4-3-1975

Brief in Opposition to Petition for Certiorari

Corporation Counsel of the City of New York

(42035)

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1004

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, 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,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

W. BERNARD RICHLAND,
Corporation Counsel of the City of New York,
Attorney for Respondents,
Municipal Building,
New York, New York 10007.
(212) 566-3322

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1004

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, 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,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

This is an action brought under the Civil Rights and Fair Housing Acts seeking declaratory and injunctive relief and damages because of the refusal of the respondents to

process an appication for financing of a middle-income housing project. The District Court for the Southern District of New York, after a trial, dismissed the complaint on the grounds that the plaintiff had not established that the cancellation of the project was the result of racial discrimination or that such cancellation had a discriminating impact on minorities.* The Court of Appeals for the Second Circuit, one judge dissenting, affirmed on essentially the same grounds.

Questions Presented

1. Were the determinations of the District Court and the Court of Appeals that the plaintiffs had not proved that the defendants had refused to proceed with the middle-income project because of improper motives or intent supported by the evidence?

2. Were the determinations of the District Court and the Court of Appeals that the refusal of the defendants to proceed with the midde-income project did not have a discriminating impact on minorities supported by the evidence?

3. Assuming, *arguendo,* that the plaintiffs have failed to establish that the termination of the project was the result of improper motives or had a discriminatory impact, are the plaintiffs entitled to relief under the Fair Housing Act?

* The trial was held before Judge McLEAN. Judge McLEAN died before rendering a decision in this case. Both sides stipulated to refer the case to Judge WARD for decision.

Facts

(1)

The plaintiffs are a civic group, the Citizens Committee for Faraday Wood, the Association for Middle-Income Housing (AMIH) which was the sponsor of the project, and low-income minority residents of New York City (Complaint, pp. 2-5).* Plaintiffs bring this action as a class action on behalf of all residents of New York City who are compelled "because of race, ethnic origin or nationality and their lower economic status" to reside in inadequate housing in the "City's impacted racial ghettos" (Comp. p. 6).

The proposed Faraday Wood project site is located in the North Riverdale section of the Bronx and is bounded on the West by Mosholu Avenue, on the South by 255th Street and on the East by Fieldstone Road. The parcel involves approximately seven acres.

The complaint alleged that the defendants' refusal to process the Faraday Wood project was the result of neighborhood opposition to the project (p. 11); that the defendants were aware that the reason for opposition to the project "in large part was to deny to low income citizens residency in North Riverdale" (*id.*); and that the defendants halted this project in response to the community oppo-

* Unless otherwise indicated, references in parentheses are to the original papers which constitute the Record on Appeal. Numbers in parentheses refer to pages of the transcript of the trial before Judge McLean beginning on February 18, 1972. Numbers preceded by A refer to pages of the Appendix annexed to the petition for a writ of certiorari.

sition "even though they had knowledge of the racially discriminatory purpose involved" (*id.*).

The complaint requested declaratory and injunctive relief and damages (pp. 14-15).

(2)

In 1966 the Mayor of the City of New York announced a scatter-site housing program for the selection of sites for new public housing (Pltfs.' Exh. 1, 30). Under the announced guidelines for this program, the construction of new public housing was to be concentrated on vacant land and in under-utilized areas in outlying sections of New York City (Pltfs.' Exhs. 1, 45, 49).

On July 1, 1967, the New York City Housing Authority (a public benefit corporation separate from the City) submitted a plan for a public housing project on the Faraday Wood site to the New York City Planning Commission (Pltfs.' Exh. 3). The proposal called for a federally-aided, low rent public housing project to be developed on part of the site and a city-aided or federally-aided moderate income project to be developed on the remainder of the site (*id.*). The low rent public housing was to consist of one 15 story, 150 unit building, to house 65% families and 35% elderly persons (*id.*). The middle income portion was also to contain 150 apartments (*id.*). The plan proposed that the entire project be developed by the sponsor of the middle income housing, with the Housing Authority leasing or purchasing the 150 units for low income tenants (*id.*).

