6-24-1988

Motion to Dismiss or Affirm

Lewis M. Steel '63

No. 87-1961

In The

Supreme Court of the United States

October Term, 1987

TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Appellants,

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Appellees.

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether appeal properly lies pursuant to 28 U.S.C. §1254(2) when appellants admit they have not relied on the statutory provision held invalid by the Court of Appeals and when the judgment of the Court of Appeals itself does not strike the ordinance provision in question.

2. Whether the Court of Appeals' opinion below raises a substantial issue warranting this Court's review when it interprets the Fair Housing Act (Title VIII) in a manner consistent with decisions of at least five other Courts of Appeals and when there is no conflict among the Circuits.

PARTIES TO THE PROCEEDING

Appellants: The Town of Huntington, New York; Kenneth C. Butterfield; Clair Kroft; Kenneth Deegan; Edward Thompson; and Joseph Clemente.

Appellees: Huntington Branch, National Association for the Advancement of Colored People; Housing Help, Inc.; Mabel Harris as President of the Huntington Branch, National Association for the Advancement of Colored People; and Perrepper Crutchfield and Kenneth L. Cofield, individually, and in their capacity as representatives of the certified class.

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TOWN OF HUNTINGTON, NEW YORK, *ET AL.*,

Appellants,

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

MOTION TO DISMISS OR AFFIRM

Appellees respectfully move, in accordance with Rule 16.1(c) and (d) of this Court's rules, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals for the Second Circuit on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Appellees show in this motion that this appeal should not be heard for the following reasons: (1) no appeal lies to this Court pursuant to 28 U.S.C. § 1254(2)

because the Court of Appeals did not invalidate a provision of a local ordinance on which appellants rely; and (2) the questions on which the decision in this case depend are so unsubstantial as not to require briefs on the merits or argument in their resolution. The Court of Appeals did no more than apply established doctrine under Title VIII of the Civil Rights Act of 1968, the Fair Housing Law, 42 U.S.C. §§ 3601, *et seq.*, to uncontroverted facts and there is no conflict between the Courts of Appeals requiring resolution by this Court. Accordingly, the judgment below is correct.

The appellants in their Jurisdictional Statement accurately set forth the procedural history of this matter. The Statement is replete, however, with incorrect factual claims and claims unsupported by any judicial findings of fact at either the district court or Court of Appeals level. In light of the factual misrepresentations, appellees will first address certain factual issues.

STATEMENT OF THE FACTS

Appellants assert in their Jurisdictional Statement that the Court of Appeals engaged in unauthorized fact finding. This is not the case. The Court of Appeals carefully explained that it was following this Court's instruction that Rule 52(a) of the Federal Rules of Civil Procedure " 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' *Bose Corp. v. Consumers Union of the United States,*

Inc., 466 U.S. 485, 501 (1984); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855, n. 15 (1982)" (23-24a).[1] With this precept in mind, the Second Circuit reviewed the district court findings regarding the strength of the showing of discriminatory effect and the sufficiency of the Town's stated justifications for opposing the housing project (23a-24a).

A. Huntington's Population and Low Cost Housing Need

In its Jurisdictional Statement, Huntington attempts to give the impression that it is a racially integrated community which has met the housing needs of its less affluent residents. That is not the case. As the Second Circuit noted, Huntington is an "overwhelmingly white suburb" whose zoning regulations restrict private multi-family housing projects to the largely minority "urban renewal area" (3a), and which has "demonstrated little good faith in assisting the development of low cost housing" (34a). It is undisputed that in 1980, the Town's population was approximately 197,000, of whom 3.35% were black. This small black population is clearly residentially segregated, being heavily concentrated in the

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[1] In this brief, references with the symbol "a" refer to the Appendix to appellants' Jurisdictional Statement; the symbol "T" refers to the Joint Appendix Transcript volume filed in the Court of Appeals; the symbol "E" refers to the Joint Appendix Exhibit volume filed in the Court of Appeals; and the symbol "A" refers to the Joint Appendix filed in the Court of Appeals.

areas known as Huntington Station and South Greenlawn. The Second Circuit noted the undisputed fact that "43% of the total black population lived in four census tracts in Huntington Station and 27% in two census tracts in the South Greenlawn area. Outside these two neighborhoods, the Town's population was overwhelmingly white" (5a). Thirty of the Town's 48 census tracts contained black populations of less than 1% (5a).

