3-4-1975

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Eisner, Levy, & Steel

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Motion

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1104

CITIZENS COMMITTEE FOR FARADAY WOOD, ANNE M. MONTERO, THE ASSOCIATION FOR MIDDLE-INCOME HOUSING, INC., LEONARD GOODY, EDNA GOODY, ANITA GONZALES, A. V. BOWERS, LUCILLE BOWERS, EDWIN F. HENRY, LOUIS DEJESUS, BERYL ABRAHAM,

Petitioners,

v.

JOHN V. LINDSAY, individually, ABRAHAM D. BEAME, Mayor of the City of New York in his official capacity. THE HOUSING AND DEVELOPMENT ADMINISTRATION OF THE CITY OF NEW YORK, ALBERT B. WALSH, individually, ROGER STARR, Administrator, Housing and Development Administration of the City of New York, in his official capacity,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Second Circuit which affirmed the dismissal of this action.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit affirming the District Court's decision dismissing petitioners' action is not yet reported; it is appended hereto at 1a-28a.[1] The opinion of the United States District Court for the Southern District of New York, which is reported at 362 F.Supp. 651, is appended hereto at 29a-42a.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit was rendered on December 5, 1974. This petition is filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1254(1).

Questions Presented

1. Whether interference with a subsidized housing project by public officials should be scrutinized under Fourteenth Amendment and Fair Housing Law standards developed in racial discrimination cases when the project is designed to promote racial residential integration but relies upon an economic mix of tenants to accomplish that goal.

2. Whether the federal courts are required to evaluate the validity of asserted non-racial justifications for the interference by public officials with subsidized housing proj-

1. In this petition "a" refers to the attached appendix; "A" refers to the appendix filed with the court below.

ects when evaluating claims of purposeful racial discrimination.

3. Whether the Fair Housing Act applies in cases where public officials interfere with efforts to build racially integrated subsidized housing projects in white areas and when the developer relies upon an economic mix of tenants to achieve that goal.

Statutes Involved

42 U.S.C., §§1981, 1982 and 1983; the Fair Housing Act of 1968, 42 U.S.C. §3601, *et seq.*, and the Fourteenth Amendment to the United States Constitution.

Statement of the Case

This case involves a challenge to a determination by New York City officials to terminate a publicly financed low and middle-income housing project, which was conceived by the City officials themselves as part of their plan to bring about racially integrated housing opportunities for non-white citizens. The project was slated for the Faraday Wood site in Riverdale, a virtually all-white enclave in New York City (A497).

The petitioners are the Association for Middle-Income Housing (hereinafter, AMIH), a non-profit organization which has sponsored numerous subsidized housing projects in the New York area (A47-48); several low-income minority residents of New York City seeking publicly assisted, integrated housing, and the Citizens Committee for Fara-

day Wood, an *ad hoc* group of residents of the Riverdale area who supported the proposed development. AMIH was invited to devedop the Faraday Wood project by City officials because of its history as a developer of non-profit integrated housing (A52-53).

The respondents are the City of New York, the Mayor, the City Housing and Development Administration (hereinafter, HDA), and that agency's former administrator, Albert Walsh.

The Project's History

The Faraday Wood project originated as part of the program proposed by the City for scatter site subsidized housing outside of inner city ghettos. The City scatter site program was announced on March 16, 1966 by former Mayor John V. Lindsay who called for a revised public housing site selection program which would insure that new subsidized low-income housing would be built in "under utilized areas in outlying sections of New York City * * *" (A484).

To implement the program, the Department of City Planning in September, 1967 designated eleven sites for new subsidized housing. The Department emphasized that the scatter site effort represented the City policy of promoting racially integrated housing opportunities. The Department stated that the new program was "to open housing opportunities in sound, predominantly white, middle-income neighborhoods for those now confined to the City's ghettos. * * *" The Department pointed out "[Y]ou cannot breach the walls of the ghetto if you only

build within them. Placing all public housing projects in Negro and Puerto Rican neighborhoods would use public funds to reinforce existing patterns of segregation." The Department further emphasized that the scatter site effort was mandated by federal law (A485-487).

The City designated the Faraday Wood site as one of the eleven scatter site locations (A488-489). The parcel is located in North Riverdale, a community whose population at the time was 97.7% white (A497). There is no subsidized housing project in this part of the City (A 283).

Following this designation, local community opposition caused the City to modify the nature of this project. The original concept for Faraday Wood called for a 300-unit project, with 150 of the units slated for low-income citizens, and 150 units for middle-income citizens (A488-489, 492). This original proposal anticipated that the entire development would be built by a private housing sponsor, and that the 150 low-income units would then be leased or sold to the New York City Housing Authority and operated as part of the City's public housing program (A488-489, 492, 504). At several public hearings before the City Planning Commission in 1967, however, strong community opposition was expressed to the scatter site proposal generally and to the Faraday Wood project in particular (A265-271). After these hearings, the Commission determined to eliminate the Housing Authority's participation in Faraday Wood altogether and to cut back on the low-income units by converting the Faraday Wood development into a "Mitchell-Lama" housing project, with a low-income component of either 20% or 30% (A276).

It is undisputed that this reduction in the low-income component resulted from "opposition from the neighborhood to low income housing" (A527).

Under the Mitchell-Lama program the City provides assistance to limited profit housing companies so as to lower the interest rates on developments designed to provide housing for low-income persons.[2]

Modification of the proposal did not, however, relieve the vehement community opposition. At a May 1968 hearing before the local planning board on the AMIH proposal, approximately 500 participants, almost all of whom were white, emotionally expressed their opposition. Among other things, speakers argued that a subsidized development would threaten their property values and would result in "ghettoization" of the neighborhood (A301-306). A representative of the City Planning Commission attending this meeting emphasized that the scatter site program was intended to integrate the City's poor who were "mostly Negros and Puerto Ricans" into more affluent neighborhoods. This representative stated "some of your community leaders have told me that there is local reluctance to face this issue in public discussion, that it may be hidden in a smoke screen of seemingly plausible objections (A498, 501). The local board approved the project (A505). Shortly thereafter an organization called the North Riverdale Civic Association was formed to defeat the Faraday Wood proposal (A310).

In February 1969, City Planning Commission and HDA representatives met with AMIH officials to arrange an ex-

2. See, New York Private Housing Law, Article 2 (McKinney, 1962), as amended (McKinney Supp. 1974).

pedited processing schedule. The goal was to secure an early approval by the New York City Board of Estimate prior to the upcoming mayoralty campaign in 1969 to avoid having Faraday Wood become a campaign issue (A83-84, 528). Nonetheless, Faraday Wood did become a campaign issue and on August 8, 1969 Mayor Lindsay's office issued a press release stating that the Faraday Wood development was dead. The press release referred to local opposition to a high-rise structure and possible overcrowding of neighborhood schools (A91, 518).

Following the mayoralty election in 1969, an attempt was made to reactivate the Faraday Wood development. In January, 1970, Administrator Walsh advised AMIH that HDA would process its application for funding if the sponsor would agree to amend the proposal to provide for a development which was 50% for families and 50% for elderly. Walsh suggested the change to make the project "more palatable to the community" (A99-100, 434). In April, 1970, AMIH submitted a revised site application and architectural sketches to HDA (A197, 522).

The revisions did not, however, lead to HDA approval. Instead, for the next six and one-half months AMIH representatives were continually advised by HDA personnel that the issue was political and was being handled at a higher level (A108-109, 198, 233). In fact, AMIH's revised application was never even processed within HDA (A208). In September, 1970, the HDA official responsible for processing the Faraday Wood application recommended killing the development for political reasons (A529, 533).

The following month Administrator Walsh told the attorney for the owner of the Faraday Wood site—who had

optioned the land to AMIH—that great pressure was being exerted to kill the project. Walsh stated that he believed the fact that blacks would be living in the project probably explained some part of the opposition (A184-186).

Finally, in November, 1970, Walsh told AMIH's president it would be difficult for HDA to proceed with even the 50/50 project, but HDA would be prepared to process an all-elderly development at the site (A110-112, 479-481, 80, 186-189). AMIH's Board of Directors responded to HDA that a project exclusively for the elderly would constitute an abandonment of principle (A522). In December, 1970 HDA terminated the Faraday Wood project (A525).

In January, 1971, AMIH and the Citizens Committee for Faraday Wood sought the assistance of the National Committee Against Discrimination in Housing (hereinafter NCDH), a national, non-profit, civil rights agency and on February 8, 1971, NCDH's Executive Director met with Administrator Walsh. What was said was disputed at trial. NCDH's Executive Director testified that Walsh agreed "that the racial issue was a fundamental issue, a very important issue in the Riverdale area * * *" and that "race was a very important political factor" affecting the viability of the development (A323-324). By contrast, Walsh testified that he said he "believed that [he] had been able or would be able * * * to isolate [racial prejudice] from the responsible majority of the community * * *" (A460).

It is undisputed, however, that Administrator Walsh said he would try to reactivate the project once again (A327). When the project was not reactivated, this action

was commenced. Six months after the suit was filed, the owner of the Faraday Wood parcel, who had been holding the land for AMIH's development even though the option had expired, contracted to sell the site to the Soviet Union. The District Court and HDA were advised of this development. Subsequently, the HDA Administrator wrote to AMIH, stating that his agency was now prepared to proceed with a project on the Faraday Wood site with a 50% family/50% elderly component (A526).

At trial City officials attempted to justify the termination of the 50/50 plan on the basis of technical difficulties, such as cost factors, and because some members of the community objected on the grounds of alleged lack of adequate community facilities. Petitioners introduced voluminous evidence to establish that the project was technically feasible and that Riverdale was a most appropriate site for such a project.

In brief, with regard to the technical objections, the record reveals AMIH's past successful record in building such projects (A143-144) and the numerous steps it took to make this project feasible (A156-158, 159-180). Significantly, HDA's design section chief testified that any problems with AMIH's architectural renderings "were of a minor order as opposed to major" (A224-225). Respondents were unable to produce any internal memorandum recommending disapproval on technical grounds (A415-420).

With respect to community concerns, petitioners proved that the high-rise portion of its development would be set back from the street and shielded by low-rise structures

(A149-151), that eight out of the nine acres would be preserved in a natural, hilly and wooded state (A151), and that its density would be less than one-half as great as other neighborhood non-subsidized development (A286). As for community facilities, the former vice chairman of the City Planning Commission gave undisputed testimony that:

> * * * the Riverdale community is among the most if not the most privileged community in the city with respect to parks, schools, transportation, fire, police, with the possible exception of hospitals (A298).

Respondents presented no evidence to support its claim that it cancelled the project because of valid community concerns.

Relief Sought

After the loss of the Faraday Wood site, the petitioners were permitted to file a supplemental complaint and an amended claim for relief. The revised pleadings sought monetary damages, a declaratory judgment and an order requiring that an alternative site be made available for subsidized housing in Riverdale (A31-33). The claim for monetary damages was pressed to compensate AMIH for the approximately $214,000 it expended in developing the Faraday Wood project. The trial testimony with regard to these damages (A115-136) was uncontroverted.