In July 1967, Mr. Elliot, Mr. Orton and Mr. Robbin, all of the New York City Planning Commission, informed

Shirley Boden, President of AMIH, an organization which develops housing for families of low or moderate income, of the proposed plan to build a project to house 50% low income residents and 50% middle income residents on this site (36, 38, 45, 49). Mr. Robbin invited Mr. Boden to submit a plan to develop this project (50, 52).

On July 28, 1967, AMIH submitted to the Housing and Development Board an "Applicant's Certificate of Interest" (Pltfs.' Exh. 5-b). Attached to the certificate was a "Preliminary Site Information" form which stated that Robert Weinberg, the owner of the property, had agreed to sell the property to AMIH at a fair price (Pltfs.' Exh. 5-a). AMIH's proposal called for a 465 dwelling unit project (*id.*).

In August and September 1967, public hearings were held by the City Planning Commission on the scatter-site projects, including the Faraday Wood project (676). There were objections to the Faraday Wood site because of prior substantial growth in the area (677); there was opposition to high-rise dwellings in the area and people objected because the schools were already overcrowded and the public facilities were inadequate (677-678).

In September 1967, Mr. Boden met with officials of New York City and the residents of the Riverdale Community to discuss the proposal for a 50% low income housing and 50% middle income project (69, 72). The audience was predominantly white (71). Mr. Boden testified that some of the residents opposed the project "for all sorts of reasons, inadequate facilities, problems of transportation, school, all that sort of thing" (73).

Some time thereafter in 1968, a determination was made to change the project to a "Mitchell-Lama", with 20 percent of the apartments made available to low income residents (556-557, Pltfs.' Exh. 6).

On May 7, 1968, Mr. Boden appeared with City officials before Local Planning Board No. 14, which Board represents the North Riverdale area in the Bronx (73-74). The Local Board had before it a statement from the City Planning Commission. The statement explained that the City Planning Commission wanted the Local Board's recommendation on the Faraday Wood proposal in order to help the City Planning Commission with a preliminary determination as to whether the planned use of the Faraday Wood site was appropriate (617, Pltfs.' Exh. 6).

At the meeting, residents objected to the public housing character of the project and objections were raised as to the absence of adequate community facilities to service the project (85, 619).

At the end of the meeting, Local Board No. 14 recommended approval of the project conditionally (85). The recommendation was contingent on the City taking remedial action to solve existing problems arising from inadequate community services (Pltfs.' Exh. 8).

On May 14, 1968, Donald Elliott, Chairman of the City Planning Commission, informed Jason Nathan, Administrator of the Housing and Development Administration of the City of New York (hereafter referred to as HDA) that AMIH had been given preliminary site approval for a Mitchell-Lama development (Pltfs.' Exh. 9). At the time

the City Planning Commission approved the preliminary plan, it had called to Mr. Boden's attention the transportation and school problems in the Riverdale area resulting from the community's growth in the last 15 years (201-202).

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 (91, 93, Pltfs.' Exh. 10).

On June 10, 1968, AMIH entered into a Sponsor's Agreement with HDA (Pltfs.' Exh. 11). The agreement stated that the sponsor agreed that, until the Administration approved the contract for construction of the project, he will not expend or commit any funds on account of contract costs * * *." (Pltfs.' Exh. 11, par. 5).

On December 17, 1968, Walter Fried, Deputy Commissioner of HDA, by letter, notified Mr. Bohen that AMIH had been approved as sponsor for the Faraday Wood project (95, Pltfs.' Exh. 12).

In February 1969, Mr. Boden met with Saul Nimowitz, Director of HDA's Bronx Office, Donald Rubenstein, Project Expeditor for HDA, and Richard Kaplan, architect for AMIH (99, 100, 106). At the meeting a schedule was agreed upon for the processing of the Faraday Wood project application (Pltfs.' Exh. 13). Preliminary work was to be submitted to HDA by February 26, 1969 (*id.*). Cost estimates were to be approved by April 2 (*id.*). HDA was to approve the entire project by April 25 (*id.*). The

project then was to go to City Planning Commission for a hearing and, if approved, to the Board of Estimate (*id.*).