Under the R-3M section of Huntington's zoning ordinance, privately developed multi-family housing is limited to the Town's urban renewal area. The R-3M provision allows the Huntington Housing Authority to build multi-family housing townwide.

The district court found that there is a large unmet need for low cost subsidized housing among Huntington's low income population and that this need disproportionately falls upon minority residents (81a). Thus, the Second Circuit noted, "The Town's Housing Assistance Plan (HAP), which is adopted by the Town Board and filed with HUD as part of Huntington's application for federal community development funds, reveals that the impact of this shortage [of low cost housing] is three times greater on blacks than on the overall population. Under the 1982-1985 HAP, for example, 7% of all Huntington families required subsidized housing, while 24% of black families needed such housing" (5a).

Consistent with this pattern of a disproportionate need for low cost housing among minority persons in Huntington, the Second Circuit stated that "a disproportionately large percentage of families in existing subsidized projects are minority" (5a). At time of trial, in

Gateway Gardens, a 40 unit public housing project built in 1967, 95% of the units were occupied by minority households and 74% of those on the waiting list were minority. In Whitman Village, a 260 unit HUD-subsidized development built in 1971, 56% of the units were occupied by minority households. In Lincoln Manor, another HUD-subsidized project built in 1980, 30% of the units were occupied by minority households and 45% of those on the waiting list were minority. Under the HUD existing Section 8 program, lower income families can obtain rent subsidies from the Housing Authority as long as they locate their own housing unit. In 1984, 68% of the families obtaining these subsidies and 61% of those on the waiting list were minority (5a).

Moreover, on the basis of undisputed facts, the Second Circuit noted that despite "a disproportionate number of minorities need low-cost housing, the Town has attempted to limit minority occupancy in subsidized housing projects" (6a). The record establishes that Town officials attempted to impose quotas limiting minority occupancy in the Lincoln Manor project and in an aborted project proposed for the urban renewal area (6a). This latter project was abandoned when the Town Board "unanimously passed a resolution withdrawing its support for the project because they could not 'ensure a particular ethnic mix' " (6a).

There is also a clear pattern of segregation of subsidized housing in Huntington. All three projects for low income families are located in the disproportionately minority Huntington Station area. Gateway Gardens and Whitman Village are adjacent to each other in the urban renewal area and are located in census blocks with more

than 40% minority residents. Lincoln Manor is located a few blocks away in a disproportionately minority census block (7a-8a).

B. Housing Help's Effort to Secure Multi-Family Zoning for its Project

The Second Circuit observed that, from the outset of its effort to create a racially integrated low cost housing project, Housing Help, Inc. (HHI) sought the assistance of Huntington officials. Specifically, HHI's Executive Director, Marianne Garvin and HHI Board members approached Michael Miness, Director of Huntington's Community Development Agency. Miness responded affirmatively to HHI's request for assistance and numerous meetings were held among him and HHI officers (8a-9a).

Because of the restrictive nature of the R-3M provision, HHI representatives repeatedly asked Miness for help in securing multi-family zoning for whatever parcel the organization ultimately obtained. Miness assured HHI that multi-family zoning would not be a problem because the Town Board would amend the ordinance if it supported the organization's project (9a).

In 1980, HHI obtained an option to purchase a 14.8 acre site on the corner of Elwood and Pulaski Roads. The Second Circuit noted, "This flat, largely cleared and well-drained property was near public transportation, shopping and other services, and immediately adjacent to schools. Ninety-eight percent of the population within a one-mile radius of the site is white. HHI set a goal of 25%

minority occupants. The district court found that 'a significant percentage of the tenants [at Matinecock Court] would have belonged to minority groups' " (9a).