District Court Proceedings and Opinion

The case was tried before the late Judge Edward C. McLean in February, 1972. Prior to decision, however, Judge McLean died, and the case was assigned to Judge Robert J. Ward who decided the matter on the existing record.

The District Court held that the project was terminated for political reasons in response to community opposition, rather than for the technical reasons asserted by the respondents at trial. The court, however, found that there was insufficient evidence to sustain the claim that the community opposition was racially motivated to any significant extent, and "to the extent there was racial opposition in the community," the court found "HDA was not acting in response thereto" (36a-37a). Noting that "the standard of review in equal protection cases is in a state of chaos," the trial court ruled that because the respondents' decision also adversely affected certain whites who would reside in the project, a racially discriminatory effect was not established (42a).

The Court of Appeals Opinion

Because the District Court decided this case on a written record, the Court of Appeals was free to undertake an independent evaluation of the facts. The majority found itself in "basic agreement with the District Court findings" (2a, fn.1).

Central to the majority's opinion was the finding that the final Faraday Wood proposal called for an 80 percent middle-income component, which would be predominantly white, and a 20 percent low-income component, which would be predominantly for racial minorities. The court ruled that this mix "precludes a finding that the project's cancellation had a disproportionate effect on nonwhites" (7a). Having determined that no racial effect flowed from the respondents' actions, the court applied a rational basis test to evaluate the constitutional claim. Without ruling on the

validity of the asserted community objections, the court held that the respondents had a rational basis to cancel the project solely because "community opposition, not shown to be racially motivated," was expressed (12a).

Judge James L. Oakes dissented to both the majority's findings of fact and the constitutional standard applied. Focusing on how a court should determine whether seemingly plausible community objections are in reality a mask for racial discrimination, the dissent emphasized six critical factors in this case. These were (1) that the stated purpose for the Faraday Wood project as defined by the City itself was to overcome previous practices of segregating subsidized housing and to promote integrated housing in white residential areas (19a-20a); (2) that the area in question was 97.7% white (20a); (3) that community residents were opposed to low-income housing and this opposition led to the dilution of the low-income component from 50 to 20 percent (20a-21a); (4) that the racial issue was aired at public meetings and that public officials were aware of the potentially disruptive effect of this issue (21a, especially fns. 10 and 11); (5) that the voiced community concerns were without validity (22a-23a), and (6) that the community did not object to other nonsubsidized projects in the area (23a). In view of all of these factors, the dissent concluded that "the reasons advanced to oppose scatter site housing at Faraday Wood were invalid and only a cover for discrimination" (23a).

The dissent also stated that even in the absence of a racially discriminatory motive, "at the very least there was a racially discriminatory effect" (23a). According to Judge Oakes, the majority's reliance on the 80/20 ratio

for finding no racial effect completely ignored the fact that Faraday Wood had been watered down to make it more palatable to the white community. The dissent stressed that the project was part of an affirmative action program "to remedy the effects of past discrimination" and that its sole reason was to provide decent housing for the ghetto's poor (24a). Also, the dissent noted that the economic mix in the project was part of a trend in such developments and designed to insure a more successful integrated environment (24a). Finally, the dissent reasoned that the intended beneficiaries of the project—"ghetto residents"—were adversely affected by the termination (24a). This evidential pattern caused the dissenting judge to conclude that a case of racial discrimination was established warranting rigid judicial scrutiny.

Reasons for Granting the Writ

I

This Court should settle the question whether a decision by public officials to terminate a publicly subsidized housing project designed to promote racial integration must be subjected to rigid judicial scrutiny under the Fourteenth Amendment and the Federal Fair Housing Law.

By ruling that the termination of a publicly-funded housing project conceived to promote some measure of escape for citizens trapped in racial ghettos is not subject to Fourteenth Amendment scrutiny because the project was designed to be internally integrated, the court below has established a rule which immunizes community opposition from constitutional challenge in most subsidized housing

cases. This decision simply fails to take into account that the structuring of housing developments which are to be racially integrated require an economic mix of middle-income as well as low-income tenants.

The ruling raises an important question of federal law because application of the lower court's doctrine would mean that housing sponsors using public subsidies to build low-income projects in white areas must propose developments which will be overwhelmingly comprised of minority citizens, or be effectively foreclosed from challenging governmental interference.

Since *Brown* v. *Board of Education,* 347 U.S. 483 (1954), this Court has recognized and has repeatedly affirmed the principle that minority citizens are entitled to live in an integrated society. See, *e.g., Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960); *Reitman* v. *Mulkey,* 387 U.S. 369 (1967); *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968); *Hunter* v. *Erikson,* 393 U.S. 385 (1969); *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972). This Court also has been concerned with the nexus between patterns of racial segregation in housing and in public education. *Milliken* v. *Bradley,* —— U.S. ——, 94 S. Ct. 3112, 3132, 41 L.Ed. 2d 1069, 1097 (1974, Mr. Justice Stewart concurring).

Congress and the Executive have also responded to this national goal of creation of an integrated society. Thus, Congress adopted in 1968 a comprehensive fair housing law with the goal of furthering equal housing opportunities for all citizens. 42 U.S.C. 3601, *et seq.* Congress also called upon the Executive in the Fair Housing Law to act affirmatively to promote this national purpose. 42 U.S.C.

3608. Federal housing agencies responded in turn, promulgating a variety of regulations to insure racial integration in federally subsidized housing programs. See, *e.g.*, *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Shannon* v. *HUD*, 436 F.2d 809 (3d Cir. 1970). Indeed, New York City's scatter-site housing effort was in response to these federal policies.

Most recently, Congress, in enacting the Housing and Community Development Act of 1974, 42 U.S.C. 5301, *et seq*, revamped the entire federal subsidized housing effort and once again affirmed the need for integrated housing developments. Critical to the revised housing program are the amendments to the Housing Act which create a new program of federal housing assistance payments, the purpose of which is to aid "lower-income families in obtaining a decent place to live and of promoting economically mixed housing. * * *" 42 U.S.C. 1437f(a). Payments may be made to assist lower-income families residing in "existing, newly constructed, and substantially rehabilitated housing." *Ibid.* To promote the goal of integrated housing Congress provided in the housing assistance program that with respect to housing developments for families involving more than fifty units, the Secretary of Housing and Urban Development "may give preference to applications for assistance involving not more than 20 per centum of the dwelling units in a project." 42 U.S.C. 1437f(c)(5). Congress therefore has articulated, as national policy, the promotion of housing developments involving an economic mix identical to the final Faraday Wood proposal—20 percent low income.

The rule articulated by the lower court of denying protection under the Constitution and Fair Housing Law, 42 U.S.C. 3601, *et seq.*, to projects with a limited proportion of lower-income persons, no matter the reason for such limitation, is at war with the policy of promoting racial integration through vehicles of economically mixed housing developments.

In reaching its decision that the petitioners failed to present a constitutional claim, the court below relied heavily on this Court's rulings in *Dandridge* v. *Williams,* 397 U.S. 471 (1970) and *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973), which reject low-income status as a suspect classification, and *Lindsey* v. *Normet,* 405 U.S. 56, 74 (1972), which holds there is no constitutional right to a certain quality of housing. This Court, however, could not have meant by these rulings to foreclose judicial scrutiny in subsidized housing cases involving projects specifically designed to break down past patterns of racial segregation, merely because the vehicle to accomplish that goal entails integrating people of differing incomes. As this Court said in *Green* v. *County School Board,* 391 U.S. 430, 439 (1968), a public agency must come forward "with a plan that promises realistically to work." New York City's scatter-site plan was its response to its affirmative duty to correct past discrimination in a housing context.

Nor should the court below have limited the scope of the Fair Housing Act (5a, n. 5) which is designed to assure freedom of residential choice, and thereby to "replace the ghettos by 'truly integrated and balanced living quarters.'" *Trafficante, supra,* 409 U.S. at 211. Indeed, that law was enacted to eliminate from the housing market

badges of slavery which remained after the Thirteenth Amendment, *Jones* v. *Mayer Co., supra,* 392 U.S. at 442-443, and this Court has directed that the Act be interpreted broadly in order to confront the task of reversing the pattern of residential segregation. *Trafficante, supra,* at 211-212; *cf., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

This case presents an important federal question which this Court should decide. It should answer the question as to whether this case falls within the contours of a racial case as petitioners urge, or whether it may be treated as merely an economic matter. The ramifications of such a decision will greatly affect public policies in housing and the effort to desegregate America's residential areas.

II

The lower court opinion conflicts with rulings in the Fifth, Eighth and Tenth Circuits dealing with challenges to interference with the construction of racially integrated housing projects.

The Second Circuit decision conflicts with the Eighth Circuit decision in *United States* v. *City of Black Jack,* Nos. 74-1345 and 74-1378 (8th Cir., decided December 27, 1974); the Fifth Circuit decision in *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974), and the Tenth Circuit decision in *Dailey* v. *City of Lawton, Oklahoma,* 425 F.2d 1937 (10th Cir. 1970).

Like this case, the conflicting rulings in the other circuits all concerned private efforts to construct publicly

financed housing projects which would achieve racial integration through programs which required low and middle-income residency. All met with community opposition based on allegedly non-racial objections. The Fifth, Eighth and Tenth Circuits all espoused the principle that a complainant need not establish an invidious motive by public officials and emphasized that the effect of the public action on minority citizens was controlling. Furthermore, these cases held that where a *prima facie* case of racially discriminatory impact or effect was established, the burden shifts to the public officials to justify their conduct under rigid judicial standards. Two of the circuits applied a compelling governmental interest test in evaluating the asserted justifications. *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach, supra; United States* v. *City of Black Jack, supra.* The Tenth Circuit simply emphasized that a high degree of judicial scrutiny is mandated. *Dailey* v. *City of Lawton, Oklahoma, supra.*

A. The Conflict as to Proving Racial Effect

The court below, focusing on the fact that the Faraday Wood project was designed to be economically integrated, ruled that the presence of a middle income component precluded "a finding that the project's cancellation had a disproportionate effect on non-whites." It reached this conclusion notwithstanding its recognition that the low-income units would be disproportionately occupied by racial minorities. (7a).

This conclusion is in stark conflict with the *Black Jack* ruling. The district court in that case, in denying relief, had applied precisely the same reasoning as the majority

in the Second Circuit. The Eighth Circuit reversed, stating:

> The District Court concluded that the ordinance had no discriminatory effect. It based this conclusion on its finding that, because Park View Heights was designed to meet the needs of families earning between $5,000 and $10,000 per year—a class including 32 percent of the black population in the metropolitan area and 29 percent of the white population—the ordinance has no measurably greater effect on blacks than on whites. The court's conclusion was in error. It failed to take into account either the "ultimate effect" or the "historical context" of the city's action. (Slip Opinion, at 11.)

The *Black Jack* court found a racial effect in the City's interference with the project because it focused on the impact of that action on the nonwhites who would have had access to the development. The court stressed that "Black Jack's action is but one more factor confining blacks to low-income housing in the center city***." (Slip Opinion, at 12). For minority citizens in New York, as well as in the St. Louis metropolitan area, the problems of housing and the patterns of racial ghettos are identical. And the racial effect of terminating a project designed to correct housing segregation is also identical. For a court to ignore this ultimate effect on minority citizens and focus instead on the proportion of prospective white tenants—a group whose housing opportunities are not circumscribed in the manner confronted by nonwhites—is to avoid the reality of the nation's racial problem. This conflict in approach is fundamental to the resolution of cases involving interference with the development of subsidized housing.