Prior to August 1969, AMIH's architects had submitted a complete set of preliminary drawings (115, 116). Mr. Boden testified that in the plans AMIH attempted to respond to the community's concern as to inadequate facilities (112-113, 114). Paul Mauch, Director of architecture in the Design Department of HDA, testified that he had reveiwed the 100% family project with Kaplan and Harvey, the architects for AMIH (728, 737). Mr. Mauch had informed them about the costly aspects of the design submitted to HDA (738, 740). On June 3, 1969, Mr. Mauch sent a memorandum to Alexander Cooper, Director of Design at HDA, stating that the basic scheme was uneconomical (Defts.' Exh. D).

As of August 8, 1969, HDA had not approved the preliminary drawings (116). On August 8, the Mayor's Office issued a press release stating that the Mayor was in "complete agreement with the Mayor's Urban Action Task Force's report that Faraday Wood site was 'unsuitable for high rise construction'" (Pltfs.' Exh. 15). The release stated that the Mayor had said that "[a]s long as my administration is in office * * * this proposal will never be submitted to the Board of Estimate" (*id.*).

Subsequent to the issuance of the press release, HDA stopped processing the Faraday Wood project (119).

In January 1970, Albert Walsh replaced Jason Nathan as Administrator of HDA (865). Mr. Walsh met with his HDA commissioners and the Local Community Board in

Riverdale to discuss the status of the Faraday Wood project (811, 822). He was informed that the community in Riverdale was opposed to the Faraday Wood project because of lack of community services (811, 822, 815-816, 822-823).

In February 1970, Mr. Boden met with Albert Walsh, Mr. Fried, and Mr. Rosenberg, Assistant Commissioner of HDA (126-127). Mr. Walsh suggested an alternative plan which would be 50 percent for families and 50 percent for the elderly (128). Mr. Walsh suggested state financing for the portion of housing for the elderly (129-130).

On March 13, 1970, Tuck Harvey, an architect in Richard Kaplan's firm, which firm was hired by AMIH for the Faraday Wood project, stated in a letter that Albert Walsh's proposal for 50 percent family and 50 percent elderly was constructive since the new proposal "would be more responsive to the community" and improve "its economic feasibility as well" (Pltfs.' Exh. 16). The letter concluded by stating that the firm was enthusiastic about the prospective changes (*id.*).

On April 27, 1970, AMIH submitted a new application, with supporting data, for site approval for the 50 percent family and 50 percent elderly plan (135, Pltfs.' Exh. 17). HDA did not act on the revised application (136). Alfonse Dimeo, Division Director of the Housing and Facilities Unit at HDA, testified that the new plan was not feasible because of cost problems (920-921).

In November 1970, Mr. Boden met with Administrator Walsh, Robert Weinberg, owner of the property, and Ira

Robbins, Weinberg's counsel, Robert Rosenberg, Assistant Administrator of HDA and Alexander Cooper, Director of Design at HDA (138). At the meeting, Mr. Boden testified, Walsh told him that the Mayor would only support a 100 percent-for-elderly housing project (139-140). Mr. Walsh then stated that he would only accept calls on the elderly project (937). Mr. Walsh testified that at the November 1970 meeting he told Mr. Boden that to get the maximum financial benefit out of the housing for the elderly in the 50-50 plan, Boden would have to set up two corporations (837-838). Mr. Walsh then told Mr. Boden that he would not accept any more calls on the project unless Mr. Boden was willing to discuss the recommendations made by Mr. Walsh (847-851).

On December 31, 1970, Edward Levy, Deputy Commissioner of HDA, by letter, notified Mr. Boden that the 50-50 proposal submitted by AMIH on April 27, 1970, was unacceptable (Pltfs.' Exh. 19).

