

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF BLACK JACK, MISSOURI,
a municipal corporation,

Defendant.

CIVIL ACTION NO. 71 C 372(1)

DEEDS BRIEF FOR THE UNITED STATES

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PRETRIAL BRIEF FOR THE
UNITED STATES

INTRODUCTORY STATEMENT

On October 20, 1970, the newly incorporated City of Black Jack passed a zoning ordinance excluding any further apartment construction within that municipality, and thereby prohibited the construction of the proposed Park View Heights development under the FHA Section 236 program. The question in this case is whether this zoning ordinance, in the context in which it was passed, constituted racially discriminatory conduct denying persons equal housing opportunity secured by the Fair Housing Act, 42 U.S.C. 3601 et seq. The United States contends that it did, and seeks relief pursuant to 42 U.S.C. 3613, which authorizes suit by the Attorney General where denials of equal housing opportunity have a public^{*/} as well as a private impact.

*/ See United States v. Hunter, 459 F. 2d 205, 217 (4th Cir. 1972), cert. den. U.S. (1972), 34 L. Ed. 2d 189.

At the trial, the United States will endeavor to establish the following:

1. The effect of Black Jack's conduct was racially discriminatory, in that it perpetuated the virtually all-white character of Black Jack and the existing pattern of racial segregation in housing in the St. Louis metropolitan area. This pattern of segregation was not fortuitous, but resulted from a long and melancholy history of deliberate discrimination in housing by both public and private bodies. Its reinforcement by Black Jack not only impaired equal housing opportunity, but equal employment opportunity and equal educational opportunity as well.

2. Racially discriminatory impact being shown, Black Jack has the burden to establish that its action was required by a compelling state interest. The evidence will show that Black Jack cannot even approach making such a showing, and that, in fact, Black Jack's extraordinary course of conduct in this case, beginning with its remarkably timed secession from St. Louis County, and continuing through its passage of the challenged zoning ordinance, contravened established principles of zoning and planning. Our expert testimony will establish that, far from showing a compelling nonracial necessity to do what it did, Black Jack will not be able to show that its conduct, from a nonracial standpoint, was even plausible.

3. Black Jack's officials had a duty to know, and in fact knew, that the effect of their conduct would be to perpetuate segregation. Under conventional legal principles and common experience, they were presumed to intend the natural consequences of their conduct, and in that sense, their purpose was racially discriminatory. In addition, there is extensive extrinsic evidence of racially based opposition to Park View Heights both by the architects of the secession and restrictive zoning ordinance and by the citizens to whose views the leaders were responding. This proof of racially discriminatory purpose is germane not only to bolster the proof of a violation, but also to counteract any attempt to show a "compelling state interest" to justify its action.

BLACK JACK'S ZONING ORDINANCE HAD THE EFFECT
OF PERPETUATING RACIAL SEGREGATION IN HOUSING
AND OF IMPAIRING EQUAL OPPORTUNITY IN EMPLOYMENT
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A. THERE IS WIDESPREAD RESIDENTIAL SEGREGATION IN BLACK
JACK AND IN THE ST. LOUIS METROPOLITAN AREA

The evidence at trial in this case will show that Black Jack is a virtually all-white municipality, that the St. Louis metropolitan area is characterized by widespread racial separation in housing, and that both conditions stem from pervasive and deliberate discrimination by private and public agencies. Park View Heights, on the other hand, was to serve a user group in which blacks were substantially represented, and a serious effort was made to accomplish true freedom of choice and a meaningful level of desegregation. By excluding a development which had prospects of reversing the preexisting racial pattern, Black Jack perpetuated it.

While racial integration in the City of Black Jack was described as "fantastic" by Mayor Keith Barbero, ^{*}/ the statistics tell a different tale. According to the 1970 Census, the racial composition of Black Jack was almost 99% white. ^{**}/

Racially, Black Jack is representative of its surrounding area. Analysis of the census data for the entire

^{*}/ Dep. Barbero, pp. 29-31.

^{**}/ A precise calculation of the black percentage of Black Jack's population is impossible because the City includes some census districts in whole and others in part. The testimony of Department of Justice research analyst Nancy Sweesy will show that the percentage of blacks in each of these

area north of Route I-270 (which runs from east to west) shows that its population is about 98% white. */ As of 1970, the Hazelwood School District, of which Black Jack is a part, had a total of 24, 256 pupils, of whom 250, or 1%, were black. **/

The segregated condition of Black Jack and its environs is not isolated. In Park View Heights v. City of Black Jack, 467 F. 2d 1208, 1216, note 10 (8th Cir. 1972), the Court of Appeals described the pertinent racial facts in the metropolitan St. Louis area as follows:

In the area of housing, plaintiffs present statistics which reflect a growing pattern of racial segregation in housing in the St. Louis metropolitan area. The percentage of black residents in the City of St. Louis has increased from 17 per cent to 46 per cent of the city's population in the last 20 years. In St. Louis County, in which Black Jack is located, the percentage of black residents dropped from 4.1 per cent to 2.1 per cent of the population of the county as a whole.

Inability to escape from the inner city likewise makes it more likely that one will reside in older and, therefore, less desirable homes. The emmigration trend has resulted in 95 per cent of all new housing being built in the suburbs. Eighty per cent of the black population of the region lives in homes that are at least 30 years old. Forty-three per cent of the black population lives in housing that is seriously substandard, and 33 per cent in housing that is overcrowded.

In the schools, the segregation is even more apparent. Five per cent of the total enrollment in the county is black; in the City of St. Louis, the enrollment is 64 per cent black. The schools in the ghetto area of north St. Louis are virtually all black.

*/ PX A-1(a)

**/ PX A-10

Living in the city causes decreased employment opportunities also. Between 1951 and 1969, the city lost a total of 37,000 payroll jobs, a decrease of 9 per cent while the payroll jobs in St. Louis County increased by 197,000, an increase of 448 per cent. In manufacturing, the county gained 77,000 jobs -- an increase of 423 per cent, while the city lost 49,000 jobs -- a decrease of 25.7 per cent. In retail trade, the county gained 44,000 jobs -- an increase of 540 per cent and the city lost 25,000 jobs a decrease of 33 per cent.

Unemployment and subemployment are more likely for those living in the inner city. The unemployment rate for the area of north St. Louis City is 12.9 per cent, compared to 2.9 per cent for the area as a whole. Subemployment is 33.9 per cent. These statistics seem to indicate that employment opportunities are increasingly to be found only in those areas where the low and moderate income citizens do not live. */

B. THE RACIAL RESIDENTIAL PATTERNS RESULTED FROM DELIBERATE DISCRIMINATION IN THE HOUSING MARKET

Long standing public and private discrimination caused the racial residential patterns which have kept blacks and whites apart in the St. Louis metropolitan area.

1. Private discriminatory conduct

With respect to the private housing market, the history of discrimination started long ago and continued unabated until quite recently. In about 1915, the burning of black homes in East St. Louis brought thousands of blacks across the river to St. Louis, and, as the Executive Secretary of the St. Louis Real Estate Exchange tactfully put it in

*/ The Court's footnote is taken from the allegations of the complaint in the Park View Heights suit, and is predicated on information available before the results of 1970 census became known. We will show at trial, however, that the 1970 census fully corroborates the thrust of the Court's footnote and changes only a few details which have no bearing on the result in this case.

a letter to a counterpart in Detroit, "a flock of Ethiopians were imported from the South by a group of political leaders. */ This brought "the negroes [sic] rubbing elbows with the whites," a situation which the whites found intolerable. **/ In 1916, the City of St. Louis passed an ordinance prohibiting residence of blacks in white areas, and vice versa. ***/ In 1917, however, the Supreme Court of the United States held a similar Louisville, Kentucky, ordinance unconstitutional, Buchanan v. Warley, 245 U.S. 60 (1917), and the real estate industry turned to racially restrictive covenants. In 1923, 99% of the members of the St. Louis Real Estate Exchange personnel voted to designate certain Negro sections in the City and to prohibit sales to blacks outside these sections. ****/ In 1929, the Executive Secretary of the St. Louis Exchange proudly related that "we are rigid in the enforcement of this rule" (against sales to blacks outside their designated areas) and that members had been fined, suspended or expelled for violations of it. In 1949, the St. Louis Board voted to retain the separation of the city along racial lines. ***** /

The St. Louis real estate industry's vigorous adherence to racial segregation in housing is reflected in Plaintiff's Exhibits D-1 through D-13, and to some extent echoes a similar

*/ PX D-3.

**/ Id.

***/ PX D-1.

****/ PX D-2.

*****/ See PX D-4. In this exhibit, a 1949 letter to a Detroit real estate representative, Clarence Long, Executive Secretary of the St. Louis Board, related that restrictive action was necessary because of higher earnings by Negroes during the war years, the establishment of "Eleanor Clubs," and certain

policy of the National Association of Real Estate Boards (NAREB), of which the St. Louis Board is a member. Until 1950, NAREB's canons of ethics expressly provided that

A realtor shall never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality whose presence will clearly be detrimental to property values in the neighborhood. */

In 1950, NAREB, while continuing to adhere to the spirit of the old rule, eliminated the unadorned use of the words "race or nationality" from the national version of the ethics of the profession. The St. Louis Board, however, made it quite plain that, so far as St. Louis was concerned, blacks in a white area remained taboo. In 1955, the Board's Executive Secretary wrote a letter to all members of the Board which reads as follows:

Our Board of Directors wishes to call to your attention our rule, that no Member of our Board, may, directly or indirectly, sell to Negroes, or be a party to a sale to Negroes, or finance property for sale to or purchase by Negroes, in any block, unless there are three separate and distinct buildings in such block already occupied by Negroes. By a 'block is meant, both sides of the street on which the property fronts, between intersecting streets.'

This rule is of long standing, and has our interpretation to be directly associated with Article 34 of the Code-of-Ethics of the National Association of Real Estate Boards, reading: 'A Realtor should not be instrumental in introducing into a neighborhood a character of property or use which

will clearly be detrimental to
property values in that neighborhood.'

Recently it has been observed that some Members of our Board are offering for sale to Negroes, property in the city of St. Louis in violation of our rule. In some instances thereof it is quite possible that the said offerings are made without the knowledge of the existence of our rule. Therefore, we ask that you cause a bulletin to be issued to your Members, present and future, reciting our rule and Article 34 of NAREB Code-of-Ethics, and requesting due observance thereof. . .

We ask that you govern yourself accordingly when dealing within property in City of St. Louis. */

On October 15, 1958, the Real Estate Board voted to allow sales to blacks in the city if a single Negro already lived on the block; in the county, three prior black residents continued to be required. **/ In both areas, the prohibition of sales to blacks in all-white areas continued in full force.

Alfred H. Mayer, the defendant in the landmark case of Jones v. Mayer Co., ***/ testified on trial deposition that he was familiar with the rules against sales to blacks in white areas, that such sales were regarded as "blockbusting," and that these racial restrictions were generally implemented in the St. Louis area at least until 1968. ****/

*/ Stipulation dated February 23, 1973; PX D-15, pp. 233-34.

**/ PX D-10.

***/ 392 U.S. 409 (1968).

****/ Mayer Dep., p. 20.

He testified that after he failed to persuade his competitors in the 1960's to sell to blacks on an open occupancy basis, he operated his subdivisions on a segregated basis too, except for those subject to President Kennedy's Executive Order of 1962 requiring equal opportunity in some federally assisted housing. Mayer felt a financial necessity to do so because nobody else was integrating. Incidentally, Paddock Woods, the segregated Mayer development which was the subject of the Jones case, is only a mile or so from Black Jack. */

The discrimination in the housing market which characterized the St. Louis area did not stop at the city limits of what is now Black Jack. As we have observed, supra, pp. 4-5, the 1970 census discloses that a Negro in Black Jack was something of a rarity. We will show at trial that, of the few blacks who did find their way into the city, at least several experienced deliberate attempts by a local builder to exclude them on account of race, and did not in fact succeed in moving to Black Jack until after the Freedom of Residence organization and its attorneys had assisted them to do so by challenging the legality of the builder's actions. **/ One black who failed to obtain a

*/ William McKinney, who had the responsibility to work on race relations for HUD from 1953 to 1966, also related in some detail the restrictive practice of St. Louis real estate companies and financial institutions during his deposition in this case. Several additional witnesses identified in plaintiff's summary of its testimonial proof will also testify to discriminatory practices in the housing market. pp. 10-13, McKinney Dep.