B. The Conflict as to Proving Purposeful Discrimination

The lower courts which have been faced with cases involving governmental interference with subsidized housing uniformly have determined whether that interference was predicated on a racially discriminatory purpose. In those cases where elements of purposeful discrimination emerged, the courts were facilitated in the process of finding a *prima facie* case of racial discrimination. See *e.g., United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach, supra,* 493 F.2d at 808; *Dailey* v. *City of Lawton, Oklahoma, supra,* 425 F.2d at 1039-1040; *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970) *cert den.* 401 U.S. 1010 (1971).

The court below, in analyzing the facts to determine racial purpose, concentrated only on what transpired at public meetings where the Faraday Wood project was considered and limited its search to overt racially discriminatory public statements. Finding no clear pattern, the court dismissed the allegations that racism permeated the events leading to termination (9a-10a).

By contrast, both the Eighth Circuit in *Black Jack* and the Tenth Circuit in *Dailey* emphasized that an invidious purpose can rarely be perceived in this fashion. Instead, the *Black Jack* and *Dailey* courts undertook an evalution of the circumstantial evidence. This is precisely the approach followed by Judge Oakes below in his dissent—an approach which led him to find the advanced justifications were "only a cover for discrimination" (23a).

The conflict in approach is most graphically illustrated by comparing the decision below with the *Dailey* opinion.

In *Dailey,* there were minimal overt manifestations of racial animus. To determine whether discriminatory intent in fact existed, the Tenth Circuit analyzed the non-racial objections, such as overcrowding of neighborhood facilities and schools, put forward by the City and found these objections insubstantial. The court concluded that allegations of racial prejudice "must be met by something more than bald, conclusory assertions that the action was taken for other than discriminatory reasons." 425 F.2d at 1040.

The contrary Second Circuit's approach of accepting the asserted justifications without evaluation, establishes a seriously defective standard for judicial review and permits racial discrimination by subterfuge.

C. The Conflict with Respect to the Interpretation of the Fair Housing Act

The Eighth Circuit in *Black Jack* held:

> Title VIII is designed to prohibit "all forms of discrimination, sophisticated as well as simple-minded." *Williams* v. *Matthews Co.,* 499 F.2d 819, 826 (8th Cir. 1974). Just as Congress requires
>
> > * * * the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[,]
>
> *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430-431 (1971), such barriers must also give way in the field of housing. (Slip Opinion, at 8.)

Petitioners contended below that the Fair Housing Act should be accorded a broad reading. The Court of Ap-

peals, however, did not attempt an independent analysis of the Fair Housing Act's significance, but ruled that its scope was no broader than the narrow interpretation it gave to petitioners' Fourteenth Amendment claim (5a, n 5). This Court should grant this petition to ensure that the circuit courts uniformly apply a proper interpretation to this Act which was passed to vindicate a policy to which Congress has accorded the highest national priority. *Trafficante* v. *Metropolitan Life Ins. Co., supra,* 409 U.S. at 211.

Conclusion

For all of the foregoing reasons, petitioners respectfully urge this Court to grant this writ of certiorari.

Respectfully submitted,

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March 4, 1975

OPINION OF THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 17—September Term, 1974.

(Argued September 24, 1974 Decided December 5, 1974.)

Docket No. 73-2590

CITIZENS COMMITTEE FOR FARADAY WOOD, ANNE M. MONTERO, THE ASSOCIATION FOR MIDDLE INCOME HOUSING INC., LEONARD GOODY, EDNA GOODY, ANITA GONZALES, A.V. BOWERS, LUCILLE BOWERS, EDWIN F. HENRY, LOUIS DEJESUS, BERYL ABRAHAM,

Plaintiffs-Appellants,

—v—

JOHN V. LINDSAY, Mayor of the City of New York, THE CITY OF NEW YORK, THE HOUSING AND DEVELOPMENT ADMINISTRATION OF THE CITY OF NEW YORK, ALBERT B. WALSH, Administrator, HOUSING AND DEVELOPMENT ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

LUMBARD, FEINBERG and OAKES,

Circuit Judges.

Appeal from judgment of District Court for the Southern District, Robert J. Ward, *J.*, dismissing class action that sought declaratory and injunctive relief and damages from New York City and certain of its officials for refusal of such defendants to process an application for

financing the construction of housing project allegedly because of racial discrimination.

Affirmed.

RICHARD F. BELLMAN, Esq., Tarrytown, N.Y. and LEWIS M. STEEL, Esq., New York, N.Y. (Eisner, Levy & Steel, Esqs., New York, N.Y., on the brief), *for Appellants.*

LEONARD KOERNER, Esq., Attorney, Office of Corporation Counsel of the City of New York, New York, N.Y. (Adrian P. Burke, Corporation Counsel of the City of New York, L. Kevin Sheridan and Frances Loren, on the brief), *for Appellees.*

LUMBARD, *Circuit Judge:*

Plaintiffs appeal from a judgment dated September 10, 1973, of the Southern District, Robert J. Ward, *J.*, dismissing their complaint after a trial without a jury.[1] 362 F.Supp. 651. The plaintiffs brought a class action on behalf of all New York City residents who reside in inadequate and deteriorating housing and who would qualify for residence within low-income public housing units. They sought declaratory and injunctive relief against New York City, its mayor, the city's Housing and Development Administration (HDA) and HDA's administrator on the

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1 The case was tried before the late Judge Edward C. McLean. After Judge McLean's death in October 1972 the case was assigned to Judge Ward. The parties stipulated that Judge Ward could decide the case on the record made before Judge McLean. While in such a case we have the power to set aside the findings of the district judge even if they are not clearly erroneous since we can evaluate the written record as well as he can, see *Orvis* v. *Higgins*, 180 F.2d 537 (2d Cir. 1950), cert. denied, 340 U.S. 810 (1950), we find ourselves in basic agreement with Judge Ward's findings.

grounds that the city's decision not to proceed with a publicly financed housing project for middle- and low-income families on an eight-acre plot known as Faraday Wood in the North Riverdale section of the Bronx violated the equal protection clause of the fourteenth amendment in that it was motivated by racial considerations and had a racially discriminatory effect. In addition, one of the named plaintiffs, the Association for Middle Income Housing, Inc. (AMIH), the sponsor of the project, asserted that the city's decision to terminate the project breached the city's contractual relationship with AMIH. The district court found that the plaintiffs failed to show that the defendants had purposefully engaged in racial discrimination in violation of the fourteenth amendment and that the city's action did not have an unconstitutionally discriminatory effect. It also dismissed the contract claim. We affirm.

New York City's scatter-site program for selecting public housing sites, first announced in 1966, was designed to promote the building of public housing in the less densely populated areas of the city. Faraday Wood was one of the sites selected under this program. The initial site plans for Faraday Wood included 150 housing units for low-income families and 150 housing units for moderate-income families. However, after public hearings[2] in the fall of 1967 Faraday Wood was designated for development under the Mitchell-Lama Act[3] as a housing development for middle-income families with 20% of the units reserved for low-income families. At the city's behest AMIH became the sponsor of the project and developed a preliminary plan

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2 The Faraday Wood project was only one of several projects that were discussed. At this point the city had made no firm decisions on what, if anything, to do with the Faraday Wood site.

3 The Mitchell-Lama Act is the popular name for the New York Limited-Profit Housing Companies Law, N.Y. Priv. Housing Law art. 2 (McKinney 1962), as amended, (McKinney Supp. 1974).

for the Faraday Wood site, which envisioned one high-rise (twenty-story) building and several low-rise (six-story) buildings. On May 14, 1968, the City Planning Commission indicated that it would consider a formal application for a Mitchell-Lama project on the Faraday Wood site. On May 27th, the HDA advised AMIH that it had given the project preliminary approval subject to submission of acceptable building plans and availability of city funds. Final approval of the project was contingent upon approval of the building plans by the City Planning Commission and the Board of Estimate.

Although there was considerable community opposition to the project, the application was processed in the normal manner until August 1969. On August 8, 1969, however, in the midst of a mayoral primary election, the City Hall Press Office issued a press release that stated that John V. Lindsay, then seeking re-election as mayor of New York City, was opposed to the project because the site was allegedly unsuitable for high-rise construction and because the community was concerned about overcrowding in its schools.[4] Soon after the press release was issued the HDA stopped processing plans for the Faraday Wood site. An attempt was made to resurrect the project in a modified form in February 1970. AMIH proceeded to adapt its plans to this new proposal, but ultimately differences between the HDA and AMIH led to the termination of the Faraday Wood project in December 1970.

Judge Ward found that the technical problems advanced by the city as justifications for the project's termination were not substantial and that the termination actually occurred as a political response to community opposition. He concluded, however, that there was no purposeful discrimination on the part of the city because the community

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4 At trial Mayor Lindsay denied that he had authorized the press release.

opposition was not, in the main, racially motivated. He also found that the termination did not have an unconstitutional racially discriminatory effect because 80% of the units in the project were reserved for middle-income families and thus the brunt of the project's termination was borne by those families. 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 nonwhite. After making these findings, Judge Ward applied the rational basis standard of equal protection review and found that the city's action did not violate that standard.

I.

Traditionally courts have used two standards of review when faced with claims that a certain state action violates the equal protection clause.[5] Usually the state action is

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5 In the alternative plaintiffs urge us to adopt an intermediate equal protection test—somewhere between the compelling interest standard and the traditional rational basis standard. The Supreme Court has seemed to apply such a test on several occasions. See, e.g., *Reed* v. *Reed*, 404 U.S. 71 (1971); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). See generally Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). This circuit also espoused such a test. E.g., *Boraas* v. *Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973); *Green* v. *Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973). However, the Supreme Court reversed *Boraas* and analyzed the case under the rational basis standard of equal protection review. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). In light of that reversal and the Supreme Court's refusal to adopt an intermediate standard of review in *San Antonio School Dist.* v. *Rodrigues*, 411 U.S. 1 (1973) (decided subsequent to the Second Circuit decision in *Boraas*), it is unclear whether the Court now accepts an intermediate form of equal protection analysis. Cf. *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974) (citing *Green, supra*, with approval). In any event, even if we applied the "slightly, but perceptibly, more rigorous" test of rationality of *Green, supra*, 473 F.2d at 633, the result in this case would be the same, as we point out below.

Plaintiffs also have advanced a statutory claim based on the Fair

upheld if it has a rational basis. See, e.g., *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). However, if the state action infringes upon a fundamental right (voting, travel) or is directed at a suspect class (race), the state is required to justify its action by showing a compelling state interest. See, e.g., *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Since there is clearly no constitutional right of access to a certain quality of housing, *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972), *cf. Dandridge* v. *Williams*, 397 U.S. 471 (1970), plaintiffs must establish that the city's action impinges on a suspect class in order to qualify for the stricter compelling state interest standard.