HHI officials decided that the first step to be taken to obtain R-3M zoning for the project would be to ask the Town Board to amend the R-3M provision to permit privately built multi-family housing townwide. In the event of such a revision, HHI would then be able to apply for a zoning map change for its parcel. This approach was consistent with the structure of the Town zoning ordinance, which provides different procedures for amending the ordinance and for applying for a zoning map change. As the Court of Appeals concluded, HHI clearly followed the appropriate local procedure for changing the zoning code, the necessary first step in securing a multi-family zoning map change for HHI's project (14a).

There is no dispute that HHI requested the Town Board to amend the code to allow R-3M zoning townwide. HHI made a written proposal to the Town Board at an informal meeting with Town Board members on February 22, 1980 and at a formal Board meeting on February 26, 1980. On numerous occasions thereafter, HHI's Director followed up with inquiries about this request to the Town Board and other Town officials. As the Second Circuit stated, "During the numerous contacts with HHI directors and members, Town officials never mentioned that HHI should be pursuing a different application process. Both parties thus clearly understood that an application for a zoning change had been made. As this Court determined in *Huntington I*, no further petitions, formal or informal, were necessary" (14a, referring to *Huntington Branch NAACP, et al. v. Town of Huntington, et al.*, 689 F.2d

391, 393, n. 3 (2d Cir. 1982), *cert. den.*, 460 U.S. 1069 (1983)).[2]

On January 6, 1981, the Town Board passed a resolution acknowledging that HHI had applied for amendment of the R-3M provision of the zoning code as a first step to securing multi-family zoning for its site. It is clear from the Board's resolution that it rejected the HHI request (14a).

Based on this record, the Court of Appeals concluded that, "the Town's refusal to amend the zoning code rendered meaningless a request to change the zoning on the Elwood-Pulaski property, as R-3M classifications were reserved for property within the urban renewal area, and there were no other multi-family housing designations" (14a).

C. Huntington's Claim That the R-3M Provision Was Expanded Pursuant to An Opinion of the Town Attorney

Appellants argue in their Jurisdictional Statement that HHI should not have relied upon the plain language of the R-3M provision limiting multi-family housing to

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[2] In their Questions Presented, appellants argue that the Second Circuit set aside district court findings concerning whether HHI had, in fact, applied for a rezoning for Matinecock Court (Jur. State. at i). In fact, there is no factual dispute concerning the procedure that HHI followed. It is undisputed that HHI requested the Town to amend its zoning code and did not request a zoning map change. The Second Circuit merely concluded, as a matter of law, that the procedure HHI elected to follow was sufficient (14a).

the urban renewal area, but rather that HHI should have known that in 1978 Huntington's Town Attorney had issued an opinion sanctioning construction of the Lincoln Manor project just outside the urban renewal area. Huntington pressed this same claim in both the district court and the Court of Appeals. The district court rendered no findings on this claim and the Court of Appeals, based on the uncontroverted evidence, concluded that the Town Attorney's opinion was not made public until 1984 when it was extracted from Huntington by plaintiffs during the course of these proceedings (33a).

Prior to bringing this action, HHI could not have known of the existence of the Town Attorney's letter. None of the official Town documents concerning the Lincoln Manor rezoning mention that the site is outside of the Town's urban renewal area or that the Town Attorney had rendered an opinion permitting R-3M zoning for that site (T724-727; see Pl. Exs. 36, 37, 41 and 42). Moreover, the letter was not available to the public reviewing or purchasing the Town code or zoning maps (T2088-2089).[3]

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[3] In addition, although Miness was working closely with HHI throughout 1978-1979, he never told HHI representatives about the letter (T1057, 1099). Also, on November 8, 1979, at a meeting at HUD offices in New York City, in response to a question on how the Town was able to rezone the Lincoln School site, Miness made no mention of the Glickman letter, stating only "Don't ask the gyrations we went through to get that rezoned" (T557-558).

D. Huntington Has Repeatedly Varied the Stated Reasons For Opposing the HHI Project and These Stated Reasons Are Clearly Insufficient

Huntington has continually varied its stated reasons for opposing HHI's project and, on the basis of the record before it, the Court of Appeals concluded that all of the stated reasons were insufficient (31a).