**/ Anticipated trial testimony of Calvin Morgan, Faith Smith, Louis Hughes, John Hunt and Mrs. Cathy Yokum.

house, but who did get an apartment, was called a "nigger" by a teenager in the midst of the Park View Heights controversy, and was obscenely invited in 1971 to go back to Africa by vandals who wrote the message in shaving cream on his mirror. */ Under these circumstances, the insignificant percentage of blacks in Black Jack, and the ^{high} low level of residential segregation in the St. Louis area, can hardly be termed fortuitous.

*/ Anticipated trial testimony of John Hunt.

2. Discrimination by public officials

In view of the pervasive character of discrimination in the private housing market, and the power and willingness of the Real Estate Board to discipline those who violated segregation rules, the state needed to do little more with respect to privately owned housing than to lend its weight to the industry's racial preferences. After it became apparent that St. Louis' 1916 ordinance prohibiting residency across racial lines was invalid, the real estate industry turned to the expedients of racially restrictive covenants, ^{*}/ and the Missouri courts readily enforced such covenants as being in all respects consistent with Missouri's public policy. See Kraemer v. Shelley, 355 Mo. 814, 198 S.W. 2d 679 (1946), in which the Court ironically indicated that a provision of the Missouri Constitution securing equal opportunity to all "not only sustains but even strengthens" prior decisions enforcing racial restrictions. After the Supreme Court of the United States held judicial enforcement of these covenants unconstitutional, Shelley v. Kraemer, 334 U.S. 1 (1948), housing over which state and local authorities had control nevertheless continued to be segregated. Public housing in the St. Louis area, which is overwhelmingly black, has been located almost entirely in black areas of the city and in all-black Kinloch ^{**}/

^{*}/ See, e.g. PX D-3, D-4.

^{**}/ See PX A-3, pp. 536, 548; anticipated trial testimony of HUD representative Robert Strassner.

in North St. Louis County. According to the testimony of HUD's William McKinney, St. Louis public housing projects were openly segregated until the 1960's and continued to be wholly racially identifiable in terms of project occupancy even thereafter, with only the slightest steps towards token integration.^{*/}

Missouri's public policy in areas other than housing remained favorable to racial segregation for many years, and this too had the inevitable effect of supporting discrimination by private parties. The state's rigid insistence on keeping white schools white, embedded in its Constitution until 1957,^{**/} came so high in the order of priorities that the University of Missouri rejected a black applicant for admission to its law school even though Lincoln University, maintained for Negroes pursuant to state statute, did not teach law at all.^{***/} State law provided well into the 1950's for segregation of training schools, libraries, playgrounds and public parks,^{****/} and intermarriage between
*/ Dep. McKinney, pp. 13-15.

**/ Missouri Const., Art. IX, Secs. 1 and 3, requiring segregation, were not repealed until 1957, three years after Brown v. Board of Education, 347 U.S. 483 (1954).

***/ The Supreme Court of the United States ordered the Negro's admission even under the "separate but equal" doctrine. See Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938), reversing 342 Mo. 121, 113 S.W. 2d 783 (1937)

****/ For a discussion of the state laws providing for segregation of the races, see Williams v. Kansas City, Missouri, 104 F. Supp. 848 (W.D. Mo. 1952).

whites and Negroes was still forbidden in Missouri when the Supreme Court invalidated all state anti-miscegenation laws in Loving v. Virginia, 388 U.S. 1 (1967).

If Missouri's stance promoted segregation, the Federal Government's was no better. In his June 11, 1971, Statement on Equal Housing Opportunity,^{*/} President Nixon observed that federal housing policies have in the past promoted racial segregation. That has indeed been so. In Bradley v. School Board of City of Richmond, Va., 338 F. Supp. 67, 215-218 (E.D. Va. 1972), rev'd on other grounds 462 F. 2d 1058 (4th Cir. 1972), the Court summarized federal housing policies and concluded that

By deliberate policy the Federal Housing Administration encouraged the institution and perpetuation of segregated housing.
338 F. Supp. at 216.

The Court noted that the FHA underwriting manuals in the 1930's and 1940's, seeking to protect neighborhoods from what were euphemistically termed "adverse influences" or "inharmonious user groups," recommended deed restrictions containing a

Prohibition of the occupancy of properties except by the race for which they are intended. 338 F. Supp. at 216.

One manual urged investigation of each proposed area to assure that it is not likely to be "invaded" by "incompatible social and racial groups," since "if a neighborhood is to

^{*/} PX M-23, p. 2.

retain stability, it is necessary the properties continue to be occupied by the same social and racial classes." Id. at 216. In 1950, two years after Shelley v. Kraemer, supra, FHA announced that it would not assist the development of properties containing new racially restrictive covenants (imposed after 1950), but would continue to finance properties with restrictive covenants instituted prior to the new policy. Id. at 217.

The FHA policies supporting segregation were not an academic matter in St. Louis. William McKinney, later Director of Low Income Housing at the Fort Worth Regional Office, was assigned to FHA in St. Louis from 1953 to 1966, and had special responsibilities with respect to race relations. Asked on deposition if he believed that FHA's policies promoted racial discrimination in the housing market, McKinney responded emphatically that "I know that they did." He related that at FHA's St. Louis office, white areas into which blacks had moved were appraised by FHA personnel as having lower property values because of integration. To assure that this policy was implemented, the FHA officials posted a map which separated white residential areas from those occupied by blacks; below Grand Avenue meant no insurance. */

*/ McKinney Dep., pp. 11-13. Mr. McKinney testified that these practices continued until about the time of President Kennedy's Executive Order of 1962 which prohibited discrimination in some but not all federally assisted housing.

Section 203 of the Fair Housing Act, 42 U.S.C. 3608, and the decisions construing it,^{*/} require the Secretary of HUD, as well as other federal officers, to exercise their responsibilities in a manner affirmatively to promote equal opportunity in housing. Pursuant to that responsibility, site selection guidelines^{**/} have been promulgated for federally assisted housing which effectuate the foregoing requirements and fulfill the obligation to correct the effects of past discrimination. These guidelines state that it is an important element in favor of locating a development at a particular site that it provides opportunities for de-segregated residency outside areas of minority concentration. Location of Park View Heights at the proposed site in Black Jack was an appropriate implementation of the policy commanded by the Act and by the Constitution. Black Jack is virtually all-white, and Park View Heights would provide realistic opportunities for residents of all races and had much appeal to blacks.

^{*/} See, e.g., Shannon v. HUD, 436 F. 2d 809 (3rd Cir. 1970); Gautreaux v. Romney, 448 F. 2d 731 (7th Cir. 1971).

^{**/} PX M-24, 37 F.R. 203 (January 7, 1972).

C. PARK VIEW HEIGHTS WAS PLANNED FOR AN INCOME GROUP
IN WHICH BLACKS WERE HEAVILY REPRESENTED AND THE
DEVELOPMENT WAS TO BE MARKETING SO AS TO ATTRACT
BLACKS AS WELL AS WHITES

The effect of Black Jack's exclusion of Park View Heights from what is for all practical purposes an all-white area has a major racial impact because

(1) a far greater percentage of blacks than of whites live in apartments;

(2) the income group to which Park View Heights appealed includes a high proportion of blacks; and

(3) the developers of Park View Heights were particularly conscious of their responsibility to provide housing opportunities for blacks.

1. Blacks constitute a significant portion of the group eligible for Park View Heights.

The statistical case is simple but devastating. The 1970 census shows that 57% of the blacks in the St. Louis metropolitan area, but only 25% of the whites, live in apartments.^{*/} While blacks represent only 14% of the entire population of the metropolitan area, 27% of the apartment dwellers are black. Apart from the special characteristics of Park View Heights, the impact of apartment exclusion is racially disproportionate.

The upper income limit for Park View Heights is just in excess of \$10,000.^{*/} Almost half of the white households (49%) but only about a fifth of the black ones (21%) earn more than \$10,000.^{**/} Moreover, while the percentages of blacks and whites in the moderate income category (\$5,000 - \$10,000) are comparable,^{***/} a substantial majority of the blacks in this category (58%) rent, while most of the whites (61%) own their own homes.^{****/} A far larger percentage of blacks than whites (39.4% to 11.1%) live in sub-standard housing.^{*****/}

All in all, there are 19,861 black renters and 72,617 white renters in the moderate income category, a black percentage of about 22%.^{*****/} Assuming no special efforts by the sponsors to attract blacks, it is readily apparent that the percentage of Negroes in the user group is far greater than in Black Jack as now populated.

^{*/} See this Court's Order of February 23, 1973.

^{**/} PX A-1(b).

^{***/} 32% of the black households and 29% of the white households earn between \$5,000 and \$10,000.

^{****/} PX A-1(b).

^{*****/} PX A-8, p. 535.

^{*****/} This percentage is conservative. The statistics taken above are from the entire St. Louis metropolitan area, including white areas in South St. Louis County and in Illinois. It is highly improbable that whites in those areas would move to Black Jack, but far more likely that blacks from the city would do so.

2. Park View Heights was designed and marketed to attract blacks as well as whites.

Park View Heights (PVH) was, in substantial part, conceived by its sponsors as a means of creating alternative housing opportunities in the suburbs for black persons in the appropriate income range who had previously not been afforded such opportunities. In 1968, the Inter Religious Council for Urban Affairs (ICUA) was organized in part to establish a long-range program for the construction of housing for persons of low and moderate income. */ Within 18 months ICUA became involved in the planning and development of 6 or 7 federally financed housing complexes in predominantly black areas. **/

By mid-1969 ICUA had concluded that construction of low and moderate income housing in the ghettos was not solving the problems of persons for whom it was intended, and that there was a need for alternative housing opportunities. ***/ Their judgment was influenced by contacts with 25-30 black leaders from the inner city, who indicated that large numbers of blacks were seeking moderately priced housing in the

*/ Dep. Quigley, p. 6. While, for the Court's convenience, we refer in this portion of our brief to the depositions now in the record, proof of the facts described herein will be offered at trial through the live testimony of John Quigley, Paul Mittelstadt, Rev. Harrison Peyton, and several black representatives of PVH, among others.

**/ Dep. Quigley, p. 13.

***/ Dep. Quigley, p. 16.

suburbs which would be free of the social problems of the ghetto.*/ It was then that the idea for PVH was spawned.

Just as ICUA sought to create an alternative housing choice for blacks, so, in fact, did St. Mark's United Methodist Church (St. Mark's), the local community sponsor for PVH. For many years, the leadership and congregation of St. Mark's had actively participated in the area-based fair housing organizations.**/ The Reverend Harrison Lee Peyton, the co-pastor of St. Mark's, who was also active with the Freedom of Residence group (FOR), a fair housing organization, testified that his contacts through his church had given him personal knowledge of the need for racially unrestricted housing in the area, especially for young persons of moderate income.***/ Similar activities and experiences led Reverend Willard Jones, Peyton's co-pastor to the same conclusion.****/ Accordingly, when representatives of ICUA requested the Board of Directors of this church to agree to become the local sponsor of PVH, the church viewed the offer as an opportunity to fulfill one of its goals -- to provide "an opportunity for black people of middle income to have housing available."*****/

*/ Dep. Quigley, pp. 22, 70.

**/ Dep. Jones, p. 11; Dep. Peyton, p. 11.

***/ Dep. Peyton, p. 11.

****/ Dep. Jones, p. 9-15.

*****/ Dep. Peyton, p. 6.

The commitment to assure that PVH would be "racially integrated" was widely publicized by the sponsors. In a leaflet distributed by ICUA to residents of the North County, the sponsors described one of their prime goals as being "to establish a stable yet diverse community, through integration of interests, professions, races and incomes." */ But the sponsors realized that this goal could be achieved only by a carefully planned and executed program to inform eligible blacks of the PVH development. A plan was formulated to do just that.

One of the first concerns of the sponsors was to secure substantial black representation on the Board of Directors of the Park View Heights Corporation, which was formed to build the development. Accordingly, of the 12 directors of the corporation, six were white and six were black. **/ It was agreed by the sponsors and especially the blacks among them, that contacts and acquaintances in the black community would be utilized to inform eligible blacks of the housing opportunities by PVH. ***/

Use of various sources and media geared to serving primarily the black community was also planned. ****/

*/ PX B-13.

**/ Dep. Mittelstadt, p. 42.

***/ Dep. Mittelstadt, p. 43.

****/ HUD's affirmative marketing regulations for federally assisted housing require various steps of this kind, including use of nonwhite media. See PX M-25, 37 F.R. 75.