In February 1971, Edward Rutledge, Executive Director of the National Commission against Discrimination, at the request of Mr. Boden, met with Albert Walsh, Administrator of HDA (646). Mr. Rutledge testified that Mr. Walsh had stated that the racial issue was a fundamental issue in Riverdale as in other scatter-site areas (648, 648-a, 662). Mr. Rutledge testified that he had asked Mr. Walsh about the Mayor's press release in August 1969 and Mr. Walsh had agreed that race was an important factor at that time (648-a).

On cross-examination, Mr. Rutledge stated that he knew Mr. Walsh for over twenty years and never knew Mr.

Walsh to make a decision on racially discriminatory grounds (657). Mr. Rutledge also stated that whenever he hears a project has been cancelled he presumes it is cancelled for racial reasons (661).

Mr. Walsh testified with respect to his meeting with Mr. Rutledge in February 1971 (853). He stated that he told Mr. Rutledge that, while some community opposition was based on racial grounds, this was only a minor part of the opposition to this development and had nothing to do with the differences between AMIH and HDA (854-855).

On October 20, 1971, Mr. Walsh sent a letter to Mr. Boden asking him to reconsider the 50-50 plan (Pltfs.' Exh. 21). AMIH did not reply to the letter because they no longer had control of the property (151, 158).

During the trial, evidence was introduced showing the population in Riverdale had doubled in the last 15 years and that Riverdale's existing community facilities were unable to cope with the increase in population (600, Defts.' Exh. E., pp. 2-3, 25). During the last fifteen years, a large number of high-rise apartments have been constructed in Riverdale (601).

Opinions Below

District Court Opinion
362 F. Supp. 651

In dismissing the complaint Judge WARD found that the underlying reasons for the difficulties encountered by AMIH in its dealing with HDA was community opposition to the project (A36a). The Court found the cost problems

attributable to the project to be of secondary importance and not the reason HDA did not proceed with the project (*id.*).

The Court found that HDA's response to the community opposition (A37a):

> "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."

The Court also concluded that the conduct of the defendants did not have a discriminatory effect of sufficient magnitude to constitute a violation of the Constitution or any statute (A37a). The Court noted that there was no evidence to show why Riverdale is 97% white (A41a). The Court said that it could not "conclude on the basis of the evidence before it that the racial composition of the community [was] a result of illegal racial discrimination" (*id.*). The Court stated (A41a):

> "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 acknowledged that the defendants' refusal to process the Faraday Wood project may have caused a greater harm to minority groups (A41a). But, the Court

stated, "[s]ince 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" (*id.*).

Court of Appeals Majority Opinion
507 F. 2d 1065

The Court of Appeals reviewed the evidence submitted in the District Court. The Court noted that since District Court Judge WARD had decided the case on the record made before Judge MCCLEAN, who had died before rendering a decision, the Court of Appeals could set aside the findings of the District Court Judge even if they were not clearly erroneous (A2a). The Court then stated, "* * * we find ourselves in basic agreement with Judge Ward's findings" (A2a, fn. 1).

The Court then discussed the applicable standard of review involving the plaintiffs' claims under the equal protection clause (A5a). The Court stated (A6a):

> "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 Court, after stating that it was in agreement with the District Court's conclusion that no effect was shown, reviewed the evidence supporting that conclusion (A6a). It noted that eighty per cent of the project was reserved for middle income persons (A6a). The Court noted that the "whole rationale" for scrutinizing governmental housing actions that adversely affect public housing projects (A7a):

> "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 lower levels of our society. There is no disproportionate overrepresentations of minorities in middle income levels. Hence the assumption used in the typical public housing case is not valid here."

The Court also concluded that the evidence failed to establish that the City's actions had been motivated by improper racial considerations (A9a). The Court noted that there was evidence of community opposition to high-rise structures in general (A9a). The Court stated (A10a):

> "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 were 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."

The Court, after reviewing the applicable case law, concluded (A12a):

> "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.' "

Court of Appeals Dissenting Opinion

The dissent, noting that the Court of Appeals was entitled to make its own findings, concluded that the findings of the District Court "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, and no racially discriminatory effect flowing therefrom seems to me clearly erroneous" (A18a-19a). The dissenting judge then reviewed the evidence which he concluded indicated that the community opposition in an all white neighborhood was based on racial discrimination (A21a-22a).