While race has long been recognized as a suspect classification, low-income status has not been so recognized. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973). Thus, plaintiffs must show that there was an impingement or a disproportionate effect on nonwhites when the city cancelled the Faraday Wood project. The district court concluded that no such effect was shown and we agree. Eighty per cent of the project was reserved for middle-income persons.[6] Since the apartments at Faraday Wood would have rented for at least $80 per room per month, the annual family income limitation for a four-room apartment would have been over $23,000. See N.Y. Private Housing Finance Law § 31 (McKinney Supp.

Housing Act, 42 U.S.C. §§ 3601-31 (1970). They do not specify how the Act is involved here, except to say that if they establish their constitutional claim, they will have established their statutory claim. Since they view whatever statutory claim they have as dependent on their constitutional claim, we need not discuss it. See *Acevedo* v. *Nassau County*, —— F.2d ——, slip op. at 4613, 4620-21 (July 2, 1974).

6 Since plaintiffs had no complaint with the city's actions until August 1969, the project under consideration then—the 80%-20% project—is the proper measure against which the effect of the termination should be measured. The 50%-50% plan was never more than a tentative suggestion of how the site might be used. See note 2 supra.

1974). The existence of such a high income limitation for the majority of the project's occupants precludes a finding that the project's cancellation had a disproportionate effect on nonwhites. Indeed, the 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.[7] Hence the assumption used in the typical public housing case is not valid here.

Plaintiffs' reliance on our decision in *Kennedy Park Homes Assn., Inc.* v. *City of Lackawanna*, 318 F.Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) is misplaced. In that case we found that the city of Lackawanna was clearly segregated—98.9% of its nonwhite citizens lived in one of its three wards. The populations of the other two wards were only .2% and .01% nonwhite. The nonwhite ward was the least desirable residential area of the city because it contained a large steel plant. Moreover, it was a ghetto in the traditional physical sense—only one bridge connected it to the rest of the city and the city's nonwhites were largely contained in that one limited area of the city. Against this background we held that the city could not, absent a compelling interest, thwart the efforts of a private organization to build housing for *low-income* families in the white area of the city by, among other things, refusing to ac-

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7 It is true, of course, that some nonwhites qualify for middle-income status, but the number is small. According to the 1970 census (based on 1969 figures) blacks and Puerto Ricans comprised only 6.1% of persons with incomes between $10,000 and $25,000 in the New York City SMSA. 1970 Census of Population, Characteristics of the Population, New York, Table 192.

cede to a reasonable rezoning request. Other courts have reached similar results. See, e.g., *Crow* v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); *Dailey* v. *City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *SASSO* v. *Union City*, 424 F.2d 291 (9th Cir. 1970); *Joseph Skillken & Co.* v. *Toledo*, No. C74-202 (N.D. Ohio, Aug. 28, 1974). See also *United Farmworkers of Fla. Housing Project, Inc.* v. *City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974).[8]

This case is clearly distinguishable from *Lackawanna*. First, in *Lackawanna*, and the other cases cited above, the housing projects were designed only for low-income persons. In such cases it was possible to say that nonwhites were disproportionately affected since only low-income persons were involved and since a disproportionate number of nonwhites are low-income persons. That is not true in this case. Second, in the cited cases a city acted to thwart a private developer's attempt to construct housing for low-income persons. The cities involved had no financial or other connection with the project. However, in this case, the governmental body that decided not to proceed with the project was the same one that initiated it and that was going to finance it. Instead of merely asking us to order the city to remove barriers to a private development, plaintiffs are asking us to enter a judgment "[o]rdering the defendants to secure for the plaintiffs an alternative site[9]

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8 Plaintiffs also cite several cases where courts have ordered cities to adopt nondiscriminatory site-selection policies for the placement of public housing projects. See, e.g., *Gautreaux* v. *Chicago Housing Authority*, —— F.2d ——, Nos. 74-1048, 74-1049 (7th Cir., Aug. 26, 1974); *Banks* v. *Perks*, 341 F.Supp. 1175 (N.D. Ohio 1972). These cases are inapposite here because the plaintiffs never established that New York City followed a practice of discrimination in its general site-selection policies. On the contrary there was evidence that the city adopted a scatter-site program in 1966.

9 The original site has since been sold by its owner to the government of the Union of Soviet Socialist Republics.

in Riverdale upon which the defendants will make possible construction of a housing project for low-income and minority citizens of New York of substantially the same number of dwelling units as have been lost as a result of the illegal blockage of AMIH's Faraday Wood project." Such relief would clearly be inappropriate.

Also, in *Lackawanna* the record clearly established that the city's actions had been motivated by improper racial considerations. *Kennedy Park Homes Assn.* v. *City of Lackawanna, supra,* at 109, 113-14. Here, however, our reading of the record convinces us that the district court was correct in concluding that the project was terminated because of community opposition and that such opposition was not for the most part racially motivated. There was, for example, evidence in the record that demonstrated considerable community opposition to high-rise structures in general.[10] Plaintiffs' attempts to prove the existence of racial motives were largely based on descriptions of public meetings where some members of the audience spoke in opposition to the project. However, there were also those who spoke in favor of the project and many of the reasons advanced in opposition—opposition to high-rise construction, fear of overtaxing community facilities—could not be characterized as racist. Plaintiffs, and our dissenting brother, conclusively perceive racism where we and the district court do not. We think that such percep-

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10 The existence of high-rise structures in North Riverdale does not indicate a lack of bona fide opposition to such structures on the part of many of the community's citizens. In fact, a February 1968 report by a consulting firm employed by the New York City Planning Commission indicated that "[c]onstruction of high-rise units during the past decade is pinpointed by [Riverdale] community leaders as their major objection to recent developments." Such opposition, of course, can only be expressed when the public is allowed to participate in the planning process. Thus it is only when a public agency, which is required to hold hearings on its projects, proposes a high-rise building that a community has an opportunity to express its opposition to such buildings.

tion in this case confuses an area's desire to protect comparatively uncrowded living conditions with a desire to keep minorities out. It is simply not true that community opposition to the housing proposal here had to be based upon racism. Just because plaintiffs "know" that the opposition was racist is not proof enough. In any event, the decision to terminate the project was made by city officials and plaintiffs did not establish that they where motivated by racial considerations, and, in fact, there was evidence that those officials were not motivated by such considerations and did not believe that the community opposition to the project was primarily racial in character.[11]

In *Lackawanna* we also stressed the historical background of the city's policy of discrimination and noted how it affected the city's nonwhites. Here, as noted above, there is no showing that the city's action had disproportionate effect on nonwhites since the project was designed mainly for middle-income persons.[12] Moreover, this project was only one of many city housing projects. The money tentatively allocated to the Faraday Wood project would be available for another housing project. In contrast, when a private developer is prevented from building pub-

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11 We realize that *Palmer* v. *Thompson*, *supra*, suggests that courts generally should not inquire into motives in order to establish racial discrimination. However, we conclude from a reading of all the opinions in that case that it is doubtful that the Court intended to exclude from all consideration clear evidence of purposeful racial discrimination.

12 Contrary to the assertion of the dissent that the Faraday Wood project was designed to aid low-income persons, and as clearly evidenced by the high-income limit for project renters, the Mitchell-Lama Act was designed to correct "[t]he greatest single deficiency in the States urban centers [which is] the shortage of moderate-income housing for families whose earnings exceed the traditional public housing level." Foreword to McKinney's Consolidated Laws of New York, Private Housing Finance Law, vii (1962) (statement of MacNeil Mitchell, Chairman, Joint Legislative Committee on Housing and Multiple Dwellings).

lic housing in a city, no such housing whatever is provided to the city's residents.

On the basis of *Lindsey* v. *Normet, supra,* and *Palmer* v. *Thompson,* 403 U.S. 217 (1971), which held that a municipality could choose not to operate any swimming pools rather than operate them on a desegregated basis, we recently rejected a claim similar to one that plaintiffs make here. In *Acevedo* v. *Nassau County,* —— F.2d ——, slip op. at 4613 (July 2, 1974), we examined Acevedo's claim in light of the cases cited by plaintiffs in that case and we said:

> Appellants argue, however, that once appellees began to plan low income housing for Mitchell Field they could not, consistent with the Fourteenth Amendment, abandon the plan if to do so would have a disproportionate impact on minority groups, unless appellees could show a "compelling state interest" for that abandonment . . . .
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> All of the cases on which appellants rely involve either the refusal of a governmental body to grant benefits equally to all or the governmental obstruction of private projects beneficial to minority groups or integration. 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 the constitution.

Acevedo v. *Nassau County, supra,* at 4618-19.

Plaintiffs seek to distinguish *Acevedo* by noting that there was no private builder or sponsor involved in that case.[18] This seems irrelevant, especially since it probably

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18 Our opinion in *Acevedo* made no mention of Acevedo's failure to show that Nassau County was segregated. The dissent's attempt to distinguish *Acevedo* on this ground seems strained.

only indicates that the Nassau County plans were more tentative than the plans here. In any event, the involvement of AMIH in the Faraday Wood project does not change the fact that the project was primarily a city project. The city initiated it, was intimately involved in its planning, and was going to finance it.

We conclude that there is no fundamental right to a certain quality of housing and that a project concerned primarily with middle-income persons does not deal with a suspect class. Hence the city's actions need not be justified by a compelling governmental interest. Those actions, in view of community opposition not shown to be racially motivated, more than satisfy the requirement of rationality, even if that be viewed with more than minimal vigor. Cf. note 5 supra. Thus here, as in *Acevedo,* there is no constitutional violation.

Our decision today does not represent a retreat from *Lackawanna.* In that case we held that a city cannot take discriminatory action which impedes a private organizations' efforts to build housing for low-income families. Nor can a city build such housing itself and then operate it in a discriminatory manner. See *Otero* v. *New York City Housing Authority,* 484 F.2d 1122 (2d Cir. 1973). We hold today only that a city cannot be compelled to build and finance a specific housing project designated, in part, to aid low-income families or any specified group of its citizens simply because it started to plan such a project. As Justice Douglas said in *Berman* v. *Parker,* 348 U.S. 26, 33 (1954): "We do not sit to determine whether a particular housing project is or is not desirable." [14]

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14 The soundness of Justice Douglas's statement is seen in the dissent's uncertainty over what remedy would be appropriate in this case if its views were followed. Courts are not equipped to choose housing sites, approve plans, sell bonds and oversee construction projects. Moreover, if we required the city to build this housing project, the city might be

II.

Plaintiff AMIH also asserts a contract claim against the city. In AMIH's words, "This claim is based on the existence of an implied agreement that [the city] would process AMIH's application for Mitchell-Lama funding in good faith." Although plaintiff concedes that New York law governs this claim, it relies principally on federal cases that hold that the federal government has a duty to consider honestly bids that it has solicited. See, e.g., *Keco Industries, Inc.* v. *United States,* 428 F.2d 1233 (Ct. Cl. 1970); *Heyer Products Co.* v. *United States,* 140 F.Supp. 409 (Ct. Cl. 1956).