Arrangements with the McDonnell-Douglas Aircraft Company to advertise the availability of PVH principally to its black employees were tentatively made.^{*/} It was decided by the sponsors that black churches would be encouraged to advertise the existence of PVH to members of their congregations.^{**/} In addition, specially written newspaper advertisements explaining the type of development that PVH was, and that it was open to members of all races, were planned.^{***/} In the same spirit, Mittelstadt (white) and PVH president Harry Williams (black) posed for a nationally publicized photograph while inspecting the proposed site together.^{****/}

It is evident from the foregoing that blacks would have represented a significant percentage of the residents of Park View Heights. In Park View Heights v. City of Black Jack, supra, half the would-be tenant plaintiffs are black, half white, and Black Jack does not contest the probability of substantial black occupancy. In fact, in the deposition of Amos Hawley, counsel for Black Jack asked a series of questions evidently intended to elicit the response that the blackness of some PVH residents would aggravate the supposed problems of "economic integration."^{*****/}

^{*/} Dep. Quigley, p. 44.

^{**/} Dep. Quigley, pp. 44-45.

^{***/} Dep. Quigley, p. 45.

^{****/} PX F-2.

^{*****/} Dep. Hawley.

II

BLACK JACK CANNOT ESTABLISH THE EXISTENCE OF
A COMPELLING STATE INTEREST FOR ITS CONDUCT,
WHICH WAS IN FACT RATIONALLY INSUPPORTABLE
FROM A NONRACIAL PLANNING STANDPOINT

In August 1972, anticipating that this case would revolve around the "compelling state interest" issue, the United States propounded interrogatories to defendant^{*/} seeking to elicit in detail the nonracial justifications on which Black Jack would rely to support its zoning ordinance. The answers to these interrogatories make it clear that "defendant's decision [was] to exclude multiple family dwellings in general Park View Heights was not excluded or considered in particular."^{**/} In summarizing the anticipated testimony of its representatives, defendant stated, in pertinent part:

4. The City's Zoning Ordinance is intended to restrict additional apartments generally in the City, not against PVH specifically.
5. There is disproportionate number of apartments already in the City of Black Jack compared to the single family residences now there.
6. The City's Zoning Ordinance is for the lawful purpose of regulating, among other ^{***/} things, density of population in the City.

*/ See Plaintiff's First Set of Interrogatories to Defendant of August 31, 1972, Nos. 17-23.

**/ Defendant's Answer 18a to Plaintiff's First Interrogatories.

***/ Id., Answer 23. The first three sentences of this Answer relate that the incorporation of Black Jack was essentially designed to enable its citizens to regulate their own municipal affairs. See also the Final Report of the Black Jack Zoning Commission, PX M-6, at pp. 23 et seq.

Since defendant has solemnly represented to the Court that sufficiency of the existing apartment supply and "density" were the reasons -- and the only reasons -- for the ordinance, we believe that Black Jack is barred from now attempting to establish some entirely different compelling state interest purportedly served by its conduct. Nevertheless, since individual Commissioners testified to other reasons, and since 13 months after the suit began defendant came up with a new, radically different theory of opposition, we will deal with each nonracial justification raised by and for the City during the pendency of this litigation.

A. BLACK JACK'S STATED DEFENSE OF "TOO MANY APARTMENTS."

1. Most blacks cannot afford single family houses in Black Jack; thus, exclusion of apartments excludes most blacks, and was primarily a pretext for racial exclusion.

According to the Final Report of the Black Jack Zoning Commission, the typical price of a single family house in Black Jack is \$30,000.^{*/} Under the rule of thumb conventionally applied in the real estate industry, a prospective purchaser should have an annual income no less than 40% of the purchase price, in this case \$12,000. This puts single family houses in Black Jack out of the reach of about 85% of the blacks in the St. Louis metropolitan area.^{**/}

^{*/} PX M-6, p. 11.

^{**/} PX A-1(b), p. 15.

These facts of life are well known. The deposition testimony of defendants' expert witness, Professor Amos Hawley of the University of North Carolina, confirms that

rental housing, no matter how desirable and advantageous home ownership may be, remains the immediate prospect for most minority families. */

The working papers on which defendant's expert relied in preparing a report to HUD for the National Academy of Sciences explained that

The zoning device most frequently cited as one used for racial exclusion is the specification of unusually large lots. **/

The working papers go on to say that a certain amount of "double talk" can be expected:

The 'shouted' reasons for opposing apartment developments in the suburbs include the following: Apartments will not pay their way; apartments will cut off light and air; apartments will turn into slums; apartments will reduce property values; apartments will injure the character of the community. The "whispered" reasons are that the apartments will attract lower class tenants, transient households not in the community's interest, and Negroes. (Emphasis added)

*/ Hawley Dep. and defendant's attachment, Freedom of Choice in Housing, National Academy of Sciences, National Academy of Engineering, p. 24.

**/ Dep. Hawley, defendant's attachment, Segregation in Residential Areas, National Academy of Sciences.

***/ Id., p. 114.

The reference to "double talk" in defendant's expert's working papers finds its echo in what happened in Black Jack. Immediately adjoining the municipal limits of Black Jack lies Heatherton, a large development scheduled for 256 multi-family units, with development almost completed. It is not federally subsidized. It was constructed without any recorded public opposition whatever.^{*/} Moreover, while there were a few petitions circulated against conventionally financed Whispering Lakes, at which the rents were much higher than those at PVH,^{**/} and which is virtually all-white^{***/} that development, too, was built without any of the hue and cry that confronted PVH, and Black Jack made no attempt to incorporate to stop the project.

The situation has been quite different where an attempt has been made to build housing likely to be occupied by blacks in white residential areas. According to the testimony of Shelby Heman, a representative of Creative Communities, which was originally to be the developer of PVH, the boss of his parent company, Fisher and Frichtel, directed that he withdraw from his association because of a fear of the same kind of extensive opposition which the firm encountered in two other instances when he sought to build what would have been integrated or black-occupied housing in the white areas of St. Louis.^{****/} Currently, a proposed 236 development in South

*/ Anticipated trial testimony of Ed Givens.

**/ PX M-6, p. 11

***/ Anticipated trial testimony of John Hunt.

St. Louis has encountered overtly racial opposition from the local branch of the White Citizen's Council. */ Finally, within the City of Black Jack, some of the citizen opposition to a single-family development of less expensive homes was phrased in racial terms, such as "niggers" and "schwarzes." **/

There are doubtless families, in a thinly populated area like Black Jack, who oppose the intrusion of anything new. Apartments are unwelcome to those persons even aside from racial considerations. Apart from the fact that this attitude, whatever its motivation, has a racially discriminatory effect, the record shows that the level of opposition has risen significantly where blacks have been among the probable newcomers.

2. The Black Jack area is not saturated with apartments.

In 1970, according to the Final Report of the Zoning Commission, two thirds of the land in Black Jack was undeveloped. ***/ In terms of existing land use, 456 acres were occupied by single-family housing, and 15.2 acres by multi-family housing, ****/ a ratio of about 30 to 1. 306 of the 321 units of multi-family housing in Black Jack involved the unsubsidized 306-unit Whispering Lakes subdivision, which, despite

*/ PXM-22. The brochure agitates its readers to "prevent black rule."

**/ Dep. Mayer, p. 24

***/ PXM-6, p. 3

****/ Id., p. 10

higher rents than Park View Heights, had a vacancy rate of only 3.7%. */ The 1965 Master Plan for St. Louis County, which had the unambiguous responsibility of planning not only for Black Jack but for the entire county, devoted only 67 acres -- less than 4% of the total -- for multi-family housing, and the proposed site of PVH was one of the few areas designated for apartments.**/ The United States will demonstrate by expert testimony***/ that the land was topographically suited for multi-family housing, and that St. Louis County's zoning of the site in that classification was appropriate and well advised. A need exists among persons in the Section 236 income group for apartments in the area (see pp.29-31,infra), and those to be built by PVH were to be expertly constructed to blend in with the character of the area.****/

Under these circumstances, no plausible case can be made for the proposition that Black Jack is "saturated" with apartments, and our expert testimony will conclusively so establish.

*/ Id., p. 11

**/ Id., p. 22

***/ That of Professor McGrath and Bruce Heckman among others. HUD official William McKinney of the Fort Worth Regional Office so testified on his trial deposition.

****/ See, e.g. Dep. of William McKinney of HUD, pp. 34-35, 43-44, and the expected trial testimony of plaintiff's expert witness Dorn McGrath, and of the architect who designed PVH. The testimony of McKinney related primarily

3. The opponents of Park View Heights sought signatures for their petitions at the Whispering Lakes apartment development and made racial statements in support thereof.

If, as Black Jack claims, the zoning ordinance was aimed at apartments generally, it would have been extraordinary conduct to seek signatures at Whispering Lakes and to represent that purpose to the residents of that complex. Nevertheless, petitions were circulated there, and, as Barbara Peterson testified on trial deposition, the petitioner's pitch was that she would not want her children to attend school with Negroes.

B. THE NONRACIAL JUSTIFICATIONS NOT CLAIMED BY BLACK JACK BUT ASSERTED BY INDIVIDUALS ON BEHALF OF BLACK JACK.

1. Defendant cannot establish any lack of demand for the apartments.

One of the most aggressive opponents of PVH testified on deposition that the main objection of his organization to the development was that it was not needed -- that other apartments in the area provided better facilities at comparable rents. */ There is no basis whatever for this proposition.

William McKinney, Director of Low and Moderate Income Housing at HUD's Ft. Worth Regional Office, testified that conventional apartments and those at subsidized rents catered to a different market, and that one cannot compare "apples and oranges." **/ His testimony is borne out by all available in-

*/ See the deposition of Francis Huss of the Spanish Lake Improvement Association, at pp. 21, 22-24.

**/ McKinney Dep. pp. 94-95.

formation. An FHA study of the housing market in the metropolitan St. Louis area as of July 1, 1970, found a need for 3,395 rental units under the FHA-236 program during the next two years, including 2,635 for families and 760 for the elderly. */ PVH was to have 210 units. The St. Louis County Department of Planning issued a study entitled "Apartments in St. Louis County," **/ which defendant's expert witness Milton Bischof agrees is accurate, ***/ and in which the intensive need for and trend towards apartments nationally and in St. Louis County, is described in some detail. Bruce Heckman, the principal author of this report, will testify for plaintiff as an expert witness as to the acute need for apartments of the FHA-236 variety. The two pastors of St. Mark's United Methodist Church, which sponsored PVH -- Rev. Jones and Harrison Peyton -- became aware through their ministry of the intensive need for moderately priced apartments in the general area of Black Jack. ****/

According to FHA's 1970 study, the general vacancy rate for all apartments, subsidized and unsubsidized, in the City of St. Louis was 6.5%, whereas in St. Louis County it was only 4.4%. *****/ The Black Jack Zoning Commission

*/ PX A-2, p. 4.

**/ PX A-11.

***/ Bischof dep., pp. 49-50.

****/ Dep. of Jones, p. 19; anticipated trial testimony of Harrison Peyton.

*****/ PX A-2, Table X.

report describes Whispering Lakes, with rentals ranging from \$140 to \$220 per month, as having a vacancy rate of only 3.7%. Yet the statistics as to existing FHA-236 developments in the St. Louis area show a minimal vacancy rate of only 1.2%. Additionally, existing FHA-236 and FHA-221(d)3 developments (the forerunner of 236) in the St. Louis area show a vacancy rate of 2.2%.^{*/} These figures reflect, beyond dispute, that FHA-236 developments and other complexes serve a different market, and that even the significantly larger general vacancy rate in the city does not impair the marketability of FHA-236 housing there. Accordingly, it can come as no surprise that the Black Jack Zoning Commission made no reference to any lack of a market for PVH, that defendants' answers to interrogatories did not raise the issue, and that HUD's William McKinney testified not only that there was a clear need for such apartments in the area, but also that no reasonable argument could be made to the contrary.^{**/}

^{*/} PX A-5. The figures shown here relate the vacancy rate at all those projects in operation long enough to have rented up at least once.

^{**/} Dep. McKinney, p. 35.

2. The Zoning Ordinance cannot be Justified
on the Grounds that Defendant is Opposed To
Economic Integration

In his pretrial deposition, Robert Schuchardt, Chairman of Black Jack's Zoning Commission, and the man who, as head of the Black Jack Improvement Association, organized the incorporation and masterminded the zoning ordinance, testified that he opposed PVH, in part, because he was against "economic integration." */ Professor Amos Hawley, an expert witness called by Black Jack, testified on deposition that, while "racial mixing" in housing had proved itself in practice, there was as yet insufficient data to determine whether what he termed "socio-economic mixing" was feasible or desirable. While Professor Hawley emphatically denied that he or his Commission had recommended an end to HUD's program of building subsidized housing in the suburbs, he did suggest that there is some doubt whether true social interaction can be attained where groups with drastically disparate income levels live in the same geographic area.

