.[13]
2) Decision by the Supreme Court on June 17, 1968, of *Jones v. Alfred H. Mayer Co.*[14]
3) Enactment by Congress on August 1, 1968, of the Housing and Urban Development Act of 1968.[15]

These actions addressed what were perceived as the overriding housing-civil rights concerns: overt discrimination and lack of sufficient housing to meet the needs of lower-income families. They had the effect of bringing exclusionary land use practices into focus as a major obstacle to equal housing opportunity for lower-income minorities.

A. *The Inadequacy of Government Programs Before 1968*

Before 1968 there was little reason for exclusionary land use practices to surface as a barrier to equal housing opportunity, since suburban municipalities that were white and affluent had little occasion to use their land use authority for purposes of excluding racial minorities or the poor. The combination of overt discrimination and lack of lower-income housing already served to exclude most minorities from suburban residence.

Prior to 1968, overt housing discrimination was largely untouched by federal law. The Executive Order on Equal Opportunity in Housing,[16] issued in November 1962, prohibited discrimination only in new federally assisted housing and excluded from coverage "conventional" (non-FHA or -VA) housing financed by federally regulated mortgage lending institutions.[17] Title VI of the Civil Rights Act of 1964[18] prohibited discrimination in programs or activities receiving federal financial assistance via loans and grants. Title VI, however, specifically exempted programs or activities receiving assistance through contracts of insurance or guaranty.[19] This exemption had the effect of excluding from coverage nearly all FHA- or VA-assisted housing and "conventionally" financed

13 42 U.S.C. §§ 3601-19 (1970).
14 392 U.S. 409 (1968).
15 Pub. L. No. 90-448, 82 Stat. 476.
16 Exec. Order No. 11,063, 3 C.F.R. 652 (Comp. 1959-63).
17 For a discussion of the weaknesses of the Executive Order and the legal basis for expanded coverage, see Sloane, *One Year's Experience: Current and Potential Impact of the Housing Order*, 32 GEO. WASH. L. REV. 457 (1964); Sloane & Freeman, *The Executive Order on Housing: The Constitutional Basis for What It Fails to Do*, 9 How. L.J. 1 (1963).
18 42 U.S.C. § 2000d (1970).
19 42 U.S.C. § 2000d-4 (1970).

housing funded by banks and savings and loan associations insured by federal agencies.[20] Thus, the housing coverage of Title VI was mainly limited to low-rent public housing and housing in connection with urban renewal activities. In combination, the Executive Order and Title VI covered only a small fraction of the nation's total housing inventory. As a result, the housing and home finance industry, which operated on the assumption that racial homogeneity was a necessary part of sound business practice,[21] excluded minority families, particularly those who could afford market prices and rents, without federal interference.

In addition to overt discrimination, the harsh facts of housing economics presented a major obstacle to minority families seeking homes in the suburbs. For example, in 1960 the median sales price for urban housing throughout the country was $12,900.[22] The median annual income for urban nonwhite families as of 1959 was $3,711.[23] Two-thirds earned less than $5,000 a year.[24] In a 1963 study of middle-income housing, the FHA estimated that the minimum cost of a home in 1959 ranged from $14,500 in cities such as Boston, Massachusetts, and Newark, New Jersey, to $11,000 in Phoenix, Arizona.[25] In Boston, where little more than five percent of the nonwhite wage earners earned more than $6,000 a year in 1959,[26] the FHA estimated that the annual income required to carry a medium priced home was $7,800.[27] In Atlanta, a lower cost area, the estimate was that an annual income of some $5,200 was required.[28] Of the more than 110,000 wage earners in that city, only 4,200 earned more than $5,000 a year in 1959.[29] Housing at market prices was obviously beyond the financial reach of most minority families.

The federal government offered little assistance; until 1961 there was only one federal program, Low-Rent Public Housing, that provided subsidies to assist lower-income families to secure decent housing. By 1968, this program, after 31 years of operation, had produced fewer than 750,000 units,[30] approximately half the number that the nation's housing industry was producing for the affluent in a single year. In 1961 a second housing subsidy program—FHA 221(d)(3)—was established,[31] and in 1965 a third housing subsidy program—Rent Supple-

20 *See* BNA OPERATIONS MANUAL ON FAIR EMPLOYMENT PRACTICES, PUBLIC ACCOMMODATIONS & FEDERAL ASSISTANCE, THE CIVIL RIGHTS ACT OF 1964, at 359 (1964) (statement of then Attorney General Robert F. Kennedy).

21 *See* U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 16-24 (1974). *See also* U.S. COMM'N ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING 3 (1973).

22 HOUSING & HOME FINANCE AGENCY, OUR NON-WHITE POPULATION AND ITS HOUSING, THE CHANGES BETWEEN 1950 AND 1960, at 99 (1963) (extracted from Table 37).

23 *Id.* at 36-37 (Table 12).

24 *Id.*

25 109 CONG. REC. 4727 (1963) (remarks of Senator Clark).

26 HOUSING & HOME FINANCE AGENCY, POTENTIAL HOUSING DEMAND OF NON-WHITE POPULATION IN SELECTED METROPOLITAN AREAS 12 (1963) (Table A) [hereinafter cited as HOME FINANCE].

27 109 CONG. REC. 4737 (1963) (remarks of Senator Clark).

28 *Id.*

29 HOME FINANCE, *supra* note 26, at 12 (Table A).

30 U.S. DEP'T OF HOUSING & URBAN DEV., 1968 HUD STATISTICAL YEARBOOK 247 (1968).

31 Housing and Urban Development Act of 1961 § 101, 12 U.S.C. § 1715*l* (1970). The FHA 221(d)(3) Program was directed to the housing needs of moderate-income families—those whose incomes were higher than the maximum allowed for public housing eligibility, but too low to afford housing at market prices or rents.

ments—was created.[32] The latter two programs, however, produced only a negligible amount of housing by 1968.[33] White affluent suburbs had little reason to fear entry of large numbers of lower-income minorities, since there was little housing they could afford anywhere, let alone in suburbia.

The problems stemming from lack of lower-income housing were compounded by the fact that the three federal programs capable of producing such housing each permitted the suburbs to exempt themselves from coverage. The Public Housing Program required local public housing authorities to secure cooperation agreements from the local governing body before locating public housing in a municipality.[34] The FHA 221(d)(3) and Rent Supplement Programs also required local government approval as a prerequisite for beginning any operations in a municipality.[35] With these means of exclusion available, the programs had little effect on suburban housing patterns.

B. *The Fair Housing Act,* Jones, *and* §§ *235 and 236*

In the pre-1968 context of legal, overt discrimination and housing deficits, exclusionary land use practices assumed a low profile and were seldom challenged in court. After 1968, however, the situation changed sharply. The Federal Fair Housing Law[36] provided federal protection against housing discrimination in nearly all housing.[37] The June 1968 Supreme Court holding in *Jones v. Alfred H. Mayer Co.*[38]—that an 1866 Civil Rights Law[39] bars "*all* racial discrimination,

32 Housing and Urban Development Act of 1965 § 101, 12 U.S.C. § 1701s (1970). Rent Supplements were directed to the housing needs of low-income families—those who were also eligible for public housing. The income limits for Rent Supplement eligibility were identical to those for public housing.

33 FHA 221(d) (3) and Rent Supplements, in combination, had produced fewer than 175,000 units. 1968 HUD STATISTICAL YEARBOOK, *supra* note 30, at 90.

34 42 U.S.C. § 1415(7)(b) (1970). In addition, state enabling legislation typically limited the territorial jurisdiction of local public housing authorities to particular municipalities or required the consent of any municipality in which the construction of public housing was proposed.

35 Under federal law, FHA 221(d) (3) could operate only in a locality that had adopted a "workable program for community improvement," a requirement attached with some logic to urban renewal and other community development programs but having little rational connection to housing programs. Housing Act of 1949, ch. 338, § 101(c), 63 Stat. 413, *as amended* 42 U.S.C.A. § 1451 (Supp. 1975). Most central cities maintained "workable programs," but relatively few suburbs did. U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 20 (1967). For Rent Supplements to operate the locality had to either adopt a "workable program" or adopt a resolution specifically authorizing operation of the program. *E.g.*, Act of May 13, 1966, Pub. L. No. 89-426, 80 Stat. 141, 143. *See* STAFF OF HOUSE COMM. ON BANKING & CURRENCY, 92ND CONG., 1ST SESS., BASIC LAWS AND AUTHORITIES ON HOUSING AND URBAN DEVELOPMENT 293 n.1 (Comm. Print 1971).

36 42 U.S.C. §§ 3601-19 (1970).

37 The only exceptions are as follows: The sale or rental of a single-family house if sold or rented without the use of a broker and without discriminatory advertising, 42 U.S.C. § 3603(b)(1) (1970). Rooms or units in dwellings containing living quarters occupied by no more than four families living independently of each other if the owner occupies one of these quarters as residence, 42 U.S.C. § 3603(b)(2) (1970). The sale or rental of dwellings owned or operated by a religious organization for other than commercial purposes to persons of the same religion unless membership is restricted on account of race, color, or national origin, 42 U.S.C. § 3607 (1970). A private club not open to the public and not operated for commercial purposes may limit rental or occupancy to its members, 42 U.S.C. § 3607 (1970).

38 392 U.S. 409 (1968).

39 42 U.S.C. § 1982 (1970).

private and public, in the sale or rental of property"[40]—extended the ban against racial discrimination to all housing. Thus, within two months the legal position of the federal government on housing discrimination had dramatically changed from a tentative, tangential concern to a firm protection of the right to equal housing opportunity. Fair housing was finally the law of the land.