With respect to the issue of discriminatory effect, the dissenting judge stated that the sole reason for the Faraday Wood project was to provide decent housing for the inner city poor. He concluded that the percentage of low income units in the project was not the determining factor and that, although the project was scheduled to have only 20% low income units, the cancellation of the project would have a discriminatory effect (A23a-24a).

ARGUMENT

The determinations of the District Court and the Court of Appeals that the plaintiffs had not shown that the defendants' refusal to proceed with the Faraday Wood project was based on improper motives or that such refusal to proceed had a discriminatory impact on minorities was supported by the evidence.

(1)

Petitioners argue that the Court of Appeals and the District Court failed to apply the appropriate constitutional standard "of rigid individual scrutiny" with respect to their claim that the termination of the project denied them equal protection of the laws. This argument lacks merit. The state is required to justify its action by showing a compelling state interest only where the state action impinges upon a fundamental right or is directed at a suspect class. See *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). This Court has held that there is no constitutional right of access to a certain quality of housing. *Lindsay* v. *Normet,* 405 U.S. 56, 74 (1972); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F. 2d 1087, 1093 (6th Cir., 1974)), cert. den. 95 S. Ct. 781 (1975). In addition, low income status is not a suspect classification requiring the application of the compelling state interest test. See *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973).

Applying the rational basis test, the Court of Appeals properly found that here the community opposition, not shown to be racially motivated, "more than satisfied the requirement of rationality" (A12a). The evidence showed

that since 1967 the residents of the Riverdale community had been concerned about the rapid development of the Riverdale area and the lack of community facilities needed to accommodate its growth (Defts.' Exh. E). A report by Manoussoff Associates, a consulting firm, based on a study conducted between June 1 through September 15, 1967, listed the community facilities found to be inadequate (Defts.' Exh. E at p. 2). These included schools, which were on the verge of overcrowding, an unsatisfactory public transportation system and inadequate health facilities. In addition, the report noted that the area had experienced a growth in population which had caused local tension (*id.*).

In the prior fifteen years the population of Riverdale had increased from "40,000 to 65,000-70,000" (600). During this period, a large number of high-rise apartments had gone up in Riverdale (601). The Manoussoff Report noted that "construction of high-rise units during the past decade is pinpointed by community leaders as their major objection to recent developments" (Defts.' Exh. E at p. 25). The report also noted "that participation by local citizens in decisions about additional housing is a frequently expressed demand" (*id.*).

Prior to July 1967, at which time the original development for Faraday Wood was proposed, the residents of the Riverdale Community had not had an opportunity to express their opposition to construction of apartments in the Riverdale area. Almost all of the apartment growth in Riverdale during the prior fifteen years had been developed privately. Proposals of private builders are not subject by law to any public hearings of the City Planning Com-

mission, local planning boards or any other City agency. A private developer may build despite community opposition once he complies with zoning regulations.

The Faraday Wood project, because it was the subject of legally required public hearings, gave the community an opportunity to express its opposition to the apartment growth in Riverdale without regard for the adequacy of the community facilities. In July 1967, the New York City Housing Authority submitted its original plan for the Faraday Wood area. The proposal called for two 150 unit apartment buildings, one building for low income tenants and the other building for middle income tenants. In September 1967, Shirley Boden and officials of New York City met with the residents of Riverdale to discuss the proposal. Mr. Boden testified that some residents opposed the project because of prior substantial growth and inadequate community facilities (73, 677-678).

In 1968, the City Planning Commission determined to withdraw the proposal and process a Mitchell-Lama project for the site. In May 1968, Community Planning Board No. 14, pursuant to its duties under Section 84 of the New York City Charter, held a public hearing on the new proposal. At the meeting, the residents of the community raised objections to the proposal because of the absence of adequate community facilities to service the project (85, 619).