Initially, in 1980, the Town reviewed the HHI proposal pursuant to its responsibilities under the federal Housing & Community Development Program. Under this program, the Department of Housing & Urban Development (HUD) was required to refer HHI's application for federal subsidies to Huntington for comment, a process known as Section 213 review (10a). To prepare the Town's Section 213 response, Huntington's Community Development Agency undertook a study of the HHI project. The Agency's findings (45a, n. 1) were reported to Town Supervisor Kenneth C. Butterfield who included them in the Town's October 14, 1980 Section 213 letter to HUD (10a-12a). The district court held that Butterfield's Section 213 letter set forth the Town's official reasons for opposing the HHI project (30a).

At trial, however, as the Court of Appeals noted, none of Huntington's officials or witnesses testified in support of the objections in the Section 213 letter (30a). Instead, Huntington's planning expert, David Portman, in his testimony presented an entirely different set of objections to the project. The district court apparently did not consider it appropriate to review Portman's after-the-fact attacks on the HHI project, as its opinion contains no findings concerning this testimony. The Court of Appeals

agreed, holding that, "*Post hoc* rationalizations by administrative agencies should be afforded 'little deference' by the courts . . . and therefore cannot be a *bona fide* reason for the Town's action" (31a). The Second Circuit ultimately concluded that the Town's stated justifications were "weak and inadequate" (31a).[4]

In its Jurisdictional Statement, Huntington again shifts its position, raising new objections to HHI's proposal. The Town reasserts the alleged concerns raised in the Court of Appeals relating to a sanitary waste disposal system and inconsistency with the Town's comprehensive plan. The Town then adds that it opposes this project because of lack of "conformity with the low density of the surrounding neighborhood and inaccessibility of the site to public transportation" (Jur. State. at 13).

These objections have already either been rejected by the lower courts or are unsupported by any evidence in the record. For example, the Court of Appeals observed, "The sewage concern could hardly have been significant if municipal officials only thought of it after the litigation

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[4] Appellants challenged this finding by the Second Circuit, arguing that the appellate court had engaged in unauthorized fact finding (Jur. State. at 13). This finding by the Second Circuit, however, constitutes a classic example of the correction or amendment of a district court finding predicated on a misunderstanding of the governing rule of law. See discussion at 2-3 *supra*. The district court, in considering the appellants' justifications, merely concluded that those justifications were not "pretextual" (84a) and did not marshal any evidence to support them. The Court of Appeals thus concluded that the district court had reviewed these justifications under incorrect legal standards (28a).

began. If it did not impress itself on the Town Board at the time of rejection, it was obviously not a legitimate problem" (31a). In addition, Huntington raises for the first time in this Court a concern about the project's accessibility to public transportation. The fact is, however, that HHI's parcel is located on a major thoroughfare served by a public bus which stops immediately in front of the parcel.

Despite appellants' claim to the contrary, the Town carefully studied the HHI project. Its consideration of the project is confirmed by the Town Board's January 6, 1981 resolution rejecting HHI's request for revision of the R-3M provision. The Board specifically acknowledged in that resolution that it had, "studied the various aspects of the proposal for the zoning change for 162 units at the said location at Elwood and Pulaski Roads . . . " (E53).

ARGUMENT

I.

APPEAL UNDER § 1254(2) DOES NOT LIE IN THIS CASE BECAUSE APPELLANTS DO NOT RELY ON A STATE STATUTE HELD BY A COURT OF APPEALS TO BE INVALID

Appellants assert jurisdiction for this appeal under 28 U.S.C. § 1254(2) which provides that a Court of Appeals ruling may be reviewed by the Supreme Court where a party relies "on a State statute held by a court of appeals to be invalid as repugnant to the . . . laws of the United States." This statute has long been strictly construed by this Court based on its "overriding policy, historically encouraged by Congress, of minimizing the

mandatory docket of this Court in the interests of sound judicial administration." *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 470, n. 12 (1985), quoting *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (construing 28 U.S.C. § 1253). *See also, Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 247 (1984); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42, n. 1 (1970) (term "state statute" construed narrowly).