A fair reading of Professor Hawley's testimony and of the publications on which it was based is that he and his colleagues entertain doubts as to whether true integration and social relations will ensue if, say, low rent public housing is placed in the middle of Ladue. Even such a proposition raises constitutional questions, for if a munici-

*/ Dep. Schuchardt, pp. 37, 39, 88. In this respect, Mr. Schuchardt is in agreement with President Nixon's Statement of June 11, 1971, defining the Administration's equal housing policy, PXN-23. President Nixon stated that the United States will not seek to impose economic integration on communities,

pality acts accordingly, the effect will be to preserve racial as well as economic separation. But this question does not arise in the present case, for Section 236 is not public housing, and Black Jack is not Ladue. According to FHA's 1970 market analysis of St. Louis, only 3% of the families eligible for Section 236 are eligible for public housing. */ The prospective tenants of PVH would earn from \$5,528 to \$10,143. **/ The average single family house in Black Jack is available to persons earning about \$12,000 per year, ***/ and the average family income in the City is about \$15,000. ****/ Park View Heights is expected to house teachers and policemen, manual workers and employees of retail establishments. Whatever the merits of placing public housing occupied by poor people in upper class areas, this is not a case in which that issue can or should be tried.

3. The Zoning Ordinance cannot be Justified on the grounds of Insufficient Employment Opportunities

Defendant's Answer 18(a) to plaintiff's August 1972 interrogatories candidly states that

No, lack of employment facilities in the nearby community was not considered in defendant's decision to exclude multiple family dwellings in general,

*/ PX A-2, p. 5.

**/ See this Court's Order of February 23, 1973, pp. 1-2.

***/ See p. 24, supra.

****/ See PX A-1(a). The City of Black Jack is within two census tracts. The median income in census tract 2108.01 is \$16,703 and the mean income is \$16,670. The median income

and the Final Report of the Zoning Commission likewise makes no reference to this problem. Nevertheless, the argument of insufficient employment opportunities has been presented on Black Jack's behalf, */ and some response should be made.

The last two decades have witnessed, both in St. Louis and nationally, a remarkable rise in employment in the suburbs as compared to the central cities. For the St. Louis area, the census shows the following number of persons employed:

	<u>City of</u> <u>St. Louis</u>	<u>County of</u> <u>St. Louis</u>
1950	366,524	156,526
1960	294,000	263,200
1970	231,765	384,409 <u>**/</u>

North St. Louis County, in particular, has major employers, including McDonnell Douglas, Ford Motor Company, and several others. The conception that black residents of the city are somehow better off remaining there than in the suburbs where jobs are moving taxes the credulity of this Court.

Aside from the foregoing, the undisputed proof will show that a large 90-store shopping center named Jamestown Mall, which is likely to employ about 2,500 persons, is under construction about a quarter of a mile from the city limits of Black Jack. ***/ Retail personnel at Jamestown Mall will fit well into the income group to which Park View Heights is directed.

*/ Dep. Francis Huss, p. 20 and P-X M-26.

**/ PX A-1 (a), (d), (e). Compare Park View Heights v. City of Black Jack, 467 F. 2d 1208, 1216, note 10 (8th Cir. 1972).

***/ PX M-11 and M-12; see deposition of defendants' expert

4. The Zoning Ordinance Cannot be Justified on the Basis of School Problems.

Much of the citizen correspondence opposing Park View Heights alleged that the schools in the Hazelwood School District were already overburdened, and that Park View Heights would aggravate the situation. Sometimes, this opposition was couched in terms that were, for all practical purposes, racial, as in the case of the editorial in the Florissant Valley Reporter which asked rhetorically if local children will

be asked to share their dwindling school room space (as well as their slim treasury) with hundreds of indigent children from St. Louis' inner city ghetto.*/

This argument was disclaimed by the Zoning Commission and is, in fact, no argument at all.

In Plaintiff's Interrogatory No. 17, Black Jack was asked if lack of sufficient educational facilities played any role in the passage of the disputed zoning ordinance. Defendant answered "No," and pointed out that concern over schools "was not a consideration by the Zoning Commission as a body," since "the Zoning Commission did not see zoning as a solution to such problems." **/

The Commission was certainly right in concluding that changing the zoning classification from multiple family to

*/ PX F-4.

**/ See also the Commission's Final Report, PX M-6, pp. 19-20, and the remarks of counsel for Black Jack at page 48 of the Quigley deposition.

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single family was no solution. It is well established that, as stated in the St. Louis County Planning Department's study of "Apartments in St. Louis County, that

even with the worst mix of factors, apartments average a lower unit school child yield than single family homes. */

5. The Zoning Ordinance Cannot be Justified either because the tenants of Park View Heights would have too few automobiles or because they would have too many.

That the nonracial arguments against Park View Heights are pretexts rather than authentic contentions is illustrated by two mutually contradictory arguments which the opponents of the development have made with some regularity:

1. The tenants would not have transportation to jobs, shopping, medical facilities, etc. -- in other words, too few cars;*/ and

2. The development would burden the roads; the tenants, in other words, would have too many cars.**/

The argument of "too few cars," which is closely related to the question of employment opportunities, was disclaimed by Black Jack in its Answers to Interrogatories 18 and 19. It is, of course, well known that automobiles are available even to low income persons, and William McKinney, Director of Low Income Housing at HUD's Fort Worth Regional ~~Office~~ office, testified that even tenants of public housing generally have cars, with no problem at all existing for tenants of Section 236 housing.***/ Expert testimony at trial will be to the same effect. Moreover, to the extent that defendant's "too few cars" argument is phrased in terms of

*/ Dep. Bressler, pp. 24-26; Dep. Schmiedler, pp. 9, 13, 14.

**/ Dep. Bressler, p. 26; Dep. Henke, pp. 35, 36; Dep. Barbero, pp. 11-12.

***/ Dep. William McKinney, p. 83.

lack of public transportation, the expert proof will show that such transportation generally follows a demand rather than preceding it.

The contrasting argument against the proposed development is that there would be too many cars at Park View Heights, and that this would place an undue burden on the local roads. The St. Louis County Apartment Study relates that, according to a county traffic study

residents of single family subdivisions use about 20 times as much road service inside their developments as do apartment residents, */

It also relates that persons in single family units in all income ranges use roads substantially more than apartment dwellers of the same income levels.**/

Black Jack did not incorporate and its citizens did not become aroused because of the number of cars, high or low.

6. The Zoning Ordinance cannot be justified because of alleged inadequacies of Section 236 developments other than Park View Heights.

A full eighteen months after this case was brought, counsel for defendant presented an entirely new defense to this suit. The citizens of Black Jack, counsel claimed, opposed Park View Heights because Section 236 programs were supposed to be a failure on a national scale, and not because

*/ PX A-11, p. 29.

**/ Id.

of race. The defense is an intriguing one, for it seeks to expand what was a huge case when it involved only one project to 5000 times its present size. An argument can be made about every 236 development. Be that as it may, however, we submit that:

(a) This novel argument is not open to Black Jack, since defendant's Answers to Interrogatories and the depositions of its Zoning Commissioners have detailed the reasons for which the ordinance was passed, and this after the fact defense was not mentioned on behalf of Black Jack at all.

(b) Even if the sworn testimony of its representatives did not exclude the alleged failure of other FHA 236 developments as a defense, the material is irrelevant. That one developer did a bad job in, say, Maryland, does not mean that Park View Heights, with outstanding architects and builders and highly reliable sponsors, would fail here.

(c) The FHA-236 program can in no sense be characterized a failure, and those who call it one make the mistake of failing to differentiate between different HUD programs.

As we have related supra, pp. 23-24 , defendant has repeatedly represented that its zoning ordinance was directed at apartments generally, and not at Park View Heights specifically.^{*/} The Final Report of the Black Jack Zoning Commission, which is 34 pages long, does not mention Park View Heights or the FHA-236 program at all. None of the Commissioners made any reference to any problems supposed to have been encountered by this program outside Black Jack. We think it illuminating as to the existence of any nonracial defense that Black Jack would now present the Court with an argument which was not mentioned by any Commissioner in sworn testimony or by the defendant in answers to comprehensive Interrogatories.

Even if the Commissioners had, during their deposition testimony, discussed or mentioned the supposed failures of the FHA 236 program elsewhere as a reason for opposing Park View Heights, we do not see how this could be relevant. If fly-by-night sponsors hire incompetent architects in Massachusetts or Maine or Maryland to build 236 projects, and they flop, that surely sheds no light on how a development sponsored by the Methodist Church, designed by the Dean of the Washington University School of Architecture, and built by a leading St. Louis builder will not be successful in Black Jack. In any event, Black Jack's zoning

^{*/} See answers 18 and 23, section 4, to Plaintiff's Interrogatories.

ordinance would bar successful as well as unsuccessful 236 developments since all further apartments are prohibited.^{*/}

Finally, the evidence in the record shows that the 236 program has, on the whole, been a success, not a failure. This Court's order of February 23, 1973, directs that, for purposes of this case, the success or failure of the program nationally is to turn on the deposition testimony of Under Secretary Van Dusen and the information as to the eighteen such developments in the St. Louis area.

Turning first to the Under Secretary's deposition, we note that, while he testified in some detail, the following colloquy with counsel for Black Jack capsulizes his testimony

Q. Does HUD consider the 236 program to be a success or failure?

A. I think in terms of providing thousands of American families with good housing in locations which are typically improved for them, it has been very successful.

Q. Is Mister --

A. And let me add that most of that housing is well constructed, architecturally attractive, entirely compatible with the

^{*/} In its Interrogatory No. 12, plaintiff asked defendant to indicate all facts known to it tending to reflect on the ability or capacity of the sponsors and developers to construct or manage Park View Heights. Defendant answered that the sponsors' capacity "was not relevant to the passage of defendant's zoning ordinance," and that defendant "does not intend to prove incompetency by any of its own witnesses."

neighborhood in which it is located. So that it makes a positive addition to the community in which it is situated. I would therefore characterize the program as successful on those counts.*/

Throughout his deposition, and especially at pages 48 through 50, the Under Secretary disclosed that much of the confusion as to the issue of federally assisted housing arose because people failed to distinguish between different HUD programs. Section 236 developments, he explained, are often confused with public housing projects, which are entirely different, and are often opposed because of publicity identifying some of the latter as failures.

With respect to the rumors that 236 developments were overwhelmingly in default, Mr. Van Dusen incorporated into his deposition by reference a speech in which he pointed out that only 29 of 2,000 FHA 236 developments, or less than 1-1/2%, have resulted in default termination, that is, foreclosure or assignment of the mortgage to the Secretary.**/

With respect to the St. Louis developments, we have already observed (page 31, supra) that they have a minimal vacancy rate and are, for practical purposes, fully occupied. Photographs of newly constructed ones***/ will confirm Mr. Van Dusen's point that they have been "well developed and

*/ Van Dusen Dep., pp. 59-60. See also p. 49, lines 18-23.

**/ PX M-27, p. 5.

***/ PX M-21.

compatible with the neighborhood environment^{*/} in which they have been located. The evidence will also show that, by and large, these developments have been a financial success; defendant's calculation that they are financial failures is predicated on the fact that depreciation is carried for tax purposes as an operating expense, thus artificially deflating the developments' financial situation on paper.^{**/}

^{*/} Dep. Van Dusen, p. 48.

^{**/} Anticipated trial testimony of George DeMetre.

C. THE IMPLAUSIBILITY FROM A PLANNING STANDPOINT OF
BLACK JACK'S CONDUCT.

As we show in our legal discussion, pp.69-83, infra, the burden is not on plaintiff to establish that Black Jack acted unreasonably. On the contrary, once discriminatory impact is shown, it is incumbent on defendant to prove a compelling state interest for its action. Nevertheless, the expert testimony will show that the entire course of conduct which led to the passage of the critical zoning ordinance was unsound from a planning standpoint, tended to promote segregation, and would not have occurred but for the opposition to this integrated development.

The City of Black Jack was incorporated on August 6, 1970. From the sequence of events, it is apparent that incorporation was precipitated by HUD's approval a short time earlier of Park View Heights^{*}/, which left changing the zoning classification of the proposed site as the opponents' only resource. It is apparent from the deposition of Robert Schuchardt that he and his Black Jack Improvement Association, (BJIA), sometimes aided by Francis Huss and his Spanish Lake Improvement Association (SLIA) first led the opposition to the project, then masterminded the fight for incorporation, and finally steered through the zoning ordinance which accomplished their exclusionary goal.^{**}/

^{*}/ The feasibility letter was dated June 5, 1970.