However, even if we adopted the standards of these cases the plaintiffs have failed to show that the city acted in bad faith. AMIH knew that this proposal had to be approved by the New York City Board of Estimate before the parties could enter into a binding contract. The Board of Estimate is a political body so AMIH knew that it would consider expressions of opinion by members of the public. It seems to us that it is a proper exercise of discretion for HDA to terminate a project when it feels that the Board of Estimate is unlikely to approve it because of public protest and political considerations.

AMIH also claims that since the city invited it to sponsor the project and caused it to expend money to develop acceptable plans for the project, the city is estopped from denying AMIH's claim for sums expended in reliance on the city's actions. As far as municipalities are concerned, the New York courts have clearly rejected

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deterred from considering future projects for fear that if it indicated even a tentative interest in a project, the federal courts might later force it to build it, despite the city's financial condition or its other housing programs.

such a doctrine. *Emerson* v. *City of New York,* 34 App. Div. 2d 901 (1970).[15]

Affirmed.

OAKES, *Circuit Judge* (dissenting):

The majority opinion proposes a double constitutional standard in housing cases—"strict" equal protection if a housing project contemplates a very high percentage of, or exclusively, low income units, and simple "rationality" if it includes a goodly percentage of middle income units—apparently on the theory that middle income housing is for white people and low income housing for nonwhites. As such the opinion carries with it its own abnegation of previous precedents of this and other courts and, with all respect, unrealistically overlooks the fact that this particular project, like many others, employed a mix of low and moderate income units primarily to make it more palatable to the local community. The opinion is, perhaps, another harbinger of a new supposedly benign judicial (on top of a firmly established executive) policy of laissez faire, and as such I do not quarrel with it philosophically here. Rather, I call attention here to it only as a departure from two decades of judicial activism in the area of restoring meaning to that provision of the United States Constitution calling for equal protection of the laws, recognizing, of course, that as now construed above that clause is deemed not to require protection of "poor" people as a

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15 Plaintiffs' reliance on *Planet Construction Corp.* v. *Board of Educ.,* 7 N.Y.2d 381 (1970), is misplaced. In that case the New York Court of Appeals merely held (4-3) that a board of education could itself take action with regard to a contract that it had entered into that might estop it from asserting a particular provision of that contract. That is a far cry from holding that a governmental body can be held to a contract because of certain actions taken by its officials, when all parties involved knew that the officials had no power to enter into a binding contract.

class equal to that of "rich," even while it requires protection by the laws of nonwhite people equal to that of whites. Here by a strained differentiation of our prior case law, on the basis that this was 80 per cent middle income housing (even if originally intended to benefit primarily nonwhite, and therefore probably lower income, residents of the ghettos of the City of New York), that case law, so far as it gave constitutional protection in the housing area to those most needing it, has been pushed further back on the shelf.

It is by no means a confession that this dissent presupposes, I suppose, that housing is, if not a preferred or even fundamental "right," one of the most basic necessities, not just because it means a roof over the head of an American individual or of his or her family, but because it carries with it a bundle of consequences that deeply involve our daily lives as American citizens, as voters, as students, as learners, as job seekers. It would be an oversimplification to say that a "right to housing" was not in the contemplation of our forebears, because anyone, by moving 100 miles more or less westerly could find his own homestead. One may suggest, 200 years later, that such a right to shelter is "fundamental" when many people no matter what they try to do are confined to living in that part of a city where grocery prices and crime rates are highest, garbage is collected last, soft coal is still burned for fuel, windows are broken, schools are worst, medical care is least and jobs are a subway ride and an education away.

This dissent also presupposes that equal protection of the *laws* means those laws which subsidize, aid and foster a given social policy, not merely those laws which prohibit or penalize antisocial conduct. The fundamental question that this easy-to-gloss-over case deals with is whether there

are any constitutional (and perforce court-enforced) remedies for local opposition for racial/social reasons to new housing opportunities (outside the ghetto) that would otherwise be made available by a city for its ghetto residents.

The factual setting of the present case has at the same time both a subtle and a stark side. The subtle side reflects a community's attempts to conceal its racially motivated negativism against housing for inner city residents, by use of the disguise of legitimate local concerns. The stark side is that there was in the defeat of the project here involved yet another victory for parochialism, helping perpetuate the formidable wall that serves to exclude the urban poor from the more affluent communities on the fringe of our metropolitan areas.[1]

This is the latest in a line of cases in which a private developer, seeking to build a low income housing project which makes use of governmental subsidies, is unable to secure the necessary governmental approval to permit the project to proceed. As background to this litigation is the sentiment, right or wrong, that at least partial solutions to many of urban America's problems may be found by breaking down metropolitan income-group clustering, with the poor concentrated in certain political subdivisions, the "central city." [2] Superior educational opportunities, the potential for better housing to be built on pres-

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1 The local community here involved, North Riverdale, is not a suburb but a part of New York City, with its own planning district.

2 *See generally* Haar & Iatridis, Housing the Poor in Suburbia (1974) (hereinafter cited as Haar); A. Downs, Opening Up the Suburbs: An Urban Strategy for America (1973); Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 Yale L.J. 483 (1973); Shields & Spector, *Opening Up the Suburbs: Notes on a Movement for Social Change*, 2 Yale Rev. L. & Soc. Action 300 (1972). *But see* Glazer, On "Opening Up" the Suburbs, The Public Interest 89 (1974).

ently underutilized land, and an increasing number of jobs all appear to lie in areas—generally "suburbs"—beyond the reach of the urban poor. Coupled with this discrepancy is an understandable reluctance on the part of the low population density communities to grant easy access to their resources.[3] We have then a wall that presently exists between affluence and poverty—a wall which some have attempted to breach by litigation aimed at, *e.g.*, land use controls, or as here promoting low or low and middle income housing in what for want of a better generic name I will call the suburbs. Most of this litigation typically has raised, and certainly involved, claims under the equal protection clause both of racial discrimination and of wealth discrimination (although since *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), the claims of wealth discrimination carry no weight). *E.g.*, *Kennedy Park Homes Association* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F.2d 291 (9th Cir. 1970).

The present decision undercuts the statement by this court in *Kennedy Park Homes*, a leading case in this area of the law, that

> [e]ven were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify.

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3 A November 5, 1974, advertisement for a town-sponsored "public service" television program put it very succinctly: "Is the onslaught of urban sprawl creeping eastward from New York City to Suffolk County? Does the mass of humanity threaten the serenity of suburban living as it was once enjoyed?" N.Y. Times, Nov. 5, 1974, at 61, cols. 7 & 8 (city ed.).

As such, it also runs contrary to more recent cases from other circuits such as *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach,* 493 F.2d 799, 801 (5th Cir. 1974), *Gautreaux* v. *Chicago Housing Authority,* No. 74-1048 (7th Cir. Aug. 26, 1974), and *Joseph Skillken & Co.* v. *City of Toledo,* No. C 74-202 (N.D. Ohio Aug. 28, 1974), all of which recognize the importance of providing a judicial remedy in situations where community opposition to low income housing is predicated upon racial discrimination.[4] I would follow *Kennedy Park* in its view of the demands of the equal protection clause, even though I have a number of doubts, if not misgivings, as to the validity or value of the social hypothesis that the problems of minority groups concentrated in inner city areas can be remedied by diffusion, without creating other problems—such as weakening of political power—of considerable moment.

Concededly on this review we are not bound by the usual rules requiring us to give special weight to findings made by a district judge, since here his role was simply to read, as can we, the printed pages of a record already made. As such, the findings below that there was no racial motivation underlying the failure of the Housing and Development Administration (HDA) to submit the final proposal to the Board of Estimate,[5] and no racially discriminatory

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4 *See also Appeal of Kit-Mar Builders, Inc.,* 439 Pa. 466, 268 A.2d 765 (1970) (striking down lot size requirements); *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 395 (1970) (exclusion of apartment buildings from community zoning plan was unreasonable). While neither of these cases involved proven racial discrimination, they express the need for a strict standard in reviewing local zoning plans which fail to take into account regional housing needs. *But see United States* v. *City of Black Jack,* 42 U.S.L.W. 2513 (E.D. Mo. Mar. 20, 1974).

5 This is not a case where a plan was submitted to and rejected by the Board of Estimate or final approving authority. *Cf. Acevedo* v. *Nassau County,* No. 74-1235 (2d Cir. July 2, 1974), slip op. 4613, 4618-19. To be sure, there is no guarantee that the Board of Estimate

effect flowing therefrom, seem to me clearly erroneous.[6] I will discuss these findings first.

The project here in question originated as part of a program for scatter-site subsidized housing outside of inner city "ghettos," of which New York has its share. This was announced by then Mayor John Lindsay on March 16, 1966, doubtless as part of his program to keep the City "cool" in an era of national urban tension, but in any event so as to take advantage of, in the words of his press release, "underutilized areas in outlying sections of New York City."[7] The September, 1967, Newsletter of the De-

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would have approved the Faraday Wood plan in any of its various phases, but absent a good faith submission to it we will never know. At the very least, it seems to me "best efforts" were required of the HDA. *See Gautreaux* v. *Chicago Housing Authority*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

6 I agree with the majority that *Palmer* v. *Thompson*, 403 U.S. 217 (1971), does not exclude inquiry into motives in a claim of racial discrimination. While there is language that it is the facial content or the effect of a law which must provide the proof of discrimination, *id.* at 225, throughout the opinions in *Palmer*, there are constant references to the "meager" quality of the record then before the court. In the present case, the record is a substantial one, and while the proof of racial motivation is circumstantial, it is nonetheless persuasive to me.

7 The scatter-site housing program had the stated purpose of providing opportunity for "status advancement" of the residents of the City's ghettos. Proponents of "opening up the suburbs" set forth a number of reasons for dispersing racial groups, consisting of lower and middle income American citizens, throughout underutilized areas in the city or its suburbs, in addition to long cherished notions of elementary social justice: to provide greater access to job opportunity; to provide an escape from the slums, with their high crime ratios and low housing standards; to furnish greater educational opportunity (and thereby, incidentally, avoid the necessity of busing for educational equalization purposes); to redistribute the cost of combatting poverty and the social ills it helps effectuate; to halt the decay of the inner city; and to avoid a society that is divided if not polarized. *See* A. Downs, Opening Up the Suburbs: An Urban Strategy for America 115 (1973). It happens that the mayor's housing program, to the extent it contemplated the increase of housing choices and promotion of a more racially balanced community, furthered U.S. Department of Housing and Urban Development (HUD) policies. Title VIII, Civil Rights Act of 1968, Fair

partment of City Planning, announcing *formal* designation of 11 sites including the one at bar, pointed out that the *object* of this phase of the City's housing program was *"to open housing opportunities in sound, predominantly white, middle-income neighborhoods for those now confined to the City's ghettos. . . ."* (Emphasis added.) The policy behind the program was stated quite simply: "[Y]ou cannot breach the walls of the ghetto if you only build within them." The majority opinion seems to me to ignore this stated purpose and thereby somehow seeks to make Faraday Wood into a housing project primarily for the benefit of middle income whites. It was, however, a project primarily for the benefit of low income nonwhite ghetto residents.