In this case, appeal does not lie under § 1254(2) for two reasons. First, the Town does not *rely* on a state statute held by the Court of Appeals to be invalid. Second, the judgment of the Court of Appeals (reprinted at 36a-37a) does not strike the ordinance in question.

The term "statute" has been defined by this Court as a "rule with continuing legal effect." *Perry, supra*, at 42. The state statute involved in this case is the R-3M provision of the Code of the Town of Huntington (§ 198-20), which allows for multi-family housing. On its face, this provision limits private multi-family housing to the Town's urban renewal area. This provision, as applied, has the effect of limiting such housing to a disproportionately minority area. Therefore, the Court of Appeals held that the limitation in the R-3M provision confining private development to the urban renewal area could not stand.

Huntington has taken the position, however, that based upon the Town Attorney's opinion letter in the Lincoln Manor rezoning, the R-3M provision, as written, has no controlling legal effect. The Town argues that it does not, in fact, limit private multi-family housing to the

urban renewal area. Rather, the Town asserts that for the past 10 years, private multi-family housing could be built in "community development areas," i.e., areas in which federal community development funds can be expended (Jur. State. at 16; Appellees' Brief to the Second Circuit at 37; Transcript of oral argument in Second Circuit, March 3, 1988 at 27-34; Amended Answer at ¶17, A39).

At trial, William Miecuna, the HUD official responsible for administering community development grants to Huntington, testified that community development funds can be spent townwide in Huntington (T434-436). Therefore, according to Huntington's own argument, R-3M zoning could have been granted by Huntington townwide even prior to the Court of Appeals' decision. The Second Circuit's directive with respect to the R-3M provision therefore is of no practical impact on the ordinance and this aspect of the Second Circuit's ruling presents no live "case or controversy" which can be reviewed by this Court. See, *Ashcroft v. Mattis*, 431 U.S. 171 (1977).

Even if the Second Circuit's ruling altered the manner in which the R-3M provision is interpreted, the Court of Appeals' directive does not limit the Town's ultimate authority over the pattern of development in the community. The existence of the R-3M provision in the code does not automatically grant a developer the right to build multi-family housing. Rather, the provision permits a developer to apply for a zoning map change and the Town, as is the case with all zoning matters, retains ultimate discretion as to whether to grant or deny the application.

Finally, the judgment entered by the Court of Appeals makes no reference to the Town's zoning ordinance and does not order the district court to strike any part of it. The judgment directs only that appellees be granted multi-family zoning for their site – the critical relief sought by appellees in this litigation. Therefore, this Court should dismiss this appeal as not falling within the meaning of § 1254(2).

II.

THE QUESTIONS RAISED BY APPELLANTS ARE UNSUBSTANTIAL AND THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING ANY OF THE ISSUES RAISED

The opinion of the Court of Appeals in this case is based on 17 years of undisturbed case law following *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), holding that violations of Title VII and Title VIII may occur where a facially neutral policy or practice, such as a hiring test or a zoning law, has a differential impact or effect on a particular group. Because Title VII and Title VIII are parallel statutes, "part of a coordinated scheme of federal civil rights laws enacted to end discrimination" (19a), the Courts of Appeals have uniformly applied the *Griggs* holding under Title VII to Title VIII analysis, at least with respect to governmental defendants, and have held that a Title VIII violation can be established without proof of discriminatory intent. *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 575 (6th Cir. 1986); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988 (4th Cir. 1984); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977), *cert.*

den., 435 U.S. 908 (1978); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977), *cert. den.*, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. den.*, 422 U.S. 1042 (1975); *United States v. City of Parma*, 494 F.Supp. 1049, 1053 (N.D.Ohio 1980), *aff'd in relevant part*, 661 F.2d 562 (6th Cir. 1981), *cert. den.*, 456 U.S. 1012 (1982).