^{**}/ Dep. Robert Schuchardt; Dep. Francis Huss.

In general, the leaders of the Black Jack Improvement Association became the officials of the new municipality after incorporation.*/

Rev. James Hennig, a Lutheran minister, now in Chicago, testified on deposition that leaders who favored incorporation after the Park View Heights controversy had previously opposed it for practical reasons. No wonder! The fragmentation and balkanization of local government makes planning for an entire area extremely difficult and minimizes the opportunity for desegregation.

Some of the most effective criticism of fragmented government was written by defendant's own expert witness, Amos Hawley. The National Academy of Sciences publication "Freedom of Choice in Housing", which is an exhibit to Mr. Hawley's deposition, contains three findings which, in our judgment, annihilate defendant's case. We quote them verbatim below:

1. Local government autonomy in metropolitan areas results in an uneven distribution of public sector costs; some government units are forced to assume the costs of decisions and policies adopted by other units.**/

2. It is unlikely that a policy of racial mixing can be consistently applied in metropolitan areas in which there are two or more autonomous governments. For any one locality to act in the total social interest is for it to put itself in a position to be beggared by others who do not accept similar responsibility voluntarily.***/

*/ Dep. Schuchardt p. 25.

**/ Dep. Hawley, Ex.No. 1, p. 44.

***/ Id, p. 31.

3. Any fragmentation of the housing market constitutes a basis for segregation. Multiple autonomous governments and private institutional barriers contribute to fragmentation.*/

St. Louis County, with 95 municipalities ranging from small to minuscule, each exercising independent zoning power, is one of the most balkanized areas in the nation, and the foregoing criticism by defendant's expert applies to it with particularity. Dorn McGrath, president of the American Institute of Planners, and plaintiff's principal expert witness, will testify in some detail with respect to the issue of balkanization and will explain how the undesirable features of fragmented local government led to a reversal of the trend to incorporation by municipalities of Black Jack's size until the Park View Heights controversy led to Black Jack's secession.

In a prior pleading, Black Jack criticized the United States for favoring what defendant called the "revolutionary" concept of "regional planning".**/ Defendant's expert Hawley explained on deposition that this concept is not revolutionary at all, and Professor McGrath will show how planning on a regional basis is essential in this day of urbanization if chaos is to be avoided. Defendant's vivid adjective, however, goes to the heart of its case, for, if there is no planning on a regional basis, the noisiest factories may be put next to hospitals

*/ Id., p. 22.

**/ Defendant's Petition for a Continuance, p.2,

by adjoining municipalities and, as has occurred here, each government can look to its parochial exclusionary interest at the expense of its neighbors and of equal housing opportunity.

* * *

The unreasonable character of Black Jack's conduct did not end with the idea of incorporation. Professor McGrath will also show that the municipal boundaries were selected in an arbitrary rather than a professional way, an unsurprising conclusion since, unlike St. Louis County, Black Jack had neither funds nor access to professionals in the field and had to rely, instead, on the zeal of a man whose governing motivation was implacable opposition to Park View Heights.*/ The expert testimony will show that St. Louis County, which had highly skilled personnel, knew what it was about when it zoned the proposed site for multiple family, that the land is entirely suited to that purpose, and that, putting to one side the controversy over the Park View Heights, the land was appropriately zoned in the first place.

*/ See generally Schuchardt Dep. and in particular p. 62, in which Mr. Schuchardt expounded on the emotional stake which he had in doing the job right so that he did not look foolish.

III

RACE WAS A SIGNIFICANT ELEMENT IN BLACK JACK'S PURPOSE IN EXCLUDING PARK VIEW HEIGHTS

The lack of any compelling or reasonable nonracial explanation of Black Jack's opposition to Park View Heights readily leads to the inference that race was, at least, a significant factor in the decision to exclude the development. Moreover, the discriminatory effect of excluding an integrated development from a white area was or should have been known to the architects of the exclusion, and this too contributes to the evidence of discriminatory intent. The record in this case, however, is not confined to facts from which a discriminatory purpose may be inferred. Even though it was surely widely known that direct mention of race would tend to impair their cause, a number of adversaries of Park View Heights either mentioned it openly or under a very thin disguise. The evidence will show that racial considerations played a part in the deliberations of the Zoning Commission, that race was on the minds of the architects of the opposition, and that there was extensive racial sentiment in the Black Jack community to which the public officials responded.

A. RACIAL CONSIDERATIONS WERE VOICED BY OFFICIALS OF THE CITY OF BLACK JACK

Gerald Hutton is a black resident of Black Jack who was a member of the Zoning Commission. He voted for the Zoning Ordinance and is in privity with the defendant.

His testimony about the deliberations of the Zoning Commission is therefore, in effect, an admission by Black Jack, and it is compelling:

Q. Well, was it your understanding that excluding apartments meant exclusion of potential black residents in Black Jack?

A. Not only black, but poor also. Black and poor. I was fully aware of this.

Q. Was this discussed at Zoning Board meetings?

A. Yes.

* * *

Q. Is it correct to say that they [the Zoning Commissioners] felt that property values would decline by having apartments which would have both poor and black occupants?

A. Correct. */

Mr. Hutton also made it clear why, in spite of the foregoing, he voted for the Zoning ordinance. He testified that he was mostly silent on the question of multiple family dwellings, and that he remained silent because

on account of my race I had a minority vote. And I would say here that I wouldn't influence anything in this regard because I wasn't there to fight with the Commission. **/

*/ Dep. Hutton, pp. 19-20. See also p. 30, at which Mr. Hutton testified specifically that the fact that blacks would live in Park View Heights was also discussed.

**/ Id., p. 19.

Mr. Hutton's testimony conveys the atmosphere which existed for a sensitive black man on that Zoning Commission, loud and clear.^{*/} He knew, and his colleagues knew, that they were excluding a lot of blacks from Black Jack.^{**/}

While the other Commissioners, unsurprisingly, denied racial bias, the evidence corroborates Mr. Hutton's feelings. Henry Sewing, who runs a local hardware store, related to Kathy Pellegrino, then a reporter for the Kansas City Star, that Black Jack had always treated its "niggers" well, and that it had a "nigger cemetery."^{***/} He asked a white minister named Art Repp to sign a petition against a proposed development in Black Jack because

it won't be long after they build that cheap housing that you know who starts moving in. ^{****/} (emphasis added)

When Sewing said you know who, Repp knew who -- black people -- and this interpretation was confirmed by HUD's expert on race relations, William McKinney.^{*****/}

^{*/} The pressures troubled Mr. Hutton, and he acknowledged that he had doubts, morally speaking, as to whether his vote was the right thing to do. Id., pp. 28-29.

^{**/} Id., p. 29.

^{***/} Dep. Pellegrino, PX F-2.

^{****/} Dep. Repp, p. 27.

^{*****/} Id.

^{*****/} McKinney Dep., p. 54.

Rev. James Hennig, a white Lutheran minister, testified that

[Sewing]'s idea of blacks was pretty much that they let their property run down and they were generally undesirable kinds of people. */

Mr. Sewing testified on deposition and denied any discriminatory intent. He testified, however, that he did not need to go to meetings to know enough to oppose Park View Heights:

A. What I knew about it is all I cared to know.

Q. What did you care to know?

A. Just what I knew about it, it was going to be an apartment, a mixed apartment.

Q. What was going to be mixed in this mixed apartment?

A. Well, it wasn't just for whites, it was for everybody.

Q. And that's all you needed to know?

A. That's all. ^{**/}

With respect to Mrs. Pellegrino's article, Mr. Sewing denied use of the word "nigger" but acknowledged that he "could have said" the other things attributed to him. His denial of the use of the word "nigger" has become somewhat academic, however, because, in the summary of his expected trial testimony furnished by counsel for defendant, it is stated:

*/ Dep. Hennig, p. 11.

**/ Dep. Sewing, p. 17.

Negroes lived in Black Jack at all times and were accepted as citizens and neighbors. Many years ago it was customary to refer to all black persons as niggers. It was not then intended in a derogatory sense. There was a colored cemetery in Black Jack. (emphasis added)

In other words, blacks were so welcome in Black Jack that they were buried in a separate cemetery and treated as equals by being called "niggers." */

Robert Schuchardt, the Chairman of the Zoning Commission, is much more sophisticated than Sewing and did not, and probably would not, publicly say "nigger." Professor Markland testified that Schuchardt did, however, tell Markland that Park View Heights would be another Pruitt-Igoe, **/ and Schuchardt acknowledged that he may have said this. ***/ While Professor Schuchardt explained at length, and eloquently, why the use of the term had nothing to do with race, and related only to crime, squalor, poor social

*/ In the deposition of Kathy Pellegrino, counsel for defendant attempted to elicit from the deponent testimony that Sewing is a "character" and might say "nigger" in some benign nondiscriminatory way. With some apology for belaboring the obvious, we point out that HUD's race relations expert William McKinney testified that he knew of no white community where "niggers" has been used in a nonderogatory way. With respect to anyone who says it has been so used, McKinney simply said: "I want to pray for him because there is no truth in him." McKinney Dep., p. 54.

**/ Markland Dep., p. 12.

***/ Schuchardt Dep., p. 50.

experimentation and failure, this explanation will not wash.

As Mr. McKinney explained in his deposition:

A. That means black. The people from Pruitt-Igoe, that means black.

Q. Pruitt-Igoe is a public housing development, is it not?

A. That's right.

Q. So, Pruitt-Igoe: does that also convey poor people?

A. Sure.

Q. Does it also convey crime?

A. Yes.

Q. All right, now if you were talking about a very poor white development or poor all-white development, would you use the term "Pruitt-Igoe"?

A. No.

Q. Why not?

A. Because there's no whites in that thing. If it is it's just a token. */

With respect to the remaining Zoning Commissioners, the principal evidence of discriminatory intent, besides the Hutton testimony implicating them collectively, is that they either knew what the racial consequences of their conduct would be -- and it is hard to conceive how they could not

*/ McKinney Dep., pp. 52-53. Harry Morley, HUD Assistant Secretary for Administration and formerly Regional Administrator in St. Louis, also testified that "Pruitt-Igoe" conjures up "blacks, poor people, crime." Morley Dep., p. 45.

have known -- or, not knowing, made their decision without the slightest concern for the racial consequences. In this respect, remarkable but not atypical testimony was given by Donald Bresler, Chairman of the Zoning Commission, who claimed that he did not know whether Black Jack was more than 90% white, more than 75% white, more than 60% white, or more than 50% white -- this about an area in which he had lived for six years, */ which he had helped to incorporate. So, too, the testimony of Commissioner Hoyt:

Q. Would you describe Black Jack as predominantly white?

A. I don't think I'm capable of answering that question. I don't know. **/

We submit that where zoning commissioners engage in a charade of this kind, the racial character of their intent is to be readily inferred from what they will not say.

*/ Bresler Dep., pp. 17-19. Intriguingly, Mr. Bresler was able to testify that Winloch, where he did not live, was "predominantly colored" but not whether Black Jack, where he does live, was more than half white.

**/ Hoyt Dep., p. 4.

B. LEADING PROPONENTS OF INCORPORATION AND OPPONENTS
OF PARK VIEW HEIGHTS EXPRESSED THEMSELVES ON THESE
ISSUES TO A SIGNIFICANT EXTENT IN RACIAL TERMS

On July 12, 1970, Mr. Harry Morley, then St. Louis Regional Administrator of HUD, now Assistant Secretary for Administration and one of his aides met at the Missouri Athletic Club with Francis Huss, President of the Spanish Lake Improvement Association, Dr. Ronald Pflueger, President of the Black Jack Improvement Association, and Councilman Milton Bischof, Jr., defendant's expert witness and an adversary of Park View Heights. The meeting was arranged by St. Louis County Supervisor Lawrence Roos, who was also present, to provide an opportunity for interchange of ideas between the adversaries of the development and HUD officials. The meeting did not turn out that way, however, but got to be a rather heated discussion with Dr. Pflueger and Mr. Huss leading it.^{*/} Mr. Huss, in particular, brought up Pruitt-Igoe, which to Mr. Morley meant blacks, poor people and crime, and made reference to the speed of integration in Black Jack. Specifically, the adversaries related that the community was being integrated "gradually," and that the project would concentrate too many blacks too quickly into a predominantly white community. It was also suggested that the "liberal element" in the St. Mark's Church,

^{*/} Morley Dep., p. 17.

which was not even in Black Jack^{*/} was trying to provide the further integration of someone else's community. Mr. Morley, who had dictated a memorandum about this meeting nine days after it was held^{**/} recalled that the racial element was not a minor portion of the opposition, but on the contrary was certainly equal to nonracial concerns also expressed by the opponents.^{***/}

John Quigley, one of the principal functionaries of ICUA, the sponsor of Park View Heights, testified on deposition and will testify at trial that he attended a meeting in the summer of 1970 involving proponents and adversaries of Park View Heights. Among the adversaries present was Dr. Pflueger, who had recently been elected President of the Black Jack Improvement Association. During the course of a conversation between them which lasted an hour or more, Quigley asked Pflueger about race, and "Dr. Pflueger said yes, that his own opposition was based primarily on his fear of what an influx of blacks would do to the Black Jack area."^{****/} According to the deposition testimony of Mark Arnold, a reporter for the National Observer, Dr. Pflueger

^{*/} The evidence will show that Huss lives in Spanish Lake, not Black Jack. Pflueger has his office in Black Jack, his residence outside.