On August 1, 1968, came the third and probably most important action from the standpoint of access to the suburbs: enactment of the Housing and Urban Development Act of 1968. This legislation's principal objective was initiation of a massive new effort to meet the housing needs of lower-income families. The Act created two new housing subsidy programs, §§ 235[41] and 236,[42] programs of home ownership and rental housing for lower-income families. In their first four years of existence, these two programs produced about 540,000 subsidized housing units,[43] well over half the total number of units all other housing subsidy programs had produced in the previous 30 years.

While the volume of housing units produced was important, perhaps these two programs' greatest significance was that they could operate freely throughout metropolitan areas without regard to local government approval. Thus, while suburban jurisdictions could still exclude Public Housing and housing under the FHA 221(d)(3) and Rent Supplement programs, they were powerless to prevent construction of housing under the §§ 235 and 236 programs. Land use control became the next logical means to exclude the poor.

While the more overt and traditional obstacles to equal housing opportunity had hardly been eliminated, exclusionary land use practices now surfaced as a major barrier. These practices soon came under concerted legal attack by fair housing litigators. This new line of challenges to exclusionary land use practices typically arises in the context of a proposal for a subsidized housing project, usually under the §§ 235 or 236 programs, which is to be occupied disproportionately by minorities. Some action by suburban officials is required to permit the project to go forward. For example, a proposal for a § 236 multifamily project on land zoned for single-family use requires a zoning variance. A proposal for a § 235 development on land zoned for a minimum two-acre lot size requires rezoning for higher density. Sponsors of subsidized housing, like sponsors of all other housing, need building permits and permission to hook up with water and sewer lines. When suburban officials have refused to take the action requested, lawsuits in the federal courts have followed, charging that the refusals are racially discriminatory.[44]

40 392 U.S. at 437 (emphasis supplied).
41 12 U.S.C. § 1715z (1970).
42 12 U.S.C. § 1715z-1 (1970).
43 U.S. DEP'T OF HOUSING & URBAN DEV., HOUSING IN THE SEVENTIES 4-45, 54-56 (1973).
44 Plaintiffs typically allege that the challenged municipal conduct violates the following laws: 42 U.S.C. § 1982 (1970); the thirteenth amendment; the fourteenth amendment; and Title VIII of the Federal Fair Housing Law. In recent state court challenges, proof of economic discrimination alone has been sufficient ground for holding the municipal conduct unlawful. *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

III. Great Expectations Unfulfilled: Judicial Successes and Failures

A. *Early Successes*

The initial exclusionary land use cases were unusually successful. By 1970, two years after the remarkable burst of governmental activity in 1968 brought exclusionary land use practices to the surface, three different courts of appeal had declared certain exercises of local land use authorities racially discriminatory and unlawful. Moreover, these initial decisions, building one upon the other, gave promise that the key issue of plaintiffs' burden of proving racial discrimination would be relatively simple to overcome.

Dailey v. City of Lawton[45] was the first federal court decision involving the new form of exclusionary land use litigation. In *Dailey,* a sponsor of Rent Supplement housing, which would be occupied largely by black families, asked the city of Lawton, Oklahoma, to rezone a parcel of land in a white neighborhood for a multifamily development. City officials denied the request on grounds of increased burdens on public services. The district court rejected the city's justification and found that the actual purpose of refusal to rezone was "to keep a large concentration of Negroes and other minority groups from living"[46] in a predominantly white section of town. The court of appeals affirmed, stating:

> The racial prejudice alleged and established by the Plaintiffs must be met by something more than bald conclusory assertions that the action was taken for other than discriminatory reasons.[47]

In the second case, *Kennedy Park Homes Association v. City of Lackawanna,*[48] city officials refused to issue building permits for a housing subdivision that was to be organized under the § 235 program and situated in a predominantly white area. The subdivision was to be occupied largely by black people. As in *Dailey,* the district court found that the real purpose of the officials' conduct was to exclude blacks from the area. The court of appeals affirmed, holding that there was ample evidence to support the district court's finding of purposeful discrimination. The court added, however, that regardless of purpose, the effect of the conduct was racially discriminatory. Therefore, in order to overcome a finding of unconstitutionality, the city had to show a compelling governmental interest, a burden it could not meet.

This principle of "racially discriminatory effect" enunciated by the *Lackawanna* court was potentially significant. Courts were, and still are, reluctant to infer a racially discriminatory motive for official conduct,[49] and proving such a motive is difficult for plaintiffs. As the court of appeals in *Dailey* put it:

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45 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd,* 425 F.2d 1037 (10th Cir. 1970).
46 296 F. Supp. at 269.
47 425 F.2d at 1039-40.
48 318 F. Supp. 669 (W.D.N.Y.), *aff'd,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).
49 *See, e.g.,* Palmer v. Thompson, 403 U.S. 217 (1971) (conduct of a city council in closing city swimming pools that were about to become integrated); Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1970) (holding of a referendum to overturn a "spot zoning" ordinance).

> If proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection.[50]

While in *Dailey* the court found racial motivation in the conduct of city officials, the future of exclusionary land use litigation would not be bright if plaintiffs were required to prove racially discriminatory motivation. In contrast, if plaintiffs were only required to prove that the effect of the conduct, regardless of motivation, was racially discriminatory, they would be relieved of a difficult, often impossible, burden.

In the third early case, *SASSO v. Union City,*[51] the Ninth Circuit advanced the principle of racially discriminatory effect one step. A Mexican American sponsor of a § 236 project in a white middle-class area of the city obtained passage of an ordinance rezoning a tract of land for multifamily residential use. Subsequently, a citywide referendum nullified the ordinance and blocked the project. The court of appeals rejected plaintiffs' argument that the action of the voters in adopting the referendum was racially motivated and, in fact, refused to inquire into the motivation of the voters. The court held, however:

> If, apart from voter motive, the result of this zoning by referendum is discriminatory . . . in our view a substantial constitutional question is presented. . . . [I]t may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups.[52]

The *SASSO* decision was significant in at least two major respects. First, it advanced the principle expressed in *Lackawanna* that racially discriminatory effect is a sufficient basis for a finding of illegality. In *Lackawanna,* although the court spoke of the racially discriminatory effect of the city's actions, it also found a racially discriminatory purpose. *SASSO,* by contrast, expressly declined to inquire into motivation; its decision was based entirely on the effect of the voters' action in nullifying the rezoning ordinance. Second, the *SASSO* court in dictum stressed the strong correlation between low-income and minority status, suggesting that proof of discrimination against the poor would be sufficient to support a finding of illegality without regard to whether racial minorities were singled out for discriminatory treatment. By this suggestion, the burden of proof on plaintiffs would not be the often severe one of showing that challenged land use practices are racially discriminatory, but only that they discriminate against the poor, a class in which racial minorities are disproportionately overrepresented.

To be sure, the court in *SASSO* used cautious language: "a substantial constitutional question is presented" and "it may well be as a matter of law." Nonetheless, this decision, together with *Dailey* and *Lackawanna,* gave promise that a breakthrough was at hand, and that exclusionary land use litigation would be effective in removing the last major obstacle to opening the suburbs for low-

50 425 F.2d at 1039.
51 424 F.2d 291 (9th Cir. 1970).
52 *Id.* at 295-96.

income residents. In the five years since those early successes, that hope has not been realized.

B. *Attempted Breakthroughs That Failed*

1. *James v. Valtierra*

James v. Valtierra[53] tested the *SASSO* principle that proof of an adverse effect on low-income people resulting from governmental conduct is sufficient to find a violation of the equal protection clause of the fourteenth amendment. In fact, the case went beyond *SASSO* by seeking to establish that the poor are entitled to the same constitutional protection as racial minorities, without regard to the high statistical correlation between low-income and minority status. *Valtierra* thus represents an unsuccessful attempt to extend existing precedents.

Valtierra involved a challenge to a California constitutional provision requiring the local electorate to approve construction of low-rent public housing before it could begin. A three-judge federal court ruled this provision violative of the equal protection clause because it subjected low-income housing to special requirements not applicable to other housing.[54]

The Supreme Court in a 5-3 decision reversed, basing its decision on a number of grounds. There was a long history of referendums in California,[55] and public housing was only one variety of the issues subject to referendum.[56] It was only reasonable for the people to have a voice in deciding whether to have public housing since it might financially burden them.[57] Additionally, the record did not show that the referendum requirement "was aimed at a racial minority."[58] The Court stated: "The Article requires referendum approval for any low-rent public housing project not only for projects which will be occupied by a racial minority."[59] The Supreme Court strongly suggested that discrimination against the poor alone did not rise to the level of a constitutional violation. Although some lower federal courts in subsequent cases have limited the holding of *Valtierra* to its special facts,[60] most have interpreted it to hold that wealth is not a suspect classification.[61]

53 402 U.S. 137 (1971).
54 Valtierra v. Housing Authority, 313 F. Supp. 1 (N.D. Cal. 1970).
55 James v. Valtierra, 402 U.S. 137, 141 (1971).
56 *Id.* at 142.
57 *Id.* at 143.
58 *Id.* at 141. The lower court had cited Hunter v. Erickson, 393 U.S. 385 (1969), as authority for its decision. In that case, the Supreme Court had struck down as racially discriminatory a city charter provision requiring referendum approval before any fair housing ordinance could become effective. In reversing the lower court in *Valtierra,* the Supreme Court said, "The present case could be affirmed only by extending *Hunter,* and this we decline to do." 402 U.S. at 141.
59 *Id.*
60 For example, in Sisters of Providence v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971), the court confined *Valtierra* to special circumstances involving referendums where the issue of voting rights injects a "different constitutional ingredient." *Id.* at 403.
61 In Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1245 (N.D. Ohio) (three-judge panel), 355 F. Supp. 1257 (N.D. Ohio 1973) (one-judge court), *rev'd on other grounds,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 95 S. Ct. 781 (1975), the district court said that *Valtierra* "does seem to indicate that wealth per se is not a suspect classification . . . ." 355 F. Supp. at 1249. *See also* English v. Town of Huntington, 448 F.2d 319 (2d Cir. 1971).