Appellants themselves concede the appropriateness of applying this disparate impact standard to appellees' challenge to the R-3M provision of the zoning ordinance. They argue here, as they did in the Court of Appeals, that a disparate treatment test, regarding proof of discriminatory intent, should be applied only to the municipality's handling of a rezoning application (Jur. State. at 21; 16a-17a). As the Court of Appeals noted, under Huntington's methodology, "every disparate impact case would include a disparate treatment component. This cannot be the case. There is always some discrete event (refusal to rezone property, refusal to hire someone because he did not graduate from high school) which touches off litigation challenging a neutral rule or policy" (17a). In this case, the Second Circuit appropriately applied the well established disparate impact standard, which has been followed by the Courts of Appeals and by this Court since *Griggs*. Its application of this test raises no substantial question appropriate for review by this Court.

There is no real conflict among the Circuits regarding the proof necessary to establish a Title VIII violation on a disparate impact theory. Appellants contend that the Circuits have not consistently dealt with the regional implications of a municipality's zoning decision, and suggest

for the first time in this Court that a model should be imposed for Title VIII cases based on the "fair share" theory adopted by the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. den.*, 423 U.S. 808 (1975). No Court of Appeals has adopted such a model for evaluating zoning decisions under Title VIII. Instead, the courts have considered local and regional issues as they related to the facts of specific cases. See, e.g., *United States v. City of Black Jack*, 508 F.2d at 1182-1183; *Arlington Heights II*, 558 F.2d at 1286-1288. In line with these decisions, the Second Circuit noted that HHI's project would have a desegregative effect on both the Town of Huntington and the region (25a, n. 8).

Similarly, contrary to the Town's contentions, it has been undisputed since *Griggs*, that disparate impact may be proven by a comparison of the proportionate impact of a facially neutral rule on the relevant minority population with the rule's impact on the relevant total population. In this case, the Court of Appeals correctly applied this analysis to the Town's refusal to rezone HHI's site. It noted the undisputed fact that under Huntington's HAP, 7% of all Huntington families needed subsidized housing, while 24% of black families needed such housing, and relied on the district court's undisputed finding that a significant percentage of Matinecock Court's tenants would be minority (27a, n. 11). Thus, the Court of Appeals concluded that rejection of HHI's proposal had a disproportionate effect on the black population of Huntington.

Contrary to the Town's contention, the standards for weighing a defendant's justifications under a disparate impact analysis are also well established by the Courts of Appeals and are in line with this Court's decision in *Griggs*, in which the defendant was required to show a "business necessity" justifying its actions. Since this Court remanded *Metropolitan Housing Development Corp. v. Village of Arlington Heights, (Arlington Heights I)*, 429 U.S. 252 (1977), the Courts of Appeals have been developing a standard in line with *Griggs* to weigh defendants' justifications in Title VIII cases.[5] The various standards developed by the Courts of Appeals do not conflict with one another. After some showing of disparate impact is made, all of the Courts of Appeals subjected defendants' asserted justifications to a heightened degree of judicial scrutiny.

The Court of Appeals in this case followed the Third Circuit's reformulation of *Griggs* that the defendant "must prove that its actions furthered, in theory and in practice, a legitimate *bona fide* governmental interest and that no alternative would serve that interest with less discriminatory effect" (22a, citing *Rizzo, supra*, 564 F.2d at 148-149). The Second Circuit also considered the two additional factors considered by the Seventh Circuit in *Arlington Heights II*: whether there is any evidence of

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[5] In *United States v. City of Black Jack*, 508 F.2d at 1185, which was decided before the remand of *Arlington Heights I*, the Eighth Circuit required the defendant to justify its conduct by a showing of a compelling governmental interest. This standard has not been followed by any other Court of Appeals, including the Second Circuit.

discriminatory intent and whether the plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing (22a).

Because the Second Circuit formulated a test consistent with *Griggs* and with the tests articulated by the other Circuits, the standard applied by the Court of Appeals should not be disturbed on appeal. The slight variations in the standards articulated by the various Courts of Appeals simply do not rise to the level of a conflict. Moreover, all of these standards are derived from *Griggs*, and are consistent with the purpose of Title VIII.