^{**/} Morley Dep., Deft's. Ex. 4; PX B-16.

^{***/} Morley Dep., pp. 45-47.

^{****/} Quigley Dep., p. 41.

Barbara Peterson is a former white resident of Whispering Lake Apartments. In 1970, two petitioners for the incorporation of Black Jack came to her apartment. When she asked why Black Jack should incorporate,

they said, well, they were about to have a Parkview Heights low income housing development and they were very much against this and thought that we would be, too. And that's why they were trying to incorporate the city. So I said, "Well, why would it be bad to have Parkview Heights in Black Jack?" And they said, well, because it's government subsidized, it would bring in low income people and this would mean a lot of colored people and high crime rates and more children; you know, more children in the classrooms and that would be a poor education and the education was already not the best. And then we would have a terrific black problem.

And so I said, "Well, isn't it true then that the real reason that you wanted to incorporate the city is to keep out the Negro population that might move in?" And they said, "Well, yes, of course. You don't want your children going to school with Negroes, do you?" And that was the extent of the conversation.

Q. Did you sign this petition?

A. No. ^{*/}

Mrs. Cathy Yokum is also a white resident of Black Jack, and a witness, among other things, to a blatant act of discrimination by one of the developers in the Black Jack area to avoid a sale to a black. ^{**/} At the time of the Park

^{*/} Peterson Dep., p. 5.

^{**/} In the middle 1960's, when she was at the Vorhof sales office to talk about the home she and her husband had purchased, the salesman suddenly turned out the light and explained that a black family had driven up and he wanted them to think no one was in the office so that the company need not deal with them.

View Heights controversy she had occasion to learn that discrimination had not ended. A petitioner for incorporation of Black Jack or for opposition to Park View Heights asked her for a contribution for legal expenses. When she told him she was in favor of the development, the man replied that she must be one of the ones who liked colored in the neighborhood.^{*/}

Milton Bischof is the County Councilman who met with Mr. Morley, and also with Under Secretary Van Dusen, in an attempt to head off Park View Heights. Mr. Bischof regards 236 housing as substantially the same thing as public housing.^{**/} He prepared a little sheet of notes on which he outlined his opposition to Park View Heights, and his notes are in evidence.^{***/} At the top of the sheet is his warning to himself. It says Points to Consider -- Racial Out. What follows, however, does not heed this tactical caveat as closely as it might.

The notes contain several references to Pruitt-Igoe, one involving "housekeeping," and Mr. Bischof explained in this connection that the tenants might "build fires in

^{*/} Rev. and Mrs. Arthur Repp will testify to racially oriented opposition to Park View Heights by Mr. and Mrs. Russell. The Russells were leaders in the anti-Park View Heights movement and organized a letter writing campaign. See PX M-17, M-18.

^{**/} Bischof Dep., pp. 104-105.

^{***/} PX B-17.

bathtubs and barbecues in bathtubs." */ Even more revealing, however, is item 10:

Why move -- Ghetto is ~~home~~ -- Boston
Urban League head

As Mr. Bischof explained this entry, he would use the argument that those in the ghetto -- presumably blacks -- wanted to stay there, that a black man had told him so, and that therefore Park View Heights should not be built. Accordingly, Mr. Bischof testified that he would have actively supported the project had it been in virtually all-black Robertson, which he described as having various employment advantages. It is apparent from the Bischof notes and testimony that he regarded Park View Heights as a project for ghetto dwellers and, despite his self-admonition of "Racial Out," opposed it as such. What his notes do not disclose is that nobody would force blacks or poor people to live at Park View Heights, and that the sponsors and the United States merely sought to afford them the opportunity to do so.

* * *

It is apparent from the foregoing that those who might be termed the activists in the resistance to Park View Heights were opposed, at least, to having any large number of blacks in the community, and that race was a factor in their resistance.

*/ Bischof Dep., p. 104. According to HUD's race relations specialist William McKinney, "barbecues in the bathtub" is another euphemistic term which whites use when they are prejudiced against blacks and will not admit it. McKinney Dep., p. 54.

In this respect, both they and the Zoning Commissioners were responding to racially-based clamor from strident elements in the community at large.

C. THE PUBLIC SENTIMENT IN THE COMMUNITY HOSTILE TO
PARK VIEW HEIGHTS CONTAINED RACIAL DISCRIMINATION
AS A MAJOR ELEMENT THEREOF

It is almost impossible to psychoanalyze a community of 3,000 people and make a composite whole out of a diversity of motivations, attitudes and prejudices. The evidence in this case will show, however, that in spite of an obvious consciousness that race ought not to be mentioned by the opponents if the battle against Park View Heights was to be won, race nevertheless came through loud and clear as an important element of the opposition. This came through at the public meetings, in the telephone calls and letters made and written in opposition to the project, and in a number of other ways.

In early and middle 1970, when the controversy was at its height, there were public meetings in Black Jack at which proponents and opponents, or sometimes the opponents alone, met and voiced their views. We cite here a few examples of what took place. Paul Mittelstadt, ICUA's former Housing Director, testified that at one such meeting, when it was suggested that teachers from the Hazelwood School District would be the kinds of tenants Park View Heights wanted, someone remarked to Francis Huss that he "would not want to live there if he knew the color of the teachers' faces." There was general laughter. Mittelstadt will testify to other incidents of a similar character.

Kenneth Boyer, a white college professor, attended one meeting and suggested that exclusion of the development would maintain a ghetto in the city. "Keep the niggers there!", someone yelled. The mayor of a neighboring municipality suggested that the project be placed in Kinloch, and there was general applause. Later, when Boyer was running for office in Black Jack, one man told him he did not care who won as long as they kept the "coons" out, and another sneered that he must be "one of Liberman's men." */

Just about everyone associated with Park View Heights received large numbers of telephone calls, most of them anonymous, which expressed opposition to the development both in euphemistic terms (Pruitt-Igoe; ghetto, people from downtown, etc.) and in more direct language (nigger, nigger-lover, colored, paint your face black, etc.). Rev. Willard Jones, co-pastor of St. Marks, personally received several hundred such calls, the majority racial in content; Paul Mittelstadt received about twenty-five; others came to Quigley, Rev. Peyton, Mrs. Peyton, Terry Lewis, **/ and several other witnesses who will testify at the trial. A crank call or two, of course, cannot characterize the attitudes of a community, but the intense, concentrated

*/ Boyer Dep., pp. 12, 16, 18, 19. Sam Liberman is, of course, a well known civil rights lawyer in St. Louis, and counsel for plaintiff both in Park View Heights v. City of Black Jack and in Jones v. Mayer Co.

**/ A black member of the Park View Heights Board of Directors.

nature of this telephone campaign, set in the context which we have described, is a part of the entire mosaic in which race has played such a prominent part.

There were also letters -- hundreds of them.^{*/} The letter writing campaigns were organized by BJIA and SLIA, and many of the letters made the arguments presented by these organizations in the press. But there were others. Mayor Brawley of Ferguson, who opposed the incorporation of Black Jack, received an anonymous postcard which said, in part

You're too d--- ignorant of laws to be Mayor. You should blacken your face and live with your buddies. **/

A letter addressed to Dear Board-Member of St. Marks but received by HUD relates that

I was a little sickened by the 3rd paragraph of your letter where it said by an intergrated [sic] project it would be culturally enriching. I grew up in just this kind of a neighborhood and believe me it was not a pleasant experience. ***/

Another woman wrote that

these people that are so willing to intregate [sic] this neighborhood move into a intregated [sic] neighborhood for a while and see how it is. We lived in one once and between the

*/ PX M-26 contains all the citizen correspondence in plaintiff's possession.

**/ PX M-14.

***/ PX M-26, letter 1.

rapings and muggings and purse
snatchings and anything else we
had to move. */

Race was not the only reason offered by adversaries of Park
View Heights, but it played a substantial part.

D. INCIDENTS OF INTIMIDATION OF A TYPE WHICH GENERALLY
CHARACTERIZE RACIAL CONTROVERSIES WERE DIRECTED AT
PROponents OF PARK VIEW HEIGHTS

There has been deposition testimony that two white
ministers who played a role in the controversy -- Rev.
Willard Jones, the co-pastor of St. Marks, and Rev. Arthur
Repp, who favored the development and later became a plain-
tiff in a suit on behalf of Park View Heights, received
anonymous threats of violence. Jones was told, in a letter,
that he would not live to see the project completed and he
received two phone calls which threatened his children;
Repp had a bomb threat. **/

In addition, Councilman Bischof frankly acknowledged
in his deposition that he told a representative of the firm
of Fisher and Frichtel, which had tentative involvement with
Park View Heights, that unless the firm withdrew from that
project it would have difficulty obtaining rezoning for other,
larger developments in which it was involved. ***/ The firm
subsequently withdrew. ****/

*/ PX M-26, letter 2.

*/ Jones Dep., pp. 31-32; Repp Dep., pp. 47-48.

*/ Bischof Dep., p. 91.

*/ Dep. Heman, pp. 65; Dep. Mittelstadt, p. 42-43.

IV

LEGAL CONSIDERATIONS

A. THE LAW OF THE CASE

Before we reach a discussion of the contested issues in this litigation, we think it appropriate to dispose of several contentions pressed by Black Jack which, in our judgment, have been conclusively rejected by this Court and by the Court of Appeals, such rejection now being the law of the case.

1. Black Jack has contended that the Fair Housing Act of 1968 does not apply to zoning cases at all. 42 U.S.C. 3602(b), however, defines a dwelling as including "any vacant land which is offered . . . for construction or location thereon" of residential property, and by passing its zoning ordinance, Black Jack has made dwellings unavailable to the persons who would reside in Park View Heights if that development were built. 42 U.S.C. 3604(a). Accordingly, this Court denied a motion to dismiss by Black Jack which was based in part on the proposition that the Fair Housing Act does not apply to the facts at hand. United States v. Black Jack, PH EOH Rptr. Para. 13,561 (E.D. Mo. 1972). So, too, in the companion case of Park View Heights v. City of Black Jack, 467 F. 2d 1208, 1214, headnote 3 (8th Cir. 1972), the Court of Appeals upheld the sufficiency of that portion of the private plaintiffs' parallel complaint which alleged violations of the Fair Housing Act.

2. Black Jack has consistently argued that this is really a case of economic rather than racial discrimination, and that the Fair Housing Act can have no application for that reason. After the initial decision of the Court of Appeals in Park View Heights v. City of Black Jack, supra, defendant petitioned the Court for rehearing on the grounds that the decision confused economic and racial discrimination, that the case was controlled by James v. Valtierra, 402 U.S. 137 (1971), and that what Black Jack termed the erroneous decision of the Court of Appeals would be of "transcendental importance" for the case of United States v. Black Jack.*/ But the Court of Appeals denied rehearing, and we agree with defendant that the impact of the decision for this case is transcendental, since it eliminates Black Jack's principal legal defense.

3. Defendant contends that this case is geographically limited to the confines of Black Jack, and that to impute a broader obligation to defendant smacks of the "revolutionary concept" of "regional zoning" and is unjustified. The Court of Appeals made it clear in the Park View Heights decision, however, that the alleged racially discriminatory effect of Black Jack's action on the individual plaintiffs and on other nonresidents of Black Jack is what this case is all about. The Court held that the allegations of discriminatory effect based on the statistics

*/ Appellees' petition for rehearing in No. 72-1006, 8th Cir., paras. 4 and 5.

contained in its footnote 10 present "a strong case for consideration at this time". 467 F. 2d at 1216. That the Court defined the issue as going beyond the boundaries of Black Jack is apparent from ~~its~~ references to the "pattern of racial segregation in housing in the St. Louis metropolitan area" */ and to the "immediate hardship on the class of low and moderate income citizens in the City of St. Louis". (emphasis added) **/

*/ 467 F. 2d at 1216, footnote 10.