In examining the defeat of Faraday Wood, two facts are of special significance in determining whether it was racial discrimination that blocked the project. First, the site was located in the predominantly white North Riverdale section of the Bronx; in the 1960 census North Riverdale had a population of 12,376, of which 97.7 per cent were white, 2.0 per cent Negro and 0.3 per cent Puerto Rican. Second, it was community opposition to the concept of a low-middle income scatter-site housing development in Faraday Wood that resulted in its changes of form and ultimate demise. The original concept for the development called for a 300-unit project, with 150 units for low income and 150 for middle income citizens;[8] after strong community opposi-

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Housing Act, 42 U.S.C. § 3601, which states that "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." See also 42 U.S.C. § 3608; *Otero* v. *New York City Housing Authority*, 484 F.2d 1122, 1132-34 (2d Cir. 1973). *See* Haar, *supra* at 319.

8 The New York Housing Authority's original plan called for 300 units. The original AMIH proposal, filed July 28, 1967, indicated a willingness to build 465 units with an equal mix of low and middle income units.

tion at the August 2 and September 11, 1967, hearings the planning officials cut this back to a low income component of 20 to 30 per cent only.[9] Again, after continuing community opposition expressed emotionally at a May 7, 1968, hearing of the local planning board,[10] and expressed practically by the formation of the North Riverdale Civic Association in opposition to the project, the project was said in a mayor's press release, issued in the heat of a reelection campaign, to be dead. Subsequently it was locally proposed to rezone the Faraday Wood section to a lower density classification. At this point, the City cut out the low income component altogether, making the project, or what was left of it, 50 per cent middle income and 50 per cent elderly, and, after November, 1970, an all elderly one. While there is some dispute whether the then administrator of HDA told a representative of the National Committee Against Discrimination in Housing (NCDH) that he agreed "that the racial issue was a fundamental issue, a very important issue in the Riverdale area . . . ,"[11] there

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9 An HDA memo in evidence attributed the shelving of the original proposal to "opposition from the neighborhood to low-income housing . . . ." At all times, it should be noted, the project did contemplate at least 10 per cent usage for elderly citizens.

10 Opposition at this meeting was on the basis of the threat of the project to existing property values, the overtaxing of community facilities and schools, and the possibility of increased crime. It is interesting that a City Planning official at the meeting stated, "Some of your community leaders have told me that there is local reluctance to face [the] issue [of providing "increased opportunity" for "status advancement" to "today's poor—mostly Negroes and Puerto Ricans"] in public discussion, that it may be hidden in a smokescreen of seemingly plausible objections." Statement of Barney Rabinow, Assistant Executive Director, Department of City Planning, May 7, 1968 (Plaintiffs' Ex. 6).

11 The HDA administrator, Albert Walsh, said that he told the NCDH official that he "believed that [he] had been able or would be able . . . to isolate [racial prejudice] from the responsible majority of the community . . . ."

is no doubt but that it was community opposition to this scatter-site project that killed it.

As in most of these cases, to grasp the true nature of the opposition, it is necessary to examine the validity of the objections actually voiced, to determine whether they were rational and plausible or only superficially valid and used, consciously or unconsciously, to mask discrimination. *Cf. Olzman* v. *Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974). The justifications for opposition as expressed by the district court were "rapid population growth and subsequent overtaxing of community facilities" and "the expanding number of high-rise apartment buildings." But there was no evidence adduced in this record to support those concerns; on the contrary, the Faraday Wood site was considered by all the public officials testifying at trial as most appropriate. As to overburdening schools, there was every indication that construction of the already approved and budgeted John F. Kennedy Educational Center in Riverdale would resolve all classroom needs for years to come; the project developer, moreover, offered to provide 7,000 square feet of extra classroom space pending completion, to avoid any temporary problems. Parking objections were taken care of by incorporating an underground garage large enough to handle one car per dwelling unit. Recreational area objections were adequately responded to by opening up to community use seven of the eight acres on the site. No showing whatsoever was made of any adverse effect on transportation facilities or police, fire or hospital services; indeed the only evidence in the record was that all of these were in abundance in a community which was considered "among the most if not the most privileged community in the city" according to a City Planning Com-

mittee executive.[12] As for the "high-rise" objection, not only was the project designed to be built on only one out of eight acres, with the high-rise structure back from and shielded from the street, but many other apartment buildings (not for low income) had been built, including high-rises. *No zoning exception* was needed for the project. Finally, 1971 city rezoning left Faraday Wood for future apartment construction and, interestingly, the U.S.S.R. Mission to the United Nations, which ultimately acquired the site in question, is in fact building a large high-rise apartment structure *without* community opposition. *See* New York Times, Jan. 13, 1974, § 8, at 1 (city ed.). All of the evidence in my mind supports the proposition that the reasons advanced to oppose scatter-site housing at Faraday Wood were invalid and only a cover for discrimination.

Even if my interpretation of these facts were incorrect, however, at the very least there was a racially discriminatory *effect*. The district court relied heavily on, and Judge Lumbard's opinion reemphasizes, the allegation that "the determination did not have an unconstitutional racially discriminatory effect because 80% of the units in the project were reserved for middle income families and thus the brunt of the project's termination was borne by those families." [13] I would not accept the allegation in any event, since originally the project was designed for 50 per cent or 150 low income families. But even accepting that allegation, what about the 20 per cent of 300, *i.e.*, 60 families left in the inner city? If as is likely the mix of low and middle income families was changed so as to make the project more palatable to the North Riverdale com-

12 He did expect hospital services if the development were exclusively for the elderly.

13 In fairness to Judge Ward, however, he said "70-80%." 362 F. Supp. at 656.

munity, nevertheless the rejection of the project still adversely affected a number of ghetto residents. Are we to have two different constitutional rules, as the majority opinion suggests, depending on the housing mix? In any event, I believe we have a different factual case from the one conceived by the district judge and ruled on by the majority.

In measuring effect, it seems to me, it has to be remembered, as the majority has not done, that the Faraday Wood project was part of a program which was in the nature of affirmative action to remedy the effects of past discrimination. To say that a decision to terminate the project has no racially discriminatory effect is to disregard the reason that the scatter-site housing plan was adopted in the first instance—a reason that was declared in advance by the City itself.

The *sole* reason for the Faraday Wood project was to provide decent housing for the inner city poor who were presently said to be residing in the New York ghettos. Middle income units were included because the trend in such developments was, for a number of reasons, to mix low and middle income units.[14] Such mixed projects have proven to be more successful than those including only low income housing. The majority opinion fails to recognize these facts, and in doing so neutralizes the primary effect of the decision to terminate the Faraday Wood project, which was an effect on the inner city poor, primarily members of minority groups.

As I read the majority opinion, it relies principally on four cases to sustain its position that there need be no showing of a "compelling state interest" for abandon-

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14 The September, 1967, Newsletter of the Department of City Planning which proposed the scatter-site plan indicates that almost all of the contemplated projects involved mixing income groups. One of the reasons for doing this was to promote greater community acceptance of the project.

ment of the project: *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972); *Palmer* v. *Thompson*, 403 U.S. 217 (1971); *Village of Belle Terre* v. *Boraas*, 42 U.S.L.W. 4475 (Apr. 1, 1974); and *Acevedo* v. *Nassau County*, No. 74-1235 (2d Cir. July 2, 1974), slip op. 4613, 4620-21.[15]

Lindsey v. *Normet* contains language to the effect that there is no constitutionally protected right to a certain quality of housing, but the case does not involve racially discriminatory site selection (or non-selection). *Lindsey* v. *Normet*, moreover, is essentially a case dealing with procedural due process relating to a state Forcible Entry and Wrongful Detention statute, rather than the equal protection claim here.

Likewise inapposite is *Palmer* v. *Thompson* which held that a city could not be forced to continue to operate recreational facilities, regardless of its motivation in closing them. The opinions in *Palmer* are replete with references to the fact that the case was dealing with non-essential recreational facilities — Mr. Justice Blackmun referred to them in his concurring opinion as "nice to have but not essential." 403 U.S. at 229. The present case involves a clear necessity, housing, and a duty of the City of New York, recognized by the City, to provide solutions to the problems of segregated housing. As this

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15 The majority also mentions at n.5 *San Antonio School District* v. *Rodriques*, 411 U.S. 1 (1973), but the present case does not involve a claim of discriminatory treatment brought about by suspect wealth classifications. The majority does not rely, as did Judge Ward, 362 F. Supp. at 658, on *James* v. *Valtierra*, 402 U.S. 137 (1971); until better advised I will continue to consider *Valtierra* as being primarily based on the sanctity of a referendum. *See* dissent in *English* v. *Town of Huntington*, 448 F.2d 319, 324, 327 n.5 (1971). Other courts have taken the narrow view of *Valtierra*. *E.g.*, *Gautreaux* v. *City of Chicago*, 480 F.2d 210 (7th Cir. 1973); *Sisters of Providence of St. Mary of the Woods* v. *City of Evanston*, 335 F. Supp. 396, 403 (N.D. Ill. 1971). *See also* Note, *The Equal Protection Clause and Exclusionary Zoning After* Valtierra *and* Dandridge, 81 Yale L.J. 61 (1971).

court said in *Otero* v. *New York City Housing Authority,* 484 F.2d at 1133, "the Authority is under an obligation [both constitutional and statutory] *to act affirmatively* to achieve integration in housing." [16] (Emphasis added.)

Village of Belle Terre v. *Boraas,* while it contains some rather broad language in a zoning context regarding the preservation of environmental amenities against the onslaught of nonfamilial lifestyles, surely does not support an abandonment of the "strict scrutiny" test in a racial discrimination case; *Belle Terre,* moreover, concerned a tiny village, one square mile in area and containing only a few hundred residents, as compared to North Riverdale's many times larger population and area.

I come finally then to *Acevedo* and I am troubled by it because it is not so easy to distinguish as appellants would make out; their suggestion that this case involves governmental obstruction of private efforts while *Acevedo* held only that Nassau County had no affirmative duty to build low-cost family housing at Mitchell Field I find not altogether convincing. There was, however, no showing in *Acevedo* that housing in Nassau County was racially segregated de jure or de facto.[17] Assuming that the *Acevedo*

16 Judge Mansfield's opinion went on to say that "Not only may such [discriminatory] practices be enjoined, but affirmative action to erase the effects of past discrimination and desegregate housing patterns may be ordered." 484 F.2d at 1133. And *see Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431-32 (1971); *Associated General Contractors* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 42 U.S.L.W. 3594 (U.S. Apr. 22, 1974). *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968), is with *Otero* the other leading Second Circuit case requiring affirmative action to provide more housing for nonwhites. The South had to face up to these problems almost two decades ago. *Heyward* v. *Public Housing Administration,* 238 F.2d 689 (5th Cir. 1956).

17 The district court in *Acevedo* specifically found that "The evidence before the court does not disclose the existence of *fixed* patterns of home ownership in Nassau County." 369 F. Supp. at 1390. Additionally,

panel did not intend to overrule *Kennedy Park Homes* sub silentio, one must assume that it was reluctant to impose an affirmative duty to construct low income housing on a community not demonstrably segregated or with a history, too long and too well developed to reconstruct, of concentrations of minority groups in the central city. Here, however, we have the City of New York and we are talking about integrated housing—albeit on a tiny scale—in one limited area. As such, in principle, there is no difference between this case and *Kennedy Park;* there may be more bridges out of Harlem than the one out of Lackawanna's ghetto, mentioned in the majority opinion here, but the ability of nonwhite population concentrations in the City of New York to cross the river to social justice[18] is none the greater.