III.

HUNTINGTON'S RELIANCE ON ITS ZONING AUTHORITY DOES NOT SHIELD IT FROM TITLE VIII LIABILITY

Huntington also contends that this matter raises a substantial question because it arises within the framework of the Town's exercise of its zoning authority. The fact that Town officials acted pursuant to local zoning prerogatives does not, however, immunize their conduct from Title VIII liability. The Court of Appeals correctly stated, "[t]hough a town's interests in zoning requirements are substantial, see *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), they cannot consistently with Title VIII, automatically outweigh significant disparate effects" (23a). In this case, the Court of Appeals concluded that the ordinance "impedes integration by restricting low-income housing needed by minorities to an area already

52% minority" (25a). It is well established that in such a situation "the discretion of local zoning officials must be curtailed where the clear result of such discretion is the segregation of low income Blacks from all White neighborhoods." *Black Jack, supra,* 508 F.2d at 1184 (citations omitted).

IV.

THE RELIEF ORDERED BY THE COURT OF APPEALS RAISES NO SUBSTANTIAL QUESTION WARRANTING REVIEW BY THIS COURT

The relief ordered by the Second Circuit in this case forms no basis for an appeal to this Court. Contrary to the Town's argument, the Second Circuit did not restructure the operation of any governmental entity in this case (Jur. State. at 28). Rather, the Court specifically noted that "[o]rdinarily, HHI would not be automatically entitled to construct its project at its preferred site" (33a) and concluded:

> This case, however, is not ordinary. First, we recognize the protracted nature of this litigation, which has spanned over seven years. Further delay might well prove fatal to this private developer's plans. Second, other than its decision in December 1987 to build 50 units of low-income housing in the Melville section, the Town has demonstrated little good faith in assisting the development of low-income housing. . . . This history . . . clearly demonstrates a pattern of stalling efforts to build low-income housing (34a).

The Second Circuit also noted that site specific relief was appropriate because there were no other suitable parcels presently zoned for multi-family construction (33a).[6]

The relief ordered by the Court of Appeals is also appropriate because the Town had ample opportunity to study HHI's proposal as part of the Section 213 review process. Moreover, every conceivable aspect of the proposed project has been dissected in the course of this litigation. If there were any real problem with the proposal, it would have surfaced and been made part of the record. Under these circumstances, the Court of Appeals' decision to award site specific relief does not raise an issue suitable for review by this Court.

V.

THERE IS NO BASIS FOR DISMISSING APPELLEES', CLAIM ON STANDING OR MOOTNESS GROUNDS

Finally, the Town argues in its Questions Presented (but does not further discuss in the body of its Jurisdictional Statement) that appellees' claims should have been dismissed on grounds of lack of standing or mootness. This argument, apparently based on the Town's claim that HHI is financially unable to build the project in the absence of federal subsidies, was rejected by the Court of

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[6] There is only one vacant multi-family zoned site in Huntington – the so-called MIA site in the urban renewal area. As the Second Circuit stated, "by the time of trial, HUD had determined it was in an area with a high concentration of minorities and therefore an inappropriate location for a federally subsidized housing development (Testimony of HUD official, William Miecuna, JA-421-22)" (33a).

Appeals in 1982. *Huntington Branch NAACP, et al. v. Town of Huntington, et al. (Huntington I)*, 689 F.2d 391 (2d Cir. 1982), *cert. den.*, 460 U.S. 1069 (1983). The district court in *Huntington II* did not find that HHI lacked the financial resources to proceed with the project and the Court of Appeals did not address the issue. Accordingly, the Second Circuit's prior ruling is dispositive.

In any event, plaintiffs presented expert testimony at trial setting forth detailed calculations and projections establishing that the project can be constructed with private monies in the absence of federal subsidies (T791-802, 954-960, 1977-1978; Pl. Ex. 99F). Therefore, appellants raise no valid claims of nonjusticiability to be decided by this Court.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as not within the scope of 28 U.S.C. § 1254(2) or, in the alternative, affirm the judgment of the Court of Appeals.

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Respectfully submitted,

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