There was testimony that some residents at these meetings objected to the public housing character of the project (85, 619). Even if it can be assumed that a small number of residents objected to the Faraday Wood project on

racial grounds, there was no evidence introduced below tending to establish that this was the motivation of a majority of the Riverdale residents. See *Ranjel* v. *City of Lansing,* 417 F.2d 321, 323 (6th Cir., 1969), cert. den. 397 U.S. 980 (1970); *cf. Palmer* v. *Thompson,* 403 U.S. 217 (1971). It is noteworthy that the Mitchell-Lama project proposed for the Faraday Wood site was a middle income project. Only twenty percent of the apartment units would be made available for low income persons. HDA, by its own regulations, instituted the requirement that all Mitchell-Lama projects make twenty percent of their apartments available to low income residents (189-191). In the absence of any evidence of racial discrimination, the District Court and the Court of Appeals properly refused to infer that the residents of Riverdale would oppose the project solely because of the presence of a small number of low income residents in the project.

In any event, there is no evidence to indicate that HDA's refusal to proceed with the Mitchell-Lama project was in response to racially motivated opposition in the community. To the contrary, the evidence indicates that this project was part of a vigorous plan undertaken by the City of New York to provide decent housing for low income and middle income residents.

The Faraday Wood site was selected as part of a scatter-site program instituted by the City after 1966 to locate housing projects in areas in which they would contribute to nondiscriminatory housing (526-527, 669-670). The testimony showed that officials of HDA, and is predecessor, the Housing and Redevelopment Board (HDB), in

1966 worked with the National Committee against Discrimination in Housing to formulate an affirmative program for open housing to serve as a model for the rest of the country (641-642). In furtherance of open housing, City officials have supported low income projects in predominantly white areas despite community opposition. See, e.g., *Margulies* v. *Lindsay,* 39 A D 2d 64, 332 N.Y. Supp. 2d 156 (1st Dept., 1972), affd. 31 N Y 2d 167, 286 N.E. 2d 724 (1972) (the Forest Hills project).

With respect to the Faraday Wood site, members of the City Planning Commission initially approached AMIH and requested that they build on the site (47-48). The City Planning Commission gave the project preliminary site approval on May 14, 1968 (Pltfs.' Exh. 9). After AMIH was approved as sponsor, AMIH submitted two sets of preliminary drawings in April and August 1969. On August 8, 1969, the Mayor's office issued the Press Release stating that the Faraday Wood project was not going to be approved. The press release noted that the site was "unsuitable for high rise construction" (Pltfs.' Exh. 15). The Mayor denied knowledge or authorization of the press release (710). Even if the press release was in response to the community opposition to the project, as we noted, *ante,* pp. 16-18, there was no evidence that the community opposition was based on race. An elected official is entitled to consider community sentiment with respect to adequacy of community services in moking governmental decisions relating to construction of a housing project which will further aggravate the problems of the community.

HDA properly considered community sentiment before finally approving the housing project. Under the Private

Housing Law, after HDA approves the project, the project must be submitted to the City Planning Commission for a public hearing and subsequent approval, disapproval or modifications. New York Private Housing Finance Law, §26(5)(a). The Planning Commission is then required to send its report and recommendations to the "local legislative body" which for this purpose is the Board of Estimate. The Board of Estimate is also required to hold a public hearing before rendering a decision. The members of the Board of Estimate are the Mayor, the Comptroller, the President of the City Council and the five Borough Presidents, all elected officials. New York City Charter §61. There was testimony that the Bronx Borough President, Herman Badillo, was against the project (451-452).

This Court has recognized the right of a community to have a voice in governmental decisions which may result in large expenditures of local government funds and which will affect the future development of the community. In *James* v. *Valtierra,* 402 U.S. 137 (1971), the Court upheld a provision of the California Constitution which provided that a low rent housing project could be developed, constructed or acquired only with the approval of a majority of those voting in a community election. See also, *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F.2d 108 (6th Cir., 1974), cert. den. 95 S. Ct. 781 (1975).

In this case, since two statutory bodies, the City Planning Commission and the Board of Estimate had to ultimately approve the project, HDA should have considered

legitimate community opposition. Strong community opposition may prevent the statutory bodies from approving the plan.