Valtierra could have been a major breakthrough in exclusionary land use litigation. Had plaintiffs won, the burden in subsequent cases would have been limited to showing that the challenged conduct adversely affected the poor. There would be no obligation to show that racial minorities were more adversely affected than whites. *Valtierra* as decided, however, requires subsequent plaintiffs to prove that the challenged conduct is racially discriminatory. With this burden, *Valtierra* leaves land use litigation where it was two years earlier.

2. *Mahaley v. Cuyahoga Metropolitan Housing Authority* and *Citizens Committee for Faraday Wood v. Lindsay*

After the Supreme Court's decision in *Valtierra,* the question remained: What evidentiary showing constitutes proof of racial discrimination? *Mahaley v. Cuyahoga Metropolitan Housing Authority*[62] attempted an answer. *Mahaley* was filed during the optimistic days between the lower court's decision in *Valtierra* and the Supreme Court's reversal and the plaintiffs were understandably ambitious. They contended that the provision in the federal public housing law requiring a cooperation agreement as a condition to the construction of public housing was unconstitutional both on its face and as applied. The defendants were five nearly all-white suburbs of Cleveland, Ohio, that had refused or otherwise failed to agree to sign cooperation agreements with CMHA, a local housing authority possessing metropolitan-wide jurisdiction. After the complaint was filed, but before the case was decided at the district court level, the Supreme Court reached its decision in *Valtierra.* Subsequently, a three-judge court in *Mahaley* ruled 2-1 that the federal cooperation agreement requirement was not unconstitutional since it did not discriminate on the basis of race.[63] But the court added that "it may have been manipulated improperly,"[64] and remanded the case for further consideration to a single-judge court.

On remand, the court held that the failure of the defendant suburbs to enter into cooperation agreements was unlawful. The basis for the decision was extremely significant:

> In view of the factual showing of the almost all-white character of the suburbs, the high percentage of Negroes in CMHA housing and on CMHA waiting lists, and the need for low income housing both on a community and on a metropolitan basis, the refusals or failures to respond to CMHA's requests to initiate public housing were intended to, and have had the effect of excluding Negroes and perpetuating racial segregation contrary to the national housing policy.[65]

The district court based its finding of racially discriminatory effect on little more than statistics: the nearly all-white character of the suburbs, the high percentage of black people in CMHA housing and on CMHA waiting lists (the waiting list for family public housing was 86 percent black), and the need for low-income housing throughout the metropolitan area.

62 *See* note 61 *supra.*
63 355 F. Supp. at 1249.
64 *Id.* at 1250.
65 *Id.* at 1263.

Again, a breakthrough seemed imminent. If the burden on plaintiffs in exclusionary land use litigation was merely to prove a need for low-income housing, and to present statistical evidence that the defendent suburb was nearly all-white while the potential residents of the subsidized housing were disproportionately minority, the chances for plaintiff success would be greatly increased. The social and economic characteristics on which the district court in *Mahaley* based its decision can be found in many, if not most, of the nation's metropolitan areas. Thus, a typical suburb blocking subsidized housing would be vulnerable to court attack by using statistics to show an unlawful racially discriminatory effect.

Contemporaneously with *Mahaley,* another significant housing case was proceeding in the federal courts of New York—*Citizens Committee for Faraday Wood v. Lindsay.*[66] The action was brought against the City of New York, charging racial discrimination in the denial of funds for a mixed middle- and low-income housing project in virtually all-white North Riverdale.[67] The district court held that the city's action was not racially discriminatory and, in so holding, enunciated a standard for determining racially discriminatory effect that differed sharply from *Mahaley*'s. In fact, the *Faraday Wood* court enunciated two standards:

> (1) [T]here must be some showing that a policy or activity which has a racially discriminatory effect results from a prior pattern of discrimination or that such policies affect only racial minorities.[68]
> (2) [I]t must be shown that the effect of the action under challenge falls more heavily on minority group members than on the population as a whole. Or it must be shown that the discriminatory effect results from a prior pattern or practice of discrimination.[69]

One element was common to both standards. If plaintiffs could prove that the discriminatory effect results from a prior pattern of discrimination, they would prevail. This element was lacking in *Faraday Wood*; the lower court stressed that while Riverdale was nearly all white, there was no evidence to show *why* this was so.[70] Presumably, if plaintiffs had proven it was due to prior discrimination by city officials, or perhaps even by private builders, lenders, or real estate brokers, they would have succeeded.

Aside from this one common element, the two standards contained a serious contradiction. The second standard, "the effect . . . falls more heavily on minority groups members than on the population as a whole," reflected a readily supportable burden of proof on plaintiffs and was entirely consistent with the test enunciated in *Mahaley.* The first test, however, "that such policies affect only racial minorities," was an extraordinarily severe one. If this test were lit-

66 362 F. Supp. 651 (S.D.N.Y. 1973), *aff'd,* 507 F.2d 1065 (2d Cir. 1974), *cert. denied,* 95 S. Ct. 1679 (1975).
67 The project, as originally proposed, was to be 50 percent low-income and 50 percent middle-income. After a series of compromises, the percentages were changed to 20 percent low-income and 80 percent middle-income. 362 F. Supp. at 654.
68 *Id.* at 659 (emphasis supplied).
69 *Id.* at 657.
70 *Id.* at 659.

erally applied in *Mahaley,* the plaintiffs would have failed even though racial minorities represented nearly 90 percent of the people adversely affected. In this regard, the *Faraday Wood* court explicitly disagreed with the *Mahaley* decision.[71]

The facts of *Mahaley* and *Faraday Wood* are sufficiently different to rationalize contrary decisions. For example, in *Faraday Wood* 80 percent of the housing units involved were designed for middle-income people. In *Mahaley* the public housing units that would have been constructed in the defendant suburbs were, by definition, all for low-income people. Further, in *Faraday Wood* a substantial percentage of those eligible to live in the proposed project were white. In *Mahaley* nearly nine of every 10 families adversely affected by the defendants' conduct were black.

Both cases were appealed. *Mahaley* was decided first, the Sixth Circuit reversing the district court by a 2-1 vote.[72] In its decision, the court of appeals cited *Faraday Wood,* and mentioned with approval the two inconsistent tests established in that case.[73] The court of appeals also enunciated a new test:

> The single judge made no findings of a prior pattern or practice of discrimination of the suburbs against racial minorities, or that the failure or refusal of the municipalities to sign cooperation agreements affected racial minorities in Cleveland any differently than other ethnic groups living in that inner city.[74]

Literally applied, this test sets a nearly impossible burden of proof. Absent proof of a prior pattern or practice of discrimination, the plaintiffs must show that no matter how large a percentage minorities comprise of the total number of people adversely affected by the defendants' conduct, a racially discriminatory effect results only if minorities are affected *differently* from other people. Curiously, the court of appeals ignored the fact that in *Mahaley* nearly nine of every 10 families adversely affected by the suburb's refusal to sign cooperation agreements were black.

This severe view of plaintiff's burden of proof was reached unnecessarily. There were several other grounds for reversing the lower court decision which did not reach the difficult issue of the test for racially discriminatory effect. First, the court of appeals found that the defendant suburbs had never been asked for cooperation agreements. There was no basis, therefore, for charging them with racially discriminatory conduct, other than "failure to take affirmative action."[75] However, the district court had found that the suburbs had been asked to sign cooperation agreements and had either refused or had failed to respond. The court of appeals, therefore, could have reversed on this ground alone.

Second, the appellate court ruled that under the federal public housing law, individual municipalities can decide for themselves whether they need low-

71 *Id.*
72 500 F.2d 1087 (6th Cir. 1974).
73 *Id.* at 1093-94.
74 *Id.* at 1094 (emphasis supplied).
75 *Id.*

rent housing and whether they desire to sign cooperation agreements: "There is no basis to infer discrimination upon the part of a municipality for doing what it has a lawful right to do under the express provisions of the housing act."[76] Thus, since the suburbs had done nothing more than that which they were entitled to do under federal law, the court indicated it would not extend its inquiry to determine whether their conduct was racially discriminatory. However, the court proceeded to do precisely this.

Third, the court noted that the three-judge court had ruled that the federal public housing law was constitutional both on its face and as applied by the defendant suburbs.[77] Accordingly, there was nothing more for the one-judge court to decide, and the case should have been dismissed. But the Sixth Circuit proceeded nonetheless to the substantive merits of the case, as though the remand from the three-judge court to the single-judge court had been proper. The appellate court thus ignored its own rulings, each one of which made it unnecessary to reach the issue of whether the defendants' conduct was racially discriminatory.

On December 5, 1974, the Second Circuit affirmed 2-1 the district court decision in *Faraday Wood*.[78] In reaching its decision, the appellate court failed even to mention the important *Mahaley* decision, let alone its tests for racially discriminatory effect. The court based its affirmance primarily on the fact that 80 percent of the people adversely affected by the city's conduct were middle-income.[79] In relying on this fact, the court drew a statistical correlation between income and race, stating: "Unlike the case where low-income families are involved, there is no reason to assume that a disproportionate number of the middle-income families affected would be non-white."[80] The court strongly indicated that if the project had been for low-income persons, that fact alone might have been highly persuasive evidence that the city's conduct was racially discriminatory.

In distinguishing its earlier decision in *Lackawanna,* the Second Circuit emphasized that the housing projects in *Lackawanna* were designed only for low-income persons. "In such cases," the court said, "it was possible to say that non-whites were disproportionately affected since only low-income persons were involved and since a disproportionate number of non-whites are low-income

76 *Id.* at 1092.