In terms of relief, at this late date and on the record before us it is hard to know whether an alternative site in Riverdale is available for possible construction of a comparable project, or whether any of the plans developed by appellant AMIH would be useful at such a site. These would obviously be matters for the district court to consider upon remand.[19]

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in *Acevedo,* the housing project in question was to be built in an area "in close proximity to other areas populated by significant numbers of Blacks." *Id.* In *Acevedo* there was no duty conceded by the County, as there was here promulgated by the City, to build low income housing.

18 This is not to say, of course, that Harlem, or Spanish Harlem, is New York's only nonwhite ghetto area.

19 The relief requested points up the problems which face any court attempting to counteract the effects of exclusionary housing practices and suggests that a legislative solution to this problem would very likely be superior to a court directed plan for integrated housing. *See, e.g.,* Mass. Gen. Laws Ann. ch. 40B §§ 20-23 (Supp. 1973) (which provides for a state level agency with the power to override local community objections to the construction of low income housing); Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall,* 54 B.U.L. Rev. 37 (1974). The fact that the legislature

At the very least there remains, however, what to my mind is a valid claim for damages, one which is supported on contractual grounds alone. *See* Restatement of Contracts § 90; *Keco Industries, Inc.* v. *United States,* 428 F.2d 1233, 1237 (Ct. Cl. 1970). *See* Knapp, Enforcing the Contract to Bargain, 44 N.Y.U.L. Rev. 673, 688-90 (1969). Appellant AMIH states that over $200,000 was invested in attempting to produce and in revising a project which was never submitted to the Board of Estimate for reasons which I believe can be treated as amounting to bad faith. As such, some relief, even under New York law and our pendent jurisdiction, should be available. *Cf. Planet Construction Corp.* v. *Board of Education,* 7 N.Y.2d 381, 198 N.Y.S. 2d 68, 165 N.E.2d 758 (1970).

I would, then, reverse and remand.

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might be able to provide a broader or better remedy than the courts in no way takes away from the compelling nature of the proposition that *somebody* act, a proposition that I believe is demanded by the application of the equal protection clause in this situation. The *Kennedy Park Homes* and *Otero* courts, and those in the cases in the text above accompanying footnote 4 of this dissent, have not been unaware that enforcement of the equal protection clause sometimes has the result of making the courts active in areas where a history of not always benign neglect has resulted in local racial discrimination.

OPINION OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
AUGUST 20, 1973

CITIZENS COMMITTEE FOR FARADAY WOOD et al., Plaintiffs,

v.

JOHN V. LINDSAY, Mayor of the City of New York, et al., Defendants.

No. 71 Civ. 2297.

United States District Court, S. D. New York.

Aug. 20, 1973.

ROBERT J. WARD, District Judge.

This is an action seeking declaratory and injunctive relief and damages against the City of New York; its Mayor, John V. Lindsay; the Housing and Development Administration of the City of New York, an agency of the City ("HDA"); and Albert B. Walsh, the Administrator of that agency. The plaintiffs allege that these defendants refused to process an application for financing the construction of a housing project known as Faraday Wood under the City's Mitchell-Lama program, Article 2 of the New York Private Housing Finance Law (McKinney's Consol. Laws, c. 44B, Supp.1972), because of racial discrimination in violation of the Fourteenth Amendment to the Constitution of the United States; the Civil Rights Acts, 42 U.S.C. §§1981, 1982, 1983 and 1985; and the Fair Housing Law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq.

The plaintiffs are a civic group which supports the project, the sponsor of the project, 8 low-income minority residents of New York City, and a resident of the Riverdale section of the Bronx, where the project was proposed to be built, who supports the project. Plaintiffs seek to bring this action as a class action.

This Court previously determined that it had jurisdiction of the claims of the sponsor, The Association for

Middle Income Housing, Inc. ("AMIH"), under 28 U.S.C. §1331 and that it had jurisdiction of the claims of the other plaintiffs under 28 U.S.C. §1343. Memorandum Decision of July 22, 1971. This decision must be modified in light of City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). Under the holding of that case, the Court has jurisdiction under 28 U.S.C. §1343 only of the claims against the individual defendants, John V. Lindsay and Albert B. Walsh. Nevertheless, the Court concludes that it has jurisdiction of the action on behalf of all plaintiffs against all defendants including the City and HDA under the Fair Housing Law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. and that claims asserted pursuant thereto are not time-barred. Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F.Supp. 669 (W.D.N.Y.), aff'd, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971); *see also,* Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F.Supp. 396 (N.D.Ill.1971).

This action is permitted to proceed as a class action on behalf of all residents of the City of New York residing in inadequate and deteriorating housing units who would qualify for residence in low-income housing units as provided for within the terms of Sections 11, 11-a and 31 of the New York Private Housing Finance Law (McKinley Supp. 1972).

In this case, it is necessary for the Court to determine why the project known as Faraday Wood faltered and ultimately died. To do this the Court has been required to ascertain the motivations of the defendants which led to the ultimate demise of this project. Questions of motive are necessarily difficult to determine. Where, as here, the motive alleged is racial discrimination, which generally is exhibited—if at all—in cloaked and subtle forms, the task is all the harder. *See, Palmer v. Thompson,* 403 U.S. 217, 225, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971). The job has been made more difficult still because the Court did not have the

opportunity to observe any witnesses.[1] Nevertheless, the Court, upon the record made at trial, has determined that sufficient evidence has not been presented to prove that the defendants purposefully engaged in racial discrimination or that their actions resulted in a constitutionally invalid discriminatory effect.

On March 16, 1966, the Mayor announced the so-called scatter-site program for the selection of sites for new public housing. Under the guidelines announced, new construction was to be "concentrated on vacant land and in underutilized areas in outlying sections of New York City." One of the purposes of this program was to "open housing opportunities in sound, predominantly white, middle-income neighborhoods for those now confined to the City's ghettos." The site known as Faraday Wood, which is located in the area of the City known as North Riverdale, was not among those which the Mayor initially asked the City Planning Commission ("CPC") to consider for the scatter-site program. On July 11, 1967, the New York City Housing Authority submitted a plan for a public housing project on the Faraday Wood site to the CPC and apparently to the Board of Estimate. The proposal called for a federally-aided low-rent public housing project to be developed on a portion of the site and a city-aided or federally-aided moderate income project to be developed on the remainder of the site. The proposed low-rent public housing was to consist of one 15-story, 150 dwelling unit building to house 65% families and 35% elderly. The middle-income portion was also to contain 150 units. It was also proposed that the entire project be developed by the sponsor of the middle-income housing with the Housing Authority leasing or purchasing 150 units for low-income tenants.

On July 28, 1967, AMIH submitted an "Applicant's Certificate of Interest" to become the sponsor of the pro-

1. This action was tried before the late Judge Edward C. McLean. After reassignment to me following Judge McLean's death, the parties entered into a stipulation that I should decide the case upon the record previously made.

posed project and a Preliminary Site Information form, to the Housing and Development Board, predecessor agency to the HDA, in response to discussions with members of the CPC requesting AMIH to undertake this project. AMIH's proposal called for a 465 dwelling unit project to be built on 8.6 acres.

In August and September, 1967, the CPC held two open hearings on the proposed scatter-site program including designation of the Faraday Wood parcel as one of the sites. After these hearings, Faraday Wood was designated for development of a Mitchell-Lama project; the proposal for one-half of the project to be leased or sold to the Housing Authority for low-income units was eliminated following these hearings. In line with the City's policy regarding middle-income projects, twenty percent of the units were to be reserved for low-income tenants. Following its filing of the application and site approval form, AMIH developed a concept—or general idea as to the nature—of the project. This concept was submitted to the local Community Planning Board which recommended to the CPC that the site was appropriate for a middle-income project with a small percentage of low-income units provided that remedial action would be taken to solve the problems of overcrowded schools and inadequate transportation, parking, police and fire protection, and recreational facilities. On May 14, 1968, the Chairman of the CPC, Donald H. Elliott, wrote Jason R. Nathan, the then Administrator of HDA, that the CPC had agreed to consider a formal application for a Mitchell-Lama project on the Faraday Wood site. On May 27, 1968, HDA advised AMIH that it had given preliminary site approval for a Mitchell-Lama development subject to submission of acceptable building plans, proof of economic feasibility and availability of City funds. AMIH entered into a Sponsor's Agreement with HDA on July 10, 1968, and HDA approved AMIH as the project sponsor for a Mitchell-Lama development at Faraday Wood.

On April 3, 1969, AMIH's architect, the firm of Richard Kaplan, submitted a set of preliminary drawings to HDA

showing the proposed buildings in greater detail. HDA reviewed these drawings and met with AMIH's architects to discuss the design as it was being revised. AMIH's architects submitted a second series of drawings to HDA in late July or early August, 1969. These designs were for an "all-family" project, but ten percent of the units were intended for the elderly. The plans called for several low rise buildings of up to six stories and one twenty-story tower containing a total of under 400 dwelling units, a reduction from their original proposal. Until this time, the processing of AMIH's application was in accord with usual procedures. AMIH and the other plaintiffs do not charge any irregularities or failure to process the application for the Faraday Wood development before August 4, 1969.

The evidence indicates that processing of AMIH's application by HDA came to a virtual halt soon after submission of this second set of drawings. No discussion about this second set of drawings occurred between HDA and AMIH's architects as was the customary practice. No action was again taken by HDA on the Faraday Wood project until about January, 1970. The events which occurred during this hiatus strongly indicate that part of the reason for its occurrence was a political response to community opposition to the project by some officials of the City Administration during the heat of an election campaign. On August 8, 1969, the City Hall Press Office issued a press release in which Mayor Lindsay was quoted as stating that he was opposed to the Faraday Wood project on the grounds that the site was unsuitable for high-rise construction and that the community was concerned about overcrowding in the schools. This release written by Robert Rosenberg, an Assistant Administrator of HDA who was also Chairman of the Mayor's Urban Action Task Force for the Northwest Bronx, was issued without the Mayor's authorization or knowledge. It does, however, reveal that his administration would thereafter oppose the project in

response to opposition in the community. While it is clear that HDA, as part of the Lindsay administration, was also reacting to the sentiments of the community, there is evidence that it was also—albeit to a lesser degree—concerned about problems inherent in the nature of the proposed design. Furthermore, a political response to community opposition is not automatically evidence of racial discrimination by public officials in response to racially based opposition in the community. On the record in this case, the plaintiffs have not established that racial motives underlay the community opposition to this project; therefore, to the extent that the inaction of HDA was a response to community concerns, no racially discriminatory motives can be imputed to it. That there was some racial opposition does not mean that opposition on other grounds was not the overriding community sentiment or the nature of the opposition to which the administration responded.