In support of their position petitioners cite decisions of this Court, including *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and *Green* v. *County School Board,* 391 U.S. 430 (1968), which involved findings of actual discrimination (Pet., pp. 14-16). The petition then states that New York City's scatter-site plan was "its response to its affirmative duty to correct past discrimination in a housing context" (Pet., p. 16). There are no allegations nor any evidence of a prior pattern of discrimination with respect to the selection of sites for publicly assisted housing. As we noted above, the evidence shows that City officials adopted affirmative programs in an attempt to aid minority residents of the City. The scatter-site program, which included the Faraday Wood site was initiated by the City in 1966 to locate housing projects in areas in which they could contribute to open housing. In 1967, the City Planning Commission held hearings on eleven scatter-site public housing projects, including the Faraday Wood site. There has been no showing by the plaintiff that the determinations by City officials with respect to any of the other ten sites were made on racial grounds.

With respect to the Riverdale area itself, there is no evidence indicating that the racial composition of the community resulted from other than economic factors; there has been no showing that there was any discrimination in the private sector in Riverdale.

(2)

Petitioners argue that the decision of the Court of Appeals in *Faraday Wood* conflicts with the decisions of the Courts of Appeals in *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach,* 493 F. 2d 799 (5th Cir., 1974), *United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Cir., 1974), and *Dailey* v. *City of Lawton, Oklahoma,* 425 F. 2d 1037 (10th Cir., 1970) (Pet., pp. 17-21). The above decisions do not conflict with the decision of the Court of Appeals in the instant case.

In *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach,* a suit was brought by farmworkers against various governmental agencies of Delray Beach on the ground that the agencies, for racially discriminatory reasons, had refused to permit a proposed housing project to be connected to the City's existing water and sewer system. The District Court had found among other things that there was no evidence of racial or ethnic discrimination. The Court of Appeals reversed the District Court on this finding, on the ground that such finding was clearly erroneous. 439 F. 2d at p. 808. The Court of Appeals further found that the plaintiffs had established a prima facie case of racial discrimination requiring the City to offer a justification for its actions.

In *United States of America* v. *City of Black Jack,* the Court of Appeals held that the City of Black Jack had deprived the plaintiffs of their right to housing by adopting a zoning ordinance which prohibited the construction of a low to moderate income integrated townhouse development. The racial composition of Black Jack was virtually all

white, with a black population between 1% and 2%. The Court noted that there was evidence in the record that the ordinance was enacted for the purpose of excluding blacks. 508 F. 2d at p. 1185 fn. 3. The Court further noted that the ordinance had a discriminatory effect because it foreclosed 85 percent of the blacks from obtaining housing in Black Jack. 508 F. 2d at p. 1186.

In *Dailey* v. *City of Lawton, Oklahoma,* an action was brought to enjoin the City from denying a building permit, because of a zoning violation, for construction of a privately sponsored low income housing project. In affirming the lower court's granting of injunctive relief to the plaintiffs, the Court of Appeals found that there was evidence of racial motivation in blocking the project.

In the instant case, unlike the three cases discussed above, there was no proof of an intention to discriminate on the part of City officials or proof of an historical pattern of public discrimination in New York City. Indeed, as noted above, the evidence indicated that the City had engaged in an affirmative program to aid the minority residents of the City.

(3)

There is no conflict among the circuits with respect to the interpretation of the Fair Housing Act, 42 U.S.C. §§3601 et seq. Petitioners, in the Court of Appeals, argued that if the "appellants show a violation of the Equal Protection Law they will also have established their claims under the Fair Housing Law of 1968, 42 U.S.C. §3601, et seq." (App. Br. in Court of Appeals, p. 46). The Court of Ap-

peals, in finding the plaintiffs' constitutional claim to be insufficient, properly dismissed the claim under the Fair Housing Act (A5a-6a, fn. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

April 3, 1975.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of the
City of New York,
Attorney for Respondents.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(4050)