77 *Id.* Indeed, the three-judge court did purport to rule that the cooperation agreement requirement was constitutional both on its face and as applied. 355 F. Supp. at 1250. The ruling as to the application of the requirement, however, appears to have been inadvertent. The entire opinion is devoted to the facial constitutionality of the cooperation agreement requirement, with no discussion of its application to the suburbs. Further, the three-judge court remanded the claims under "Count Two" (application of the requirement) to the single-judge court, *id.*, which proceeded to rule that the suburbs had applied it unconstitutionally. Finally, both the three-judge and single-judge courts' opinions were written by the same judge (Chief Judge Frank J. Battisti). As the dissenting judge in the Sixth Circuit pointed out: "His [Judge Battisti's] interpretation of his own opinion is certainly contrary to any disposition on grounds of res judicata." 500 F.2d at 1096.

78 Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974).

79 The court of appeals pointed out that the apartments at Faraday Wood would have rented for at least $80 per room per month and that the annual family income limitation for a four-room apartment would have been over $23,000. *Id.* at 1068.

80 *Id.* at 1067-68.

persons."[81] The court then stated its view of the relationship between race and income:

> [T]he whole rationale for carefully scrutinizing governmental actions that adversely affect traditional public housing projects is that these projects are designed for low-income persons and courts are not blind to the fact that racial minorities are disproportionately represented in the lower-income levels of our society. There is no disproportionate overrepresentation of minorities in middle-income levels. Hence, the assumption used in the typical public housing case is not valid here.[82]

Thus, the Second Circuit's decision in *Faraday Wood,* while adverse to plaintiffs, suggested a burden of proof considerably less severe than that required by the district court in its opinion, or by the Sixth Circuit in *Mahaley.* In view of the emphasis the *Faraday Wood* court placed on the fact that 80 percent of the people adversely affected were middle-income, it is interesting to contemplate whether the Sixth Circuit in *Mahaley* (where *all* the people adversely affected were low-income and 86 percent were minority) would have decided the case differently if the *Faraday Wood* decision had come down first. In any event, the *Mahaley* decision represents the second ambitious yet unsuccessful effort at a breakthrough in exclusionary land use litigation.[83]

IV. Substantive Law in Flux: Other Recent Federal Decisions

The significance of both *Valtierra* and *Mahaley* lies more in what was not won than what was lost. If *Valtierra* stands for the proposition that economic discrimination alone does not rise to the level of a constitutional violation—and there is still some question whether it does[84]—there is no doubt that conduct aimed at a racial minority is unlawful.[85] And if *Mahaley* stands for the proposition that a mere statistical correlation between poverty and minority status is not sufficient by itself to prove racial discrimination,[86] it is clear that something short of a showing that the challenged conduct was racially motivated would be.[87] The failure of these two efforts to achieve a breakthrough on the issue of plaintiffs' burden of proof has therefore had the principal effect of maintaining the status quo. The courts are thus left to their own resources to cope with the issue on a case-by-case basis with little guidance on the precise standards that should govern their decisions. The result since *Valtierra* and *Mahaley* has been mixed decisions and continued uncertainty.

81 *Id.* at 1069.
82 *Id.* at 1068-69.
83 It is a source of some anguish that in both *Valtierra* and *Mahaley* the breakthrough was almost achieved. A change of one vote would have meant success in each case.
84 *See, e.g.,* United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974). "[T]he law with regard to . . . classifications based on wealth may still be in flux . . . ." *Id.* at 808.
85 *See, e.g.,* Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971).
86 *Accord,* Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).
87 *See* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 95 S. Ct. 2656 (1975). *See also* Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam,* 457 F.2d 788 (5th Cir. 1972); Sisters of Providence v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971).

Of the five substantive decisions by federal courts of appeal over the past year in addition to *Mahaley* and *Faraday Wood,* three have been favorable to the plaintiffs and two adverse.[88] The two adverse decisions do not reflect substantive retrenchment by the courts involved on the issue of plaintiffs' burden of proof, but only an unwillingness to advance the law. The three favorable decisions take a new approach to dealing realistically with the issue of racial discrimination, but have not successfully articulated a rationale of general applicability.

A. *Adverse Decisions*

In *Ybarra v. Town of Los Altos Hills,*[89] a Mexican American nonprofit organization challenged the large-lot zoning ordinance of Los Altos Hills, California, on the grounds that it prevented construction of a § 236 project on land the plaintiffs had acquired for this purpose. The Ninth Circuit upheld the lower court's dismissal of the action on two grounds. First, while the court pointed to the high statistical correlation between being Mexican American and being poor, it rejected the contention that this statistical correlation was sufficient to transform economic discrimination into ethnic discrimination. Second, the court rejected plaintiffs' argument that discrimination against the poor was in and of itself unlawful. This argument failed, in the court's view, because plaintiffs could not show that low-cost housing was unavailable to them outside Los Altos Hills in areas accessible to their jobs and to social services.

In *Acevedo v. Nassau County,*[90] plaintiffs challenged as racially discriminatory the conduct of Nassau County, New York, officials in changing their plans for use of a large parcel of land from low-income family housing to low-income elderly housing. The Second Circuit rejected this challenge on the ground that county officials had no constitutional or statutory duty to provide low-income family housing. The plaintiffs contended that the county's conduct was racially discriminatory because low-income housing for the elderly would be occupied mostly by whites, while low-income family housing would be occupied by minorities. The court held that this statistical correlation did not by itself require the county to build family housing once it had decided to build elderly housing.

Certainly, neither *Ybarra* nor *Acevedo* advances the plaintiffs' cause in exclusionary land use cases or ease their burden of proof. But neither do these cases set back the law. In both, the appellate courts refused to accept a "naked statistical argument"[91] as the basis for a finding of racial discrimination. The court in *Acevedo* took notice that the county had only decided not to build housing for low-income minority families, and had not blocked private efforts

88 Favorable: Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, Civil No. 74-1326 (7th Cir., filed June 10, 1975); United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 95 S. Ct. 2656 (1975).

Adverse: Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974). In addition, one district court decision favorable to plaintiffs is on appeal. Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974), *appeal docketed,* No. 74-2116, 6th Cir., Feb. 8, 1975.

89 503 F.2d 250 (9th Cir. 1974).

90 500 F.2d 1078 (2d Cir. 1974).

91 Jefferson v. Hackney, 406 U.S. 535, 548 (1972).

to build such housing.[92] And the court in *Ybarra* declined to hold that wealth was a suspect classification.[93] In short, both cases are entirely consistent with precedent; both warn that plaintiffs must prove more than merely a statistical correlation between low-income and minority status to successfully challenge municipal conduct that on its face discriminates only against the poor.

It is also significant that in both *Ybarra* and *Acevedo* there were special facts not found in typical exclusionary land use cases. In *Ybarra,* the plaintiffs challenged the zoning ordinance itself. There was no indication that they had requested and been denied a variance to permit construction of the project, nor that city officials had done anything to block construction of that particular project or to otherwise exclude Mexican Americans. Thus, the challenged conduct consisted only of maintaining the large-lot zoning ordinance. This surely had the effect of excluding the lower-income project, but to the same extent it excluded all other lower-income projects, regardless of whether they were to house Mexican Americans. Thus, it was coincidental that the persons adversely affected were Mexican Americans.

Nor in *Acevedo* did the challenged conduct involve action to block efforts to build a lower-income project in which minorities would live. Rather, the county had simply refused to build a certain kind of lower-income housing.

> Here appellants seek not to remove governmental obstacles to proposed housing but rather to impose on appellees an affirmative duty to construct housing. This is clearly not required by any provision of the Constitution.[94]

If the adverse decisions in *Ybarra* and *Acevedo* do not necessarily represent a narrowing of the scope of protection against the racially discriminatory exercise of land use power, what of the favorable decisions? To what extent do they advance or clarify the law in regard to plaintiffs' burden of proof to show that the challenged conduct is racially discriminatory? The opinions, although not precisely worded, do suggest new possibilities for a breakthrough on this key issue.

B. *Favorable Decisions*

In *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach,*[95] local officials blocked construction of a Farmers Home Administration-assisted project for minority farmworkers by refusing to permit the project, located just outside the city limits, to tie into its existing water and sewer facilities. The city sought to justify this refusal on two grounds. First, the city had a long-standing policy of requiring annexation as a condition to extending water and sewer lines to areas outside the city limits. Second, the project would violate the density limits of the city's master land use plan. The Fifth Circuit,

92 500 F.2d at 1081.
93 503 F.2d at 253-54.
94 500 F.2d at 1081. Curiously, the court after noting plaintiffs' contention that the county had acted on the basis of racially motivated opposition—the very ground for the *Dailey* decision earlier—then proceeded to ignore this contention.
95 493 F.2d 799 (5th Cir. 1974).

in rejecting these arguments, noted that the city had made numerous exceptions to its annexation policy and master plan when whites were involved.

> While a city may have no obligation in the first instance to provide services to anyone outside its geographical limits, once it begins to do so, it must do so in a racially non-discriminatory manner.[96]

This the city had not done, and the effect of its refusal to permit the farmworkers' project to tie into the water and sewer facilities was held racially discriminatory.

After concluding that the city's conduct had a racially discriminatory effect, the court then examined the city's justifications for it, stating that "the City must bear the heavy burden of demonstrating that its refusal, and resulting discrimination, were necessary to promote a compelling governmental interest."[97] The court found that the city failed to satisfy this burden. Further, the court evaluated the city's conduct in its "historical context" and "ultimate effect,"[98] and found that historically the low-income housing in the city, as little as there was of it, was located almost entirely in a racially segregated area. In addition, the city had previously blocked plaintiffs' efforts to construct subsidized housing on the same site, with clear indications that the rejection had been racially motivated. The court concluded:

> The ultimate effect of the City's past and present conduct is threefold: first, the confinement of low income housing construction to the segregated area of the City; second, a further reinforcement of segregation in the City because minority citizens in disproportionate numbers live in low income housing; and third, a frustration of efforts to construct housing which farmworkers can afford.[99]

The basic holding of *Delray Beach* was that the city's administration of its apparently neutral land use policies in a discriminatory manner constituted a prima facie case of unlawful racial discrimination. While this holding lends itself to concreteness and clarity, the kind of proof required is often difficult to secure. Beyond this basic holding, *Delray Beach* is also important because the court evaluated the "historical context" and "ultimate effect" of the city's conduct. This was no abstract analysis, but an examination of the social and economic realities of racial patterns in the city.