The community involved was concerned with rapid population growth and subsequent overtaxing of community facilities. The community was also concerned about the expanding number of high-rise apartment buildings, which they viewed as detracting from their environment. When given the opportunity, the community gave general expression to these concerns. *See* New York City Planning Commission, *Plan for New York City 1969—A Proposal, Vol. 2 The Bronx*, 146-47; Manousoff Associates for New York City Planning Commission, *New York City Master Plan—Riverdale Study Phase 1.* The Manousoff report was published early in 1968 and was based on a study undertaken from June 1 to September 15, 1967. Concurrently with the developments involving Faraday Wood, the community was seeking a rezoning of the entire North Riverdale area to eliminate all future high-density development. It appears to the Court that the inference may well be drawn that the community made the Faraday Wood project the focus of opposition to further high-density development because the public hearings required by this publicly-aided project gave

them an opportunity to voice their opposition—an opportunity which was absent where privately-funded projects not requiring zoning variances were involved. This conclusion is buttressed in the Court's view by evidence that in the 80% of middle-income apartments which were not to be reserved for low-income residents, rents might conceivably have been as much as $80 per room per month. Under the formula governing income eligibility for Mitchell-Lama housing, it is clear that people who by no stretch of the imagination could be classified as low-income would be eligible for 70-80% of the apartments.[2]

Beginning in November, 1969, in response to a letter from plaintiff Ann Montero supporting the reactivation of the Faraday Wood project, discussion took place within the administration regarding such reactivation. Mr. Rosenberg opposed reviving the project on the grounds that the Mayor had given his commitment in opposition to the project and could not reverse his position and that there was still community opposition.

The reactivation of the Faraday Wood project in modified form was undertaken following defendant Albert Walsh's becoming Administrator of HDA in January, 1970. In February, 1970, Walsh met with the president of AMIH and suggested that the project be changed from all-family to 50 percent family and 50 percent elderly housing. Although other factors were again involved in this recommendation, the predominant reason for Walsh's suggesting this change was to make the project more acceptable to the community. But again it is necessary to state that there is no clear evidence in the record before the Court to link this admitted community opposition to racism. There is equally compelling evidence that the fewer children and reduced automobile use in a project which was 50 percent elderly would respond to and somewhat alleviate the concerns voiced by the community.

2. N.Y. Private Housing Finance Law §31(2) (McKinney Supp.1972).

AMIH agreed to this change to a 50 percent family and 50 percent elderly project and proceeded to modify the design it had originally submitted in order to reflect the requirements this change necessitated. The evidence establishes that this revised proposal was not processed according to HDA's usual procedures. Part of the reason for the unique treatment in the processing of this revised proposal was that it was a revision rather than an initial application. But undoubtedly another consideration behind this special handling was the political overtones attached to the project because of the hostility in the Riverdale community.

The 50-50 proposal came to naught. The demise of this proposal appears to have been caused in part by a reluctance within HDA to proceed with such a politically volatile project and in part by genuine differences of opinion between HDA and AMIH on design, cost, and financing. Given the usual nature of processing an application by a Mitchell-Lama sponsor through HDA, it appears to the Court that the technical problems which existed could have been resolved through the collaborative efforts of AMIH and HDA had both sides not adopted rigid positions. Although previously advised orally at a meeting in November, 1970, that HDA would not process the proposal then before it, AMIH received formal notification that HDA was terminating the Faraday Wood project in a letter from HDA Deputy Commissioner Edward Levy in late December, 1970. In spite of some attempts to negotiate the differences, this action was effectively the end of the Faraday Wood project.

The Court finds that the underlying reason for the difficulties encountered by AMIH in its dealings with HDA was the community opposition to the project. The cost, technical and design problems asserted by HDA as the primary basis for its objections to the all-family proposal simply are not persuasive except in the context of community concern. Furthermore, until its refusal to do additional work

on the 50-50 project without a firm commitment from HDA, AMIH and its architects consistently attempted to resolve the technical, design, and cost problems perceived and called to AMIH's attention by HDA. For example, AMIH's design provided for one indoor parking space for each apartment; space for classrooms was to be allotted if necessary; and the facing of the building was changed from concrete to brick to meet HDA's objection to the cost of the former. There is no evidence that AMIH's architects would not have continued to modify their design in order to adapt it to meet HDA objections. This is not to say that these factors were non-existent and simply woven out of whole cloth in the face of litigation. Nevertheless, they were clearly of secondary importance and readily soluble if HDA had not simply pushed the project aside.

Having found that HDA's failure to process the Faraday Wood project was primarily, if not totally, in response to community opposition; that this opposition was not shown to be rooted in racial discrimination to any significant extent; and that to the extent there was racial opposition in the community, HDA was not acting in response thereto; it is clear that there has been no showing that any of the defendants has engaged in purposeful racial discrimination in violation of the Equal Protection clause of the Fourteenth Amendment or of any statute.

In the absence of a finding of purposeful discrimination, it is necessary to determine if the conduct of any of the defendants had a racially discriminatory effect violative of the Constitution or any statute. The Court concludes that there was not such an effect.

Not every state action which has some adverse effect on minority persons is unconstitutional or in violation of a statute. For example, it 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. Furthermore, in many housing cases which find an impermissible discrim-

inatory effect, a finding of purposeful discrimination could have been and, in some cases, was made. *See, e.g.,* Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y. 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971). The Court recognizes that the statement by the Second Circuit in the *Lackawanna* case, *supra,* that

> "[e]ven were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify. *Norwalk CORE, supra* [Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 927 (2d Cir. 1968)]; Southern Alameda Spanish Speaking Organization v. City of Union City, California, 424 F.2d 291 (9th Cir. 1970) * * *.", 436 F.2d at 114.

might lead to the conclusion that *any* governmental action which has *any* adverse effect upon minorities can be classified as suspect thereby requiring the governmental unit to show a compelling state interest for the statute or action under attack. Such a standard would comport with that required when there has been purposeful racial discrimination. It must be borne in mind, however, that this statement was dictum in an opinion finding purposeful discrimination, and further, that the Court did not enunciate the appropriate standard of review to be used in determining the validity of actions which are discriminatory in effect but not in intent.

A discriminatory effect which violates the Equal Protection clause need not be accompanied by a discriminatory motive. This was made clear by the Supreme Court in Wright v. Council of City of Emporia, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972):

> "But as we said in Palmer v. Thompson, 403 U.S. 217, 225, 91 S.Ct. 1940, 1945, 29 L.Ed.2d 438, it 'is difficult or

> impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators,' and the same may be said of the choices of a school board. * * * Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect." 407 U.S. at 462, 92 S.Ct. at 2203.

To the extent that *Lackawanna, supra,* and its progeny suggest that a discriminatory effect is subject to strict scrutiny in the absence of any discriminatory intent, these cases must be viewed in light of James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971), and Palmer v. Thompson, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971). *James* and *Palmer* hold that a seemingly neutral policy which affects the majority as well as a minority, but which has a greater practical impact or places a greater burden on the minority, is not thereby invalid. In *Palmer, supra,* the Court applied the "rational basis" rather than the compelling interest test in upholding Jackson, Mississippi's closing of its municipal pools because they could not be run safely and economically on an integrated basis. In so doing, the Court seemed to take the position that the greater practical impact on minorities, who have less access to alternative facilities, was not unconstitutional.

In *Valtierra, supra,* the Court upheld a provision of the California Constitution requiring a mandatory community referendum on all public housing proposed to be built in the community. In upholding this provision the Court put great emphasis upon the nature of referenda and their importance in a democratic society. The Court, however, did not limit the reach of its decision to cases involving the use of referenda but went on to state:

> "[The plaintiffs] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconsti-

tutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums [sic] on any subject unless referendums [sic] were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people.

* * *

"The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. * * *" 402 U.S. at 142-143, 91 S. Ct. at 1334.

This decision undercuts the dictum of *Lackawanna.* To the extent that other cases, including most recently Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F.Supp. 1245 (N.D.Ohio 1973), take a contrary position, this Court must respectfully disagree. In view of *Valtierra* and *Palmer,* it appears that in housing, for a racially discriminatory effect to be found, there 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. To the extent that other courts have carried the idea of "discriminatory

effect'' in the housing field further, this Court rejects the position they have espoused while again noting that the decisions turned on their individual facts. To hold that any action or failure to act is unconstitutional because it has an adverse effect on minorities, even though it affects members of the majority as well—albeit to a lesser degree—would be carrying the idea of discriminatory effect too far. Under such an approach a governmental unit could never stop a program for entirely sound reasons even at an early talking stage if it would deprive minorities of something they would have had if the program came to fruition.

In the instant case, the Riverdale community is about 97% white and contains no subsidized housing. No evidence was introduced to show why there is almost a totally white population there, while the City as a whole is about one-third black or Hispanic. The Court simply cannot conclude on the basis of the evidence before it that the racial composition of the community is a result of illegal racial discrimination. To the contrary, the historical context within which the Faraday Wood project was contemplated indicates a desire and attempt on the part of the named defendants to achieve some semblance of integrated housing.

The Court takes judicial notice that a majority of tenants and applicants for low-rent public housing are members of minority groups. The Court recognizes that their access to decent, safe, and sanitary housing, especially outside the ghettos, is difficult, if not non-existent. But it is also apparent that the prospective middle-income tenants have also been deprived of the opportunity to live in Riverdale. The latter, of course, have a wider choice of housing options than do the minority poor; but the result is similar to that in *Palmer, supra,* in which the deprivation of use of swimming pools which affected both black and white fell more heavily on blacks. Since the defendants ceased to process the Faraday Wood project on non-racial, albeit political, grounds, that this act may cause greater harm to minorities is not a constitutionally invalid discriminatory effect.

It should be noted that the standard of review in Equal Protection cases is in a state of chaos. The *Lackawanna* case, *supra;* and United States ex rel. Chestnut v. Criminal Ct. of City of N. Y., 442 F.2d 611 (2d Cir. 1971) look to the rational basis test at least in the absence of a *prima facie* showing of racial discrimination. *See also* Pride v. Community School Board of Brooklyn, New York, School District #18, 482 F.2d 257 at 268 (2d Cir. 1973). Absent this *prima facie* showing of racial discrimination or the denial of a fundamental constitutonal right, the courts continue to apply the "rational basis" test, although it is frequently difficult to discern which test is being applied. However necessary housing may be it still falls within the area denominated by the Supreme Court as "economics and social welfare" and not the area carved out for special scrutiny known as "fundamental rights." *See* Dandridge v. Williams, 397 U.S. 471, 484-486, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970).[3]

Plaintiff AMIH's due process and contract claims, being dependent on proof that HDA ceased to process the Faraday Wood project for illegal reasons, must also fail, even assuming, *arguendo,* that a valid and binding contract existed between AMIH and HDA.

The complaint is dismissed in all respects. The foregoing constitutes the findings of fact and conclusions of law of the Court for the purposes of Rule 52, Fed.R.Civ.P.

Settle judgment on notice.

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3. In the absence of proof of racial discrimination, the other possible discrimination which could be adduced is discrimination on the basis of wealth, since this project involved government subsidy and income ceilings. Plaintiffs did not adduce proof to support this contention. Furthermore, the Court finds that even if such proof had been adduced, discrimination against the poor at best falls under the rational basis rubric. *See,* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973).

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