**/ Id., text following the footnote.

B. PROOF THAT BLACK JACK'S CONDUCT HAD A RACIALLY DISCRIMINATORY EFFECT AND TENDED TO PERPETUATE SEGREGATION OR TO REPEL DESEGREGATION ESTABLISHES A VIOLATION OF THE FAIR HOUSING ACT UNLESS BLACK JACK PROVES THAT IT ACTED PURSUANT TO A COMPELLING STATE INTEREST

It is now well settled that, if racially discriminatory effect is shown by statistical proof, the defendant can prevail only upon a showing of compelling state interest.

In Kennedy Park Homes v. City of Lackawanna, 313 F. Supp. 669 (W.D. N.Y. 1970), aff'd 436 F. 2d 108 (2d Cir. 1970), cert. den. 401 U.S. 1010 (1971), a low to moderate income housing development had been excluded from the Third Ward, which (like Black Jack) was virtually an all-white section of the City. The City's action, as in this case, followed a major controversy with meetings, petitions, letters and the like from adversaries of the development. There was little proof of overtly racially discriminatory statements by adversaries of the development,*/ and the defendants justified their resistance on the grounds that the development would burden the sewers and that the site was needed for a park. The evidence showed that blacks were generally concentrated in another area of the city and had encountered private and public opposition to moving to the Third Ward. The District Court found that the stated reasons for opposing the development were not convincing, and

*/ The Court found that one man said at a meeting (as Huss said to Mr. Morley in this case) that the gradual integration which had occurred had been well accepted but that a faster pace would not be. 313 F. Supp. at 687.

inferred from them and from all the evidence that both the effect and the purpose of Lackawanna's conduct were racially discriminatory. Applying the law to these facts, the District Court said

As long ago as Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), the Supreme Court pointed out that the Fourteenth Amendment does not allow conduct which results in racially discriminatory treatment, even though the purpose of the municipal action was to preserve the public peace and public welfare, a goal which represented a valid exercise of the police power. Furthermore, a long line of cases in the Supreme Court dealing with equal protection of the laws has held that racial discrimination may be established either by proof of purpose or effect. See Yick Wo v. Hopkins, 113 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) and, more recently Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed. 2d 820 (1967), and Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed. 2d 616 (1969). "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S.Ct. 856, 861, 6 L.Ed. 2d 45 (1961). Requirements which appear neutral on their face and theoretically apply to everyone, but have the inevitable effect of tying present rights to the discriminatory pattern of the past, are unlawful. United States v. Louisiana, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed. 2d 709 (1965). The official act may not place a special burden upon the minority. Gaston County, N.C. v. United States, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed. 2d 309 (1969). 318 F. Supp. at 694.

Holding that Lackawanna had failed to show a compelling governmental interest for its action, and that the proof established

a violation of the Fair Housing Act and of the Fourteenth Amendment, the Court ordered that the City take all necessary steps to assure that the development be built.

The Court of Appeals for the Second Circuit, in an opinion by Mr. Justice Clark, commended the District Judge for his "comprehensive and well-documented decision" and affirmed his decision. The Court went on to say

The effect of Lackawanna's action was inescapably adverse to the enjoyment of this right. In such circumstances the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality. Shapiro v. Thompson, 394 U.S. 613, 634, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969).

* * *

Even 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. 436 F. 2d at 114.

In Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd per curiam 457 F. 2d 788 (4th Cir. 1972), the Court was confronted with a situation in the Atlanta metropolitan area which closely resembled that in the St. Louis region. The case arose when county officials failed to give necessary approvals and permits for the construction of two federally subsidized low income housing projects which would have been the first in practically all-white areas of Fulton County. While no racial reason was given, and there were no direct

references to race, the evidence showed that the permits were not granted because defendants wanted "nice" housing, and subsidized housing would not so qualify in their judgment. As in this case, the proportion of blacks eligible for the proposed housing was far greater than the proportion of blacks living in the area where it was to be built. Without any conscious allusion to the situation in St. Louis and Black Jack, Judge Edenfield described the facts in Atlanta as follows:

While poor blacks have been attracted to the low-rent public housing in Atlanta and the city's problems have rapidly mounted, whites have been fleeing in increasing numbers. In 1960 35% of the residents of Atlanta were black; today 51% are black. The public school population of Atlanta was 30% black; today it is 70% black. A fair percentage of the whites leaving Atlanta have moved to the unincorporated areas of Fulton County; a similar percentage of blacks from those areas have moved to the city.

Within the immediate future, unless drastic changes occur, it is not merely possible but certain that Atlanta will become in essence, a black city with a solid white perimeter. 332 F. Supp. at 382.

The Court held that, for better or for worse, the nation is committed to a policy of balanced and dispersed housing, and that "local authorities may no more confine low income blacks to a compacted and concentrated area than they can confine their children to segregated schools." Id. at 390. The court found that the effect of defendants'

conduct was to make it impossible to achieve meaningful school desegregation and to swell unemployment rolls in the city as jobs moved (as they have in the St. Louis area) from the city to the suburbs. The Court then said

Given the decisions previously cited it is abundantly clear that, in the absence of supervening necessity, any county action or inaction intended to perpetuate or which in effect does perpetuate the conditions just described cannot stand. Nor can county action or inaction which would thwart their correction be permitted to continue. Id. at 391. */

The Court enjoined the defendants, and the Court of Appeals affirmed par curiam.

In Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), authorities of the City of Cleveland had revoked building permits for the construction of public housing in white areas of the city. In Banks, as in Lackawanna and Crow, the Court found no evidence of racially discriminatory statements by the city officials or by persons at whose instance the officials acted. The Court first described the prevailing segregation in residential patterns in the City, and the manner in which these patterns resulted in segregated schools and reduced access by blacks to the jobs

*/ It should be noted that the housing in the Crow case was public housing; as to which arguments like lowering of property values are far more plausible than in the case of FHA-236 housing. Judge Edenfield, however, gave no weight whatever to objections of this kind.

which were moving to the city's outskirts and suburbs.

The Court found that

Since this city is faced with such a massive segregation problem, a dispersal of urban housing patterns seems to be the most reasonable alternative to a massive busing program in order to eliminate the resulting segregation in the public schools. See Crow, et al. v. Brown, et al., 332 F. Supp. 382 (N.D. Ga. 1971) aff'd _____ F. 2d _____ (5th Cir. 1972).

Relying heavily on Lackawanna, Crow, Dailey v. City of Lawton,^{*/} and several other decisions, Chief Judge Battisti held that denial of equal housing opportunity resulting from neglect or thoughtlessness was unlawful irrespective of motive, and that

. . . in the absence of any supervening necessity or compelling governmental interest, any municipal action or inaction overt, subtle or concealed, which perpetuates or reasonably could perpetuate discrimination, especially in public housing, cannot be tolerated. Id. at 1180.

Accordingly, the Court ordered that the permits be granted and the housing built.

Mahaley v. Cuyahoga Metropolitan Housing Authority, _____ F. Supp. _____, No. 71-251 (N.D. Ohio February 22, 1973) is the logical sequel to Banks v. Perk, and applies its teaching to the suburbs of Cleveland as well as to the white areas of the city. The question was whether these white suburbs could be required to accept public housing, which they had excluded by the expedient of refusing to sign the

^{*/} 296 F. Supp. 266 (D. Okla. 1969), aff'd 425 F. 2d 1033 (10th Cir. 1970), discussed infra.

"cooperation agreement" required by 42 U.S.C. 1415 (7)(b)(1).

The Court held that, while the requirement of a cooperation agreement was not unconstitutional on its face,^{*/} its application would be unconstitutional as applied if its use had a discriminatory effect and no compelling state interest or supervening necessity was shown. After describing the intense segregation existing in Cuyahoga County^{**/} and describing its effects as

segregated schools of poor quality, denial of access to jobs, ineffective health services, generally poorer health, higher rate of infant mortality -- the list seems endless;

the Court found that a need for low income housing existed throughout the county. Under these circumstances, the Court synopsisized the law as follows:

Many civil rights cases brought against municipalities for interference, indifference, or inaction relative to attempts to alleviate segregation within their jurisdictions by the

^{*/} This decision was by Judges Celebrezze and Battisti, with Judge Lambros dissenting.

^{**/} Cuyahoga County is a racially segregated county. The population of Cuyahoga County in 1970 was 1,721,300; 328,419 (19.1%) of whom were Negro. 87% of these 328,419 Negroes reside in Cleveland. Of the 40,578 who reside outside of Cleveland but within Cuyahoga County, 80% live in three eastern suburbs: 23,196 in the City of East Cleveland; 5,250 in Shaker Heights; and 4,007 in Warrensville Heights. In 1970 the defendant City of Garfield Heights had 1,739 Negro (4.6%) residents. All but two resided in one area of Garfield Heights adjacent to the City of Cleveland. The other four defendant suburban cities' population in 1970 was from 99.1% to 99.8% Caucasian. Slip opinion, p. 2.

development of public housing have held that when the result of said action is discrimination it cannot be viewed as within the normal bounds of municipal discretion. See Crow v. Brown, 332 F. Supp. 332 (N.D. Ga. 1971), aff'd 457 F. 2d 733 (5th Cir. 1972); Kennedy Park Homes Association v. City of Lackawanna, 318 F. Supp. 669 (W.D. N.Y.), aff'd 436 F. 2d 103 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okl. 1969), aff'd 425 F. 2d 1037 (10th Cir. 1970); Hawkins v. Town of Shaw, Mississippi, 437 F. 2d 1286 (5th Cir. 1971); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972).

The teaching of these cases is that any municipal conduct which has the purpose or effect of discriminating against Negroes or perpetuating racial concentration or segregation in housing is violative of the civil rights of Negroes and a denial of equal protection, absent a showing by the municipality of a supervening and compelling necessity. Under the rule of these cases, given a prima facie showing of discriminatory effect, the cities must come forward with a supervening necessity or compelling interest to overcome a finding of discrimination. Crow v. Brown, supra; Kennedy Park Homes Association v. City of Lackawanna, supra. Slip opinion, p. 12.

Observing that the Court in Crow had disregarded the Atlanta-Fulton County boundary line, Chief Judge Battisti likewise disregarded the line between Cuyahoga County and Municipal Cleveland. The Court also cited Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961), for the proposition that

no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them, whatever the motive may be. */
(emphasis added)

The doctrine that a showing of racially discriminatory effect requires the defendant to prove that he acted pursuant to a compelling state interest is not confined to "zoning" cases. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court held that the fair employment law prohibits discriminatory consequences as well as motivations, and that practices which disproportionately disqualify blacks must fall unless the employer can prove business necessity. In Wright v. City of Emporia, 407 U.S. 451 (1972), the Supreme Court held that the City of Emporia, Va. may not split off its school system from that of Greensville County where this would have the effect of perpetuating the educational segregation, even though no discriminatory purpose was shown. The case was a difficult one, for both the city and county had black majorities among their pupils, and withdrawal of the city, which was 52% black, would have raised the black pupil majority in the county only from 66% to 72%. Even this was impermissible, however, the Court noting that

*/ In addition to Lackawanna, Crow, Banks, and Mahaley, and apart from Park View Heights v. City of Black Jack, supra, the decisions in the following "zoning" cases adopt the same approach; Dailey v. City of Lawton, supra; SASSO v. City of Union City, 424 F. 2d 291 (9th Cir. 1970), and, in a case involving a slightly different issue, Morales v. Haines, 349 F. Supp. 634 (N.D. Ill. 1972).

we have focused upon the effect -- not the purpose or motivation -- of a school board 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. */

*/ For other cases under the Fair Housing Act holding that a showing of discriminatory effect, without motive, is sufficient, see United States v. Real Estate Development Corp., 347 F. Supp. 776 (N.D. Miss. 1972); United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972).

Under the Fair Housing Act of 1968, the Secretary of HUD is required to administer his duties in a manner affirmatively to promote equal housing opportunity. Shannon v. HUD, 436 F. 2d 809 (3rd Cir. 1970); Crow v. Brown, supra. State and local officials have an obligation to take affirmative steps to correct the effects of past discrimination. Louisiana v. United States v. 380 U.S. 145 (1965); Green v. County School Board, 391 U.S. 430 (1968); Swann v. Board of Education, 402 U.S. 1 (1971). In this case, HUD attempted to carry out its responsibilities by helping to finance a housing development which would provide blacks as well as whites with the opportunity to move into a more desirable environment. St. Louis County carried out its responsibilities and placed no obstacle in the path towards desegregation. Black Jack, however, frustrated both federal and county authorities from doing what the law required of them, with the effect of perpetuating the segregation which state action had helped to bring about.