Two other courts of appeal have adopted the approach taken in *Delray Beach*. In *United States v. City of Black Jack*,[100] the city, originally unincorporated, responded to the proposed construction of a multifamily, racially integrated § 236 project by incorporating and immediately enacting a zoning ordinance prohibiting construction of new multifamily dwellings. The ordinance effectively

96 *Id.* at 808.
97 *Id.* at 809.
98 Both terms were used by the Supreme Court in Reitman v. Mulkey, 387 U.S. 369 (1967), a case in which the Court invalidated a California constitutional provision which, in effect, prevented the state from prohibiting racial discrimination in housing.
99 493 F.2d at 810.
100 508 F.2d 1179 (8th Cir. 1974).

blocked construction of the § 236 project. The district court, in holding the city's conduct not racially discriminatory, noted that the project was designed to meet the needs of families earning between $5,000 and $10,000 a year—a class which included 32 percent of the black population in the metropolitan area and 29 percent of the white population.[101] The lower court concluded, therefore, that the ordinance blocking construction of the project had no measurably greater effect on blacks than on whites. The Eighth Circuit rejected this reasoning and examined the city's conduct on the basis of its "ultimate effect" and "historical context," citing *Delray Beach*. The court referred to statistics other than those the district court had deemed material, and noted that the average cost of a home in Black Jack was approximately $30,000 while the average income of Black Jack families was $15,000 per year. This more stringent scrutiny of the facts led the court to conclude that:

> The ultimate effect of the ordinance [blocking multifamily housing] was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units.[102]

In addition, the court in *Black Jack* pointed to the racially segregated character of the St. Louis metropolitan area, stressing that the discriminatory effect of the ordinance is "more onerous" since the segregation resulted from discrimination "by the real estate industry and by agencies of the federal, state, and local government."[103] The court saw Black Jack's action as but one more factor in the "inexorable process" of segregation.[104] The rejected project was "particularly designed to contribute to the prevention of this prospect so antithetical to the Fair Housing Act."[105] Consequently, the court concluded that the ordinance had a discriminatory effect.[106] The Government contended that the ordinance had a racially discriminatory purpose, yet the court, while conceding there was evidence to support this contention, did not reach the issue of racial motivation, holding specifically that "[e]ffect, and not motivation, is the touchstone . . . ."[107]

Another favorable case was *Metropolitan Housing Development Corporation v. Village of Arlington Heights*.[108] The plaintiff, a nonprofit corporation, unsuccessfully sought a zoning change to permit construction of a § 236 townhouse development which would have had 40 percent minority occupancy. Arlington Heights, a village of 65,000 people of whom only 27 are black, sought to justify its refusal to rezone on the grounds that the site was in the middle of a single-family area and did not act as a "buffer" zone as required by its comprehensive plan.

Plaintiffs contended first that the village's zoning policy had been admin-

101 372 F. Supp. 319, 326 (E.D. Mo. 1974).
102 508 F.2d at 1186. The court did not indicate the percentage of whites in the metropolitan area who were foreclosed from obtaining housing in Black Jack, even though the figure was presumably substantial.
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 1185.
108 Civil No. 74-1326 (7th Cir., filed June 10, 1975).

istered discriminatorily, since 60 zoning changes had previously been granted to commercial developers without regard to "buffer" zone requirements. This was precisely the prevailing argument in *Delray Beach.* Nevertheless, the Seventh Circuit rejected it in *Arlington Heights.* While recognizing that exceptions had been made to the stated policy, the court found that the policy had generally been consistently applied.

The plaintiffs further claimed that the refusal to rezone had a racially discriminatory effect and perpetuated Arlington Heights' segregated character. The appellate court rejected this contention too. Although the class affected by the village's action was composed of individuals with low and moderate incomes, with racial minorities constituting a higher percentage of this class than of the general population, "[t]his fact alone . . . does not make decisions that affect those in the lower income bracket more than others racially discriminatory governmental actions."[109]

However, the court then further evaluated Arlington Heights' conduct. The impact of the village's refusal to rezone "must be assessed not only in its immediate objective but in its historical context and ultimate effect."[110] The historical context included the segregated character of the Chicago metropolitan area, and the nearly all-white make up of Arlington Heights and northwest Cook County, of which Arlington Heights is a part. The court held that the ultimate effect of the village's refusal to rezone was that no § 236 housing was likely to be built in Arlington Heights, because the plaintiffs could not find a suitable alternative site.[111] The court stressed that Arlington Heights had not sponsored or participated in any low-income housing developments and that it had no such plans for the future. The court noted the rejected project could have increased Arlington Heights' minority population by over 1,000 percent.[112]

Defendants argued that since it had not created the segregated housing pattern in the metropolitan area or within its own borders, it had no affirmative duty to alleviate the problem. The court responded that Arlington Heights could not "exploit" the problem of segregation by allowing itself to become an almost all-white community. In making this point, the court cited its earlier decision in *Clark v. Universal Builders, Inc.,*[113] which held that a private builder's exploitation of residential segregation by raising prices constituted racial discrimination even though the builder was not responsible for the discrimination that had created the problem. Thus, according to the Seventh Circuit, Arlington Heights did indeed have a responsibility to help eliminate the problem of segregated housing and could not reject with impunity the only present hope of facilitating the residence of minority people within its borders. The court then rejected as uncompelling the justifications offered by the village for its position.[114]

109 *Id.,* slip opinion at 6.
110 *Id.* at 7, quoting Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 112 (2d Cir. 1970).
111 *Id.* at 8.
112 *Id.*
113 501 F.2d 324 (7th Cir.), *cert. denied,* 419 U.S. 899 (1974).
114 *Arlington Heights,* slip opinion at 10. Chief Judge Fairchild dissented on the sole ground that the record did not support the majority's conclusion that rejection of the proposed project meant that no § 236 housing would be built in Arlington Heights. In his view, other

1. Common Elements in *Delray Beach, Black Jack,* and *Arlington Heights*

The decisions in *Delray Beach, Black Jack,* and *Arlington Heights* each stressed the need for evaluating the challenged conduct not only from the perspective of its immediate result, but in its historical context and ultimate effect. In this respect, the cases mark an advance: Each court determined the issue of racial discrimination not merely by examining the immediate circumstances surrounding the rejection of the particular project, but also by considering the relation of the challenged conduct to the past and future housing opportunities for minorities. Thus in their decisions the respective courts of appeal implicitly rejected a narrow, formalistic approach to the issue of racial discrimination in favor of a broad, realistic one.

Moreover, by their treatment of several key questions, these cases offer at least the chance that a substantive breakthrough could yet occur. In each case, the court expressly recognized and considered the disproportionate representation of minorities among lower-income people in determining the legality of the challenged conduct. In none, of course, did the court solely rely on the high statistical correlation between lower-income and minority status. This argument was in fact specifically rejected in *Arlington Heights* and *Ybarra.* Nor did any of the courts limit its examination to the racial effect of rejection of the particular project. The court in *Black Jack* specifically rejected the district court's emphasis of the fact that there was little difference between the percentage of whites and minorities eligible to live in the project. In *Arlington Heights,* the Seventh Circuit specifically noted that the project, even if approved, would have had "only minimal effect"[115] in alleviating the metropolitan-wide problem of housing segregation.

Each court evaluated the challenged conduct in a broad factual context.[116] None of them, however, articulated principles to guide plaintiffs in sustaining their burden of proving racial discrimination. Nonetheless, certain elements exist in each of these decisions which could provide the missing guidance. The key common elements are:

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possible sites did exist, and plaintiffs had not sufficiently shown that none were suitable for the proposed project.

115 *Arlington Heights,* slip opinion at 8.

116 In *Delray Beach,* the relevant facts were: the city was racially segregated; there were few subsidized housing units; all of the completed units were beyond the farmworkers' financial ability; nearly all the units, completed and uncompleted, were in the minority section of town; minorities disproportionately lived in poor housing; and a previous effort by the farmworkers to build subsidized housing in a nonsegregated area had been rejected for racial reasons.

In *Black Jack:* the city was virtually all-white, in contrast to other parts of the St. Louis metropolitan area, which were heavily black; the racially segregated character of the St. Louis metropolitan area was not fortuitous, but in large measure the result of deliberate discrimination by private industry and federal, state, and local governments; 40 percent of the black population lived in substandard or overcrowded units; and the Black Jack ordinance, by preventing construction of multifamily housing, would exclude 85 percent of the black population of the metropolitan area.

In *Arlington Heights:* the village was virtually all-white, as was the section of Cook County of which it was a part; the Chicago metropolitan area was racially segregated; the segregation was not fortuitous, but the result of discriminatory practices, although not attributable to Arlington Heights itself; the village had no low-income housing, nor plans for any; and the rejected project was the only contemplated proposal for Arlington Heights that would contribute to easing the problem of segregated housing.

(1) a racially segregated community or an all-white community in a racially segregated metropolitan area;

(2) the segregation has resulted, at least in large part, from prior discrimination;

(3) virtually no housing exists in the locality which minorities can afford, and to the extent subsidized units do exist, they are located in areas of minority concentration;

(4) the municipality has either actively discouraged minority residence in the past or has done little, if anything, to help eliminate the problem of housing segregation or to facilitate minority residence;

(5) the proposed project, by providing housing opportunities for lower-income minorities, would have contributed to the alleviation of the problem of segregated housing;

(6) the challenged conduct not only blocks construction of a particular project, but makes it unlikely that such projects will be built in the reasonably foreseeable future, thus ensuring that the existing pattern of segregation will continue.

With these elements present, and without regard to purpose, the challenged conduct was held to be racially discriminatory and therefore justified only by a compelling governmental interest, a burden that has been sustained only once in the annals of civil rights litigation.[117]

Some caution is in order, however, because none of the three courts of appeal specified in their respective opinions which of the above elements, individually or cumulatively, were relied upon most heavily in finding the challenged conduct to have a racially discriminatory effect. Nor did any of the courts explicitly state that they relied on these elements. Nonetheless, they were present, and they constitute, certainly in combination, strong proof of racial discrimination.

2. Problems of Proof

These elements of proof, while relying heavily on statistics, require considerably more than just figures; they also impose certain factual problems of proof on plaintiffs. First, the challenged conduct must not only have the effect of blocking construction of a particular project in which minorities can live, but it must also make it unlikely that future projects will be built. Thus, the respective courts broadened their scope of inquiry beyond the particular blocking of housing construction to the "ultimate effect" on housing opportunities for minorities. This point was clearly made in *Arlington Heights*.[118] The dissenting judge there would have upheld the village's conduct only because, in his view,

117 Korematsu v. United States, 323 U.S. 214 (1944).

118 In *Delray Beach*, this was the second occasion on which plaintiffs had been blocked in their efforts to build subsidized housing for minority farmworkers in a nonsegregated area. Although the court did not say so, it was unlikely they would try a third time. At the least, the city's conduct had a chilling effect. Thus the existing pattern of residential segregation was likely to continue.

In *Black Jack*, the court made it clear that adoption of the ordinance not only blocked the particular subsidized project in which minorities would live, but also all future efforts to construct such projects. As the court said, 85 percent of the black population was foreclosed from living in Black Jack.

the plaintiffs had not shown the lack of other suitable sites in the village for subsidized housing. If they had, he presumably would have voted with the majority. This suggests that had the majority found that there were other suitable sites, they too might have upheld Arlington Heights' conduct.

What is required to prove ultimate effect? Although the plaintiffs must prove that the challenged conduct represents more than a unique action by a community that otherwise welcomes minority residents, they probably need not prove to a certainty that the pattern of residential segregation will continue. In *Delray Beach,* for example, it was enough that the challenged conduct, viewed in the context of the plaintiffs' earlier experience in trying to construct a subsidized housing project, made it unlikely that they would try again. It was sufficient in *Black Jack* that the ordinance foreclosed 85 percent of the black population from living in the city, even though the ordinance presumably also foreclosed a substantial percentage of whites. And in *Arlington Heights* it was sufficient that "in all probability" no § 236 housing would be built in the village. Thus, it may be enough if the challenged conduct, considered in its "historical context," makes it likely that the existing pattern of segregation will continue.

The second major element to prove is that existing segregation is not fortuitous but the result of past discrimination. Even the *Mahaley* court conceded that plaintiffs would prevail if they could show that the discriminatory effect results from past discrimination. But past discrimination by whom? The past discrimination in *Delray Beach* had been carried out by the same officials whose current conduct was being challenged; the discriminatory effect of their conduct was thus apparent. In *Black Jack* and *Arlington Heights,* however, there was no indication that city officials had been guilty of past discrimination or were in any way responsible for the segregation that existed. The court in *Black Jack* blamed that on the real estate industry and federal, state, and local agencies, but still held the city's conduct to be racially discriminatory. The court in *Arlington Heights* did not specify who was responsible for the segregation, but accepted the village's protestation that it was not. Yet the court held that Arlington Heights had exploited the problem by ignoring it in the past, and therefore its rejection of the 40 percent minority project had a racially discriminatory effect. In short, the unarticulated rationale of *Black Jack* and *Arlington Heights* is that a segregated white community may not with impunity block efforts to provide housing opportunities for minorties on grounds that it is not responsible for the segregation that exists. If plaintiffs can prove that the segregation is not fortuitous, but is the result in large part of discrimination, even if by other parties, such as brokers, builders, or government agencies, then the locality must carry the virtually insupportable burden of justifying its conduct by a compelling government interest. If this is accurate analysis of *Black Jack* and *Arlington Heights,* then the effort to achieve a significant change concerning plaintiffs' burden to prove racial discrimination may yet be successful.[119]

119 Another case involving a potential breakthrough on the issue of plaintiffs' burden of proof is Construction Independent Ass'n v. Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd,* Civil No. 74-2100 (9th Cir., filed Aug. 13, 1975). This case involved a challenge to the constitutionality of a "slow-growth" ordinance, adopted by the San Francisco suburb of Petaluma, limiting housing construction to 500 units a year. The federal district court sustained

3. Disproportionate Effect on Minorities

One final word on proving that the challenged exercise of land use power has a racially discriminatory effect: The fact that municipal conduct disproportionately affects minorities has not been held sufficient, by itself, to carry plaintiffs' burden of proof. This holds true at least when the disproportionate effect results solely from the overrepresentation of minorities among lower-income people. In contexts other than land use, however, particularly in cases involving alleged employment discrimination under Title VII of the Civil Rights Act of 1964,[120] considerable success has been achieved by relying solely on the disproportionate effect on minorities. These cases could be applied by analogy to land use litigation.

In Griggs v. Duke Power Co.,[121] the defendant company had practiced employment discrimination prior to the enactment of Title VII, but abandoned the policy after the law's adoption. In its place the company developed a new policy of requiring completion of high school and satisfactory performance on general intelligence tests as conditions to placement in higher paying jobs. The Supreme Court held that even though the policy was "fair in form,"[122] it was "discriminatory in operation"[123] and plaintiffs had proved a prima facie case of a Title VII violation. The Court recognized that black people had received inferior educations in segregated schools and were thus adversely affected by the company's policy. But the Court did not have to rely entirely on the disproportionately adverse effect on minorities of the challenged conduct, since there was a prior history of discrimination by the defendant company which the current policy tended to perpetuate.

In two court of appeal cases also involving Title VII challenges, however, no such prior discrimination was involved. In *Gregory v. Litton Systems, Inc.*,[124] the defendant company maintained a policy of not hiring job applicants with arrest records, whether or not they were ever convicted. There was no finding of any prior discriminatory practices by the defendant company. The Ninth Circuit held, nonetheless, that because the policy "operated to bar employment to black applicants in far greater proportion than to white applicants"[125] the company was prima facie in violation of Title VII. "Historical discrimination need not be shown in order to obtain relief from discrimination in fact, regardless of its cause or motive."[126]

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the challenge, not on grounds of racial discrimination (racial minorities were not plaintiffs and no such allegation was made), but on the ground that the ordinance interfered with the constitutionally protected right to travel. The Ninth Circuit reversed on grounds that the ordinance did not violate due process. The circuit court declined even to consider the right to travel issue, holding that plaintiff home builders had no standing to raise it.

The significance of *Petaluma* is that, like *Valtierra* (if it had been affirmed), it would have totally relieved plaintiffs of the often difficult burden of proving racial discrimination, either in purpose or effect. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

120 42 U.S.C. § 2000e-17 (1970).
121 401 U.S. 424 (1971).
122 *Id.* at 431.
123 *Id.*
124 472 F.2d 631 (9th Cir. 1972).
125 *Id.* at 632.
126 *Id.*

In *Wallace v. Debron Corp.*,[127] the Eighth Circuit reached the same result in a case similarly involving a facially neutral policy which disproportionately affected minorities. The plaintiffs charged employment discrimination based on the company's policy of discharging employees whose wages were garnished more than once within a 12-month period. As in *Gregory,* there was no finding of prior discrimination on the part of the defendant company. In fact the defendant, citing *Griggs*, rested its defense primarily on the argument that only if its policy had the effect of perpetuating prior racially discriminatory practices could it be held in violation of Title VII. The Eighth Circuit rejected this reasoning, holding that the violation resulted from the disproportionately adverse effect on black employees of the garnishment policy.

> For us to take any position other than one which requires that all employers remove all artificial, arbitrary, and unnecessary racial barriers to employment would be inconsistent with the broad purposes of Title VII; would permit many employers (those with no past history of discrimination and new employers) to erect such barriers; and would result in a inequitable and unequal enforcement of the Act.[128]

Thus, although the Supreme Court has not yet spoken, two courts of appeal agree that facially neutral policies and practices that have disproportionately adverse effects on minorities are prima facie violations of Title VII in and of themselves even without a history of discrimination.

Similar protection has not yet been accorded under Title VIII, a law almost identical to Title VII in its detailed provisions and broad scope of protection.[129] One recent Eighth Circuit case involving an alleged Title VIII violation suggests, however, that the courts may be prepared to rely on the disproportionate adverse effect in Title VII cases. In *Williams v. Matthews Co.*,[130] the defendant company maintained a policy of selling residential lots only through "approved builders," all of whom were white. A black family, seeking to acquire a lot for purposes of building a home, was turned down by these "approved builders," who in fact had never built a home for a black person in that subdivision. Although there are indications that the court questioned whether this policy was nondiscriminatory in purpose, it held that even if facially neutral, it was prima facie in violation of Title VIII. "[S]uch a policy, even though neutral on its face, can not stand if it in its operation serves to discriminate on the basis of race."[131]

Matthews is the first fair housing case which can be said to adopt the Title VII principle that policies and practices disproportionately affecting minorities are prima facie unlawful even without a showing of past discrimination.[132]

127 494 F.2d 674 (8th Cir. 1974).
128 *Id.* at 676.
129 In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Supreme Court characterized the policy reflected by Title VIII as one Congress has assigned the highest priority to.
130 499 F.2d 819 (8th Cir. 1974).
131 *Id.* at 828. The court cited *Griggs* for this principle.
132 In another Title VIII case, however, plaintiffs challenged the policy of an apartment complex that excluded welfare families, on the ground that minorities were disproportionately overrepresented among the excluded class. The Second Circuit rejected plaintiffs' analogy to the Title VII cases, ruling that the principle of disproportionate effect on minorities "has

It is far too early to predict whether this important principle can be sustained and developed further in other Title VIII cases, including those challenging exclusionary land use practices. If it is, it will provide another significant change to plaintiffs' burden in land use litigation.

V. New Procedural Problems

While land use litigation may be moving toward a breakthrough on important substantive issues, new and troublesome procedural problems have recently emerged in federal court cases. These problems involve issues of justiciability, including the standing of various classes of plaintiffs.

Cornelius v. City of Parma[133] involves the charge of racial discrimination against the Cleveland suburb of Parma, Ohio. According to the complaint, Parma, a city of more than 100,000 people with a black population of 50, had a history of deliberate minority exclusion culminating in the denial of a building permit to a subsidized housing project for which lower-income minorities were potential residents, and the adoption of ordinances requiring referendum approval for subsidized housing and prohibiting residential structures higher than 35 feet. The principal plaintiffs were lower-income minority residents of Cleveland desiring to live in Parma, and white residents of Parma claiming injury from Parma's discriminatory conduct through denial of the benefits of interracial association.[134] In February 1974, the district court dismissed the complaint for lack of justiciability, reasoning that the referendum requirement was not ripe for adjudication. Regarding the alleged discriminatory denial of the building permit, the district court ruled that since the project was no longer viable (though the builder had been prepared to proceed for nearly a year after the case was filed) the issue was moot. The opinion also strongly suggested that the minority plaintiffs lacked standing to bring the lawsuit. In October 1974, the Sixth Circuit vacated the district court's order and remanded the case for trial.[135] In February 1975, the defendants petitioned for certiorari, requesting the Supreme Court to review the Sixth Circuit's order.

At the same time, another important procedural case was proceeding through the federal courts of New York. The case, *Warth v. Seldin,*[136] involved an action against the town of Penfield, New York, a suburb of Rochester, charging that the town's zoning ordinance, by its terms and as applied, blocked hous-

never been applied in any Fair Housing Act case . . . ." Boyd v. Lefrak Organization, 509 F.2d 1110, 1114 (2d Cir. 1974). The court offered no reason why this principle had no application to fair housing cases; but it may be significant that *Boyd* was decided five months before *Williams*.

133 374 F. Supp. 730 (N.D. Ohio), *vacated and remanded,* 506 F.2d 1400 (6th Cir. 1974), *cert. granted, order vacated, and case remanded,* 95 S. Ct. 2673 (1975).

134 *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

135 The full text of the court of appeals' opinion is as follows:

"On consideration of the briefs and records and oral argument in the above-styled opinion; and

"Noting that the complaint appears to state a cause of action alleging racial discrimination in the exclusion of black citizens from equal access to housing, jobs and educational opportunities in the City of Parma, Ohio, which requires a factual hearing,

"The judgement of the District Court is vacated and the case is remanded for trial." 506 F.2d 1400 (6th Cir. 1974) (unpublished opinion).

136 95 S. Ct. 2197 (1975), *aff'g* 495 F.2d 1187 (2d Cir. 1974).

ing construction in which lower-income minorities could live. There were different classes of plaintiffs: individual lower-income minority nonresidents who sought to live in Penfield, a Rochester taxpayers' association, a civic group which included white residents of Penfield, and a home builders association. The Second Circuit dismissed the complaint on grounds that none of the plaintiff classes had standing. The Supreme Court granted plaintiffs' petition for certiorari and affirmed.

Lower-income minority plaintiffs were denied standing by the Supreme Court primarily because they had not demonstrated that the challenged practices of Penfield were harmful to their interests. The Court noted the absence of any projects in which plaintiffs could live that were viable proposals at the time the lawsuit was instituted, and the lack of any allegation by plaintiffs that they had been eligible for the projects previously blocked through Penfield's conduct. While the Court made it clear that low-income minority plaintiffs need not show a "present contractual interest in a particular project,"[137] they must show "a particularized personal interest."[138] The Court also characterized the purpose and effect of Penfield's zoning ordinance as "excluding persons of low and moderate income, many of whom are members of minority racial or ethnic groups."[139] Thus the thrust of the charge, according to the Court, was one of economic discrimination and only "coincidentally"[140] one of racial discrimination.

> But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights.[141]

Warth v. Seldin is not necessarily a serious roadblock to exclusionary land use litigation in federal courts, but it does raise questions concerning the specificity of a complaint. The principal complaint of the lower-income minority plaintiffs was maintenance of Penfield's zoning ordinance. To the extent any lower-income projects were blocked through application of the ordinance, plaintiffs had failed to show that they were potential residents. According to the Supreme Court, they even failed to show that they were financially eligible to live in those projects. Nor were any of the projects viable at the time the lawsuit was filed. The failure to allege with sufficient specificity that Penfield's conduct constituted racial rather than economic discrimination also seemed to weigh heavily in the Court's denial of standing. *Warth v. Seldin,* then, is not a typical exclusionary land use case, and the Supreme Court's decision does

137 95 S. Ct. at 2210 n.18.
138 *Id.*
139 *Id.* at 2207.
140 *Id.*
141 *Id.* The Court also denied standing to the white residents of Penfield, since no charge was made of a violation of Title VIII. *Id.* at 2212 n.21. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). Standing of the Rochester group was denied in that the conduct of Penfield could have only "some incidental adverse effect on Rochester." *Id.* at 2210. The home builders association lacked standing because the only relief being sought was money damages. The Court said that although individual members who had suffered injuries through Penfield's conduct could secure money damages, the association itself, since it had not alleged monetary injury, could not. *Id.* at 2214.

not, on its face, preclude or seriously interfere with instituting more normal exclusionary land use cases. The decision, nonetheless, is potentially troubling and undoubtedly represents a setback. The case may well reflect both a reluctance on the part of federal courts to entertain such suits, and an overall retrenchment by the federal courts on the issues involved.

Five days after the Supreme Court's decision in *Warth v. Seldin,* the Court granted the petition for certiorari in *Cornelius v. City of Parma.*[142] At the same time the Court vacated the order of the Sixth Circuit and remanded for further consideration in light of *Warth.*[143] *Parma,* however, is closer to the typical exclusionary land use case than *Warth,* and the disposition of the various issues of justiciability involved in *Parma* will provide further guidance on the implications of *Warth.*[144]

VI. New Approach to Housing and Community Development

As noted earlier, passage of the Housing and Urban Development Act of 1968 gave impetus to a new line of exclusionary land use litigation, chiefly resulting from the new housing subsidy programs, §§ 235 and 236. As long as these programs continued to operate, litigation could possibly achieve the practical result of providing real housing opportunities for lower-income minorities outside central-city areas. Unfortunately, in January 1973 the housing subsidy programs, including §§ 235 and 236, were abruptly suspended by the Department of Housing and Urban Development.[145] Litigation challenging the legality of this suspension was unsuccessful,[146] and the programs were effectively terminated.[147]

In August 1974, however, the Housing and Community Development Act was passed. Through this legislation susidized housing and community development programs have turned in a new direction. The various overlapping housing subsidy programs have been replaced largely by a single section[148] of the recodified low-rent public housing law,[149] commonly known as the "§ 8 program."[150] Similarly, the wide variety of community development programs, such

142 95 S. Ct. 2673 (1975).

143 The Sixth Circuit recently remanded *Parma* to the district court with orders to dismiss the complaint. Cornelius v. City of Parma, Civil No. 74-1401 (6th Cir., filed Sept. 24, 1975). Plaintiffs have petitioned for rehearing.

144 In June 1975, the Second Circuit, the same court that had denied standing in *Warth v. Seldin,* granted standing to nonresident, lower-income minorities who are challenging the approval of grants for water, sewer, and recreation facilities by federal agencies to the allegedly exclusionary Westchester County, New York, community of New Castle. Evans v. Lynn, Civil No. 74-1793 (2d Cir., filed June 2, 1975). The court distinguished its earlier decision in *Warth* on the grounds that the challenge here was not to New Castle's policies and practices but to the failure of federal agencies to implement Titles VI and VIII of the Civil Rights Act of 1964. *Evans,* slip opinion at 3897-98.

145 *See* Telegraphic Message from George Romney, Secretary of Housing and Urban Development, to All Regional Administrators, All Area Office Directors and All Insuring Office Directors, January 8, 1973 (copy on file at Notre Dame Center for Civil Rights, Notre Dame Law School).

146 Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974).

147 Litigation was recently instituted by the General Accounting Office challenging the continuing impoundment of funds for the § 235 program. Staats v. Lynn, Civil No. 75-0551 (D.D.C., filed April 15, 1975).

148 42 U.S.C.A. § 1437(f) (Supp. 1975).

149 42 U.S.C.A. § 1437 *et seq.* (Supp. 1975).

150 The term "§ 8 program" refers to that section of the United States Housing Act of 1937, 42 U.S.C. §§ 1401-36 (1970), *as amended* 42 U.S.C.A. § 1437 *et seq.* (Supp. 1975).

as urban renewal,[151] public works,[152] and open space,[153] have been replaced by a single block grant program.[154] The new legislation will necessarily require changes in the focus and substance of exclusionary land use litigation. Although this new legislation may allow litigation to play a more important role, it also may diminish the effect of litigation as a fair housing weapon. In any event, the context of exclusionary land use litigation has changed.[155]

The Housing and Community Development Act of 1974[156] contains many elements of potential value to the cause of metropolitan-wide desegregation. First, the Act specifies as one of its major objectives:

> [T]he reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income. . . .[157]

Thus for the first time in the more than 40 years since the federal government intervened in the housing field, Congress has legislatively recognized the problem of economic segregation, not only "within communities" but also in "geographic areas."

Second, the Act requires localities to deal with the housing problems of lower-income persons as a condition to receiving community development block grants. Localities in the past were free to participate in various housing and community development programs administered by HUD, such as water and sewer, and open space, while refusing subsidized housing. This is no longer permitted. Among the principal conditions of eligibility for receipt of community development block grants now is the requirement that the locality submit a "housing assistance plan," dealing accurately and realistically with the housing assistance needs of lower-income persons.[158] Moreover, the plan must consider the needs not only of lower-income people who already reside in the community, but those "expected to reside" there too.[159] Thus the Act contemplates free movement of lower-income persons throughout the metropolitan area.

Third, after submitting a satisfactory housing assistance plan a locality may object to a proposal for a subsidized housing project within its jurisdiction only on grounds that it "is inconsistent with its housing assistance plan."[160] If HUD

151 42 U.S.C. §§ 1450-69 (1970).
152 42 U.S.C. §§ 1491-97 (1970).
153 42 U.S.C. §§ 1500-1500e (1970).
154 42 U.S.C.A. § 5316 (Supp. 1975).
155 For a detailed discussion of the implications of the new legislation for purposes of exclusionary land use litigation, see Franklin, *Open Communities Litigation and the Housing and Community Development Act of 1974*, in NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING, EXCLUSIONARY LAND USE LITIGATION: POLICY AND STRATEGY FOR THE FUTURE 83 (1975).
156 Pub. L. No. 93-383, 88 Stat. 633.
157 42 U.S.C.A. § 5301(c)(6) (Supp. 1975). As one knowledgeable observer has commented, "[T]he housing dispersal objectives could fairly be construed as the economic equivalent of the racial policy embodied in Title VIII of the 1968 Civil Rights Act . . . ." Franklin, *supra* note 155, at 106.
158 42 U.S.C.A. § 5304(a)(4) (Supp. 1975).
159 *Id.* HUD regulations interpret the term "expected to reside" to mean residence because of current or projected job opportunities. 39 Fed. Reg. 40144 (1974).
160 42 U.S.C.A. § 1439(a) (Supp. 1975).

determines that the proposal is in fact consistent with the plan, it may approve the proposal despite the locality's objection.[161]

Fourth, a locality that decides to do without community development funds for fear that lower-income minorities will move in as a result of the required housing assistance plan cannot thereby exclude subsidized housing. Under the Act, HUD may approve application for subsidized housing in such localities if it determines that there is a need and that there are or will be adequate public facilities and services.[162]

The new legislation does have some serious drawbacks; and despite its commendable expression of concern over the need for "deconcentration" of lower-income people, these drawbacks may prove it to be less effective than the 1968 housing legislation, and may likewise weaken the litigation effort. The main drawback is the Act's reliance on § 8, a new and untried program, for production of assisted housing. One of the major strengths of the §§ 235 and 236 programs was that they could and did generate a massive volume of subsidized housing. Some housing experts doubt that § 8 can do the same.[163] Despite the new Act's noble aims, living conditions for the poor will not be significantly improved, nor will their mobility be enhanced, without an adequate volume of subsidized housing.

Second, while the Act speaks in terms of geographical areas as well as individual communities, its substantive provisions place control over housing policy with local governments, whose concerns are likely to be their own perceived self-interest and not the welfare of the poor or of the metropolitan area. The policy of the legislation may be catholic in perspective, but its operative provisions tend to be parochial.

Third, the Act reinstitutes, even if in limited form, a local government veto power over construction of subsidized housing. If a proposal for § 8 housing is inconsistent with a locality's housing assistance plan, it may validly object and prevent its construction. This housing assistance plan is developed by the locality itself; and unless extreme care is taken to ensure that it is satisfactory, the plan may provide the basis for continued exclusion of lower-income minorities. This form of exclusion, moreover, would have statutory sanction and could be virtually immune from attack. Thus the housing assistance plan, and particularly its consideration of the needs of people "expected to reside" in the locality, is crucial if the new legislation is to contribute to housing desegregation. Approval by HUD of inadequate suburban plans that call for little or no assisted housing could effectively block construction of subsidized housing and leave the cause of fair housing in worse condition than before.

It can be expected that a major emphasis of future litigation will be to challenge HUD approval of inadequate housing assistance plans. The stimulus to litigation will no longer be rejection of a particular subsidized project by a suburban municipality, but HUD approval of suburban applications for community development block grants. Unlike previous litigation, the relief requested

161 42 U.S.C.A. § 1439(a)(2) (Supp. 1975).
162 42 U.S.C.A. § 1439(c) (Supp. 1975).
163 *See, e.g.*, Welfied, *The Section 8 Leasing Program: A New Program in an Old Rut*, 2 HOUSING & DEV. REP. 1106 (1975).

will not be construction of a particular project, but the withholding of block grant funds from suburbs that do not adequately provide for the housing needs of lower-income people. The litigation will thus seek to utilize the leverage afforded by the link between community development and housing assistance as a means of opening up the suburbs. Its success depends largely upon the extent of that leverage. Suburban municipalities may well choose to forego community development funds if acceptance means development of a housing assistance plan that will facilitate residence of lower-income minorities. And while refusal to submit a housing assistance plan does not in theory immunize a locality from subsidized housing, as a practical matter it is doubtful that HUD, in allocating scarce subsidized housing funds, will aggressively push for locating subsidized housing in such recalcitrant communities.

Finally, even if suburban localities develop exemplary housing assistance plans as the price for needed community development funds, there is no guarantee that subsidized housing will actually be built. Construction of particular projects will still depend on the traditional discretionary authority of local officials. If construction is blocked, litigation similar to the *Dailey, Lackawanna,* and *Arlington Heights* suits may ensue. Thus, the new legislation changes the factual context of most future litigation; it is also likely that some cases will follow the usual pattern of challenges to municipal conduct blocking construction of subsidized housing on grounds of racial discrimination.

VII. Conclusion

The history of exclusionary land use litigation as an instrument for fair housing has been brief but turbulent. It rose to prominence after 1968 when actions by Congress and the Supreme Court in combination caused exclusionary land use practices to surface as a major obstacle to equal housing opportunity.

Early federal court cases were surprisingly successful, but efforts to build on them have been less so. Since 1971, the law has been in flux. This period can be characterized as one in which fair housing litigators have sought unsuccessfully to achieve a breakthrough on the key substantive issue of plaintiffs' burden of proof. Efforts to establish economic discrimination alone as a constitutional violation were apparently rejected by the Supreme Court. Later efforts to establish proof of racial discrimination by reference to the high statistical correlation between low-income and minority status were similarly rejected by lower federal courts. The federal judiciary continues to struggle with the difficult substantive issue of what plaintiffs must prove to make out a prima facie case of racial discrimination. There have been a substantial number of recent appellate court cases dealing with this issue, and several of the most recent have been favorable to plaintiffs. Nevertheless, no well-articulated rule of law has yet emerged. The recent favorable decisions do, however, offer a rudimentary outline of the elements of plaintiffs' case. Chief among these are:

(1) disproportionate minority need for the rejected housing;

(2) existence of racial segregation which is in large part the result of past discrimination and not necessarily by the defendant municipality;

(3) the defendant municipality has done virtually nothing in the past to help eliminate or reduce segregation; and,

(4) the challenged conduct not only blocks construction of an individual project, but makes it unlikely that other such projects will be built in the future.

These elements are derived, not from any explicit reliance on them by the courts, but from the fact that they exist. If in fact they are sufficient to carry plaintiffs' burden of proof, they still present problems of proof, though not insurmountable ones. Recent favorable cases offer hope, then, that the sought after breakthrough may yet occur—not of the dimensions of *Valtierra* or *Mahaley,* but a breakthrough nonetheless.

The recent Supreme Court decision in *Warth v. Seldin,* denying standing to lower-income minorities, among others, to challenge exclusionary land use practices, is disquieting. Although at face value the decision does not represent an insuperable obstacle to exclusionary land use litigation, it may reflect a trend toward retrenchment by the federal courts and a desire to diminish the federal judiciary's role in such cases.

Thus, the federal court law concerning exclusionary land use, both procedural and substantive, is changing. At the same time, the Housing and Community Development Act of 1974 has restructured basic federal programs, and it will necessarily lead to significant changes in the very nature and focus of litigation. Successful implementation of the Act's purpose of metropolitan desegregation of lower-income people is likely to depend on the vigilance of HUD and the forcefulness with which it insists on strict compliance with the housing assistance requirements of the Act. It also is likely to depend on the vigilance of fair housing groups in monitoring compliance with these requirements, and on the ability of fair housing litigators to institute timely lawsuits in instances of noncompliance.

Of major concern is the new and untried approach the legislation takes toward the provision of subsidized housing. There is, at a minimum, serious doubt whether the § 8 program can generate a volume of housing comparable to that produced under the discarded §§ 235 and 236 programs. If it cannot, then the noble congressional purpose of facilitating metropolitan desegregation will be nullified for lack of housing to achieve it and, indeed, the very base for exclusionary land use litigation will be seriously undermined.

Exclusionary land use litigation is at a crossroads. Its future as an instrument for fair housing is uncertain. It is impossible to tell at this juncture whether greater effectiveness lies ahead or whether it will become categorized as a legal development that never fulfilled its promise.

Despite the uncertainty, however, there is little reason to conclude that exclusionary land use litigation has lost its vitality. The changed focus and new problems reflect only different challenges, not imminent demise.