* * * * *

We think that little need be said about whether Black Jack has met the "compelling state interest" test. Arguments the same as or similar to those presented by Black Jack were made by the cities in the decisions cited above, and uniformly rejected. In Mahaley the Court noted that the defendants argued that there was no need for low income housing and that they feared a property tax loss. The Court found that neither allegation had been proved, and that in any event "the latter

should not be considered adequate or compelling even if proof had been offered." Slip opinion, p. 18. If an objection to public housing in a residential area on this basis is insufficient, this is surely true, a fortiori, as to moderate income housing. In view of HUD's finding that more than 3000 FHA 236 units were needed in the St. Louis area in the next two years, and in the light of the expert evidence, there is no plausible argument in this case for lack of need.

Moreover, we believe it to be well settled that the "compelling state interest" which must be established is required to apply not only to Black Jack but to the metropolitan area as a whole. This is the teaching of Crow, Banks, Mahaley, and Lackawanna, and it is the law of the case under Park View Heights. We add that the recent state court decisions cited in the footnote complete the circle of proof on this point. */

*/ E.g. Appeal of Girsch, 437 Pa. 237, 263 A.2d 395, 397-98 (1970) (ordinance excluding apartments overturned) a municipality "may not permissibly choose to take only as many people as can live in single family housing As long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city." Appeal of Kitmar Builders, 439 Pa. 466, 268 A 2d 765 (1970) (two and three acre zoning of undeveloped land held unconstitutional) "If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there would have to live in another community and the requirement that they do so is not a decision that Concord Township should alone be able to make." Molino v. Mayor and Council of Borough of Glassboro, et al, 116 N.J. Super. 195, 281 A 2d 401 (1971) (ordinance limiting number of bedroom apartment units held invalid). "Exclusionary zoning may lead to illegal and unwanted conditions, which are violative of individual rights. No municipality can isolate itself from the difficulties which are prevalent in all segments of society . . . and zoning is not a boundless license to structure a

(footnote continued next page)

All of these cases hold invalid ordinances comparable to Black Jack's even absent proof of racial discrimination. Accordingly, it can hardly be argued that there is a compelling state interest to enact a zoning ordinance which is at least arguably invalid under conventional principles of zoning.

Finally, we will deal briefly with James v. Valtierra, 402 U.S. 137 (1971), on which defendant relied both in this Court and in the Court of Appeals, for the proposition that the two Black Jack cases should be dismissed. In Valtierra, the Supreme Court sustained the facial constitutionality of a provision of the California Constitution which required a community referendum before any low rent housing project could be built. The provision for a referendum was a familiar feature of California law, and it was not contended

Continued

a municipality."; Oakwood at Madison, Inc., v. Township of Madison, Inc., 117 N.W.2d 353, 358 (Super. 11, 283 A. 2d 353, 358) (ordinance restricting number of apartments held invalid). "In pursuing the valid zoning purpose of a valid community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary." (emphasis added) Green v. Township of Lima, 40 Mich. App. (1972); (overturning ordinance prohibiting mobile home parks). "To allow the first 600 people in an area to use [its] artificial boundaries to exclude all but certain kinds of people, or those who can afford to live in favored housing, or to keep down tax bills of present property owners, subverts the idea of zoning promoting the general welfare."

that it had been adopted in a racial context. On the contrary, the Court explicitly found that the law was not "aimed at a racial minority."

No allegations were made under the Fair Housing Act, and the suit was not presented as involving racial discrimination. No record was made as to whether or not, as applied, the California provision would perpetuate segregation. Plaintiffs sought a holding that discrimination against the poor, because of their poverty, violated the Fourteenth Amendment, and a five-member majority of the Court, stressing the democratic character of referenda, held that it did not. The dissenting opinion, too, focused only on economic discrimination, for that was the issue presented.

The Valtierra decision neither holds nor suggests that, where a showing of discriminatory purpose or effect is made, the results of the referendum will stand. Had the Court so held -- had it intended to permit the exclusion of low and moderate income housing no matter what the circumstances -- then the decisions in Crow, Banks, Mahaley and, in particular, Park View Heights would have had to be different. It is noteworthy that none of the courts in these cases even thought Valtierra relevant, which it is not, and that the Supreme Court denied certiorari in Lackawanna a few weeks after the Valtierra decision. In any event, any construction of Valtierra which would bar this case is precluded by the Eighth Circuit decision in Park View Heights, for the Court of Appeals

has definitively held that Valtierra does not hold what
Black Jack says it holds. */

*/ To some extent, the Mahaley case parallels James v. Valtierra. In Mahaley, the three judge court, with Chief Judge Battisti writing the opinion, upheld the facial constitutionality of the federal requirement of a "cooperation agreement" before public housing could be built. In the follow up opinion, however, Judge Battisti held that this requirement may not be applied to exclude such housing where such exclusion has a racially discriminatory effect and no compelling state interest is shown. The same is true with Valtierra; the referendum requirement, standing alone, is valid, but if a community, by referendum or otherwise, excludes the housing and such exclusion has a discriminatory effect, the conduct is unconstitutional. See SASSO v. City of Union City, 424 F. 2d 291 (9th Cir. 1970).

C. THE PROOF IN THE RECORD OF RACIALLY DISCRIMINATORY PURPOSE IS PERSUASIVE TO COMPLEMENT PROOF OF RACIALLY DISCRIMINATORY EFFECT AND TO REBUT ANY SHOWING THAT DEFENDANT ACTED PURSUANT TO A COMPELLING STATE INTEREST

As we have shown in the preceding discussion, it is not incumbent on the United States, in order to prevail in this case, to establish that Black Jack acted pursuant to a racially discriminatory purpose. Proof of discriminatory effect is sufficient unless Black Jack shows a compelling state interest for its action. Nevertheless, evidence of a racially discriminatory purpose significantly bolsters proof of a violation. Kennedy Park Homes v. City of Lackawanna, supra. As the Supreme Court put it in Wright v. City of Emporia, supra, in the analogous context of school desegregation:

It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority. And where a school board offers non-racial justifications for a plan that is less effective than other alternatives for dismantling a dual school system, a demonstrated racial purpose may be taken into consideration in determining the weight to be given to the proffered justification. 407 U.S. at 461.

Accordingly, we have assembled in this case evidence of discriminatory purpose on the part of the Zoning Commissioners, the protagonists of the incorporation and of the zoning ordinance, and the public to whom both groups responded which far outweighs any such evidence submitted in any of the prior cases in which a violation has been found.

Before discussing the legal significance of various kinds of evidence of racial purpose, however, we wish to define what we understand to be the elements of such proof.

As the Court said in Wright, supra

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. Id. at 462.

The same is true here as to Black Jack and its representatives.

Accordingly, all that can be shown in relation to the issue of purpose is that race was a significant element in the purpose of Black Jack and its citizens and representatives.

That is sufficient under the Fair Housing Act. In Smith v.

Sol Adler Realty Co., 436 F. 2d 344 (7th Cir. 1971), the

Court held that it is not necessary in order to establish

a case under the Act to prove that a dwelling was denied

solely on account of race, for there is no room in the law

for partial racial discrimination. Accord, United States v. Accord,

Reddoch, P.H. E.O.H. Rptr. Para 13,569 (S.D. Ala. 1972),

aff'd per curiam 467 F. 2d 897 (5th Cir. 1972). "There is

no such thing as a state's legitimately being just a little

bit discriminatory." Poindexter v. Louisiana Financial

Assistance Commission, 275 F. Supp. 833, 835 (E.D. La. 1967),

aff'd 339 U.S. 571 (1963).

Moreover, while Zoning Commissioner Hutton testified (and judicially admitted) that some Black Jack officials were so imprudent as to express their racially discriminatory

sentiments in public, proof of racial purpose can be made even without such evidence. As the District Court observed in Dailey v. City of Lawton, 296 F. Supp. 266, 268 (W.D. Okla. 1969), aff'd 425 F. 2d 1037 (10th Cir. 1970), it is generally recognized that

most persons will not admit publicly that they entertain any bias or prejudice against members of the Negro race. */

As the Court of Appeals observed in the same case:

The appellants point out that the race issue was not discussed at any of the public meetings and that there was no evidence of racial prejudice on the part of any city official. If proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. In our opinion it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals. 425 F. 2d at 1039.

Accordingly, the courts do not require overt, unambiguous statements of racial discrimination on the part of officials, but will rather look to the totality of circumstances to determine the degree, if any, to which race was an element in what the defendant did. Dailey v. City of Lawton, supra;

*/ See also United States v. Reddoch, supra, Banks v. Perk, supra, to the same effect. In the light of this proposition, the courts in fair housing cases have taken a "reasonable man" approach and have inferred racial discrimination from remarks which imply it even though they do not explicitly contain it. See United States v. Mitchell, 327 F.Supp. 476, 479 (N.D. Ga. 1971); United States v. Real Estate Development Corp., 347 F. Supp. 776, 783 (N.D. Miss. 1972) ("statements which come close to admissions of a discriminatory policy, especially when bolstered by explicit admissions, are persuasive evidence of discrimination.").

Kennedy Park Homes v. City of Lackawanna, supra.

We believe that the totality of circumstances in this case establishes discriminatory purpose.

1. Black Jack is presumed to intend the foreseeable consequences of its conduct; and proof of discriminatory effect is therefore persuasive as to racial purpose.

The Supreme Court has long recognized "the common law rule that a man is to be held to intend the foreseeable consequences of his conduct." Radio Officers v. Labor Board, 347 U.S. 17, 45 (1953). This presumption applies to public officials to the same degree as to private individuals. Rabinowitz v. United States, 366 F. 2d 34, 56 (5th Cir. 1966). Accordingly, once discriminatory effect has been established -- once it is shown that the zoning ordinance tends to perpetuate segregation in the Black Jack and St. Louis metropolitan areas, with all the consequences which this entails -- a heavy burden is cast on Black Jack to show that it intended something else.

In this connection, it is well to add that to show discriminatory purpose we need not prove that the Zoning Commissioners were evil men. As the Court of Appeals said in Lackawanna, "the arbitrary quality of thoughtlessness" is equivalent to discriminatory purpose where the results are discriminatory. Either the Commissioners knew the obvious -- that the zoning ordinance perpetuated segregation -- or they never took the trouble to find out. This proves either deliberate discrimination, or arbitrary thoughtlessness, or both.

2. Racially discriminatory purpose is imputable to Black Jack where the underlying segregation was deliberately created by private and public conduct and where Black Jack's action was superimposed on that segregation and tended to perpetuate its effects.

In this case, we have assembled far more proof than in the prior "zoning" cases that the racial separation in the Black Jack and St. Louis areas was deliberately created, and that the actions of Black Jack sealed in its effects. That evidence is admissible and persuasive to establish discriminatory effect.

Proof of discrimination in the private housing market was admitted and relied on by the Court in Lackawanna. 313 F. Supp. at 694. See also Garrett v. City of Hamtramck, 315 F. Supp. 16, 19 (E.D. Mich. 1971); Dailey v. City of Lawton, supra.* /The principle is a simple one -- where a discriminatory state of affairs was created, and a public body capitalizes upon it instead of taking appropriate measures to correct it, the discrimination is properly laid at its door. In Coppedge v. Franklin County Board of Education, 273 F. Supp. 289 (E.D. N.C. 1967), aff'd 394 F. 2d 410 (4th Cir. 1968), the school board announced a freedom of choice plan, then a generally permissible method of desegregation. Members of the Ku Klux Klan and others perpetrated acts of intimidation against black pupils and their families which deterred Negroes from attending

* / Public officials may not "effectuate" private housing discrimination. 425 F. 2d at 1039.

previously white schools. Even though there was no evidence that members of the school board participated in the intimidation, they were held to have denied black children equal educational opportunity because the pupils' choice was not free in the realistic context of its exercise, and the school authorities had not offered black children a plan that would realistically desegregate the schools.

In Brewer v. School Board of Norfolk, 397 F. 2d 37 (4th Cir. 1968), the school board of another previously segregated system adopted a neighborhood school policy. The Court of Appeals, in remanding the case to the district court, instructed the district judge as follows:

Upon remand the district court should determine whether the racial pattern of the districts results from racial discrimination with regard to housing. If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color. 397 F. 2d at 41-42.

3. Racially discriminatory purpose can be reasonably inferred where defendant submits unpersuasive nonracial justifications.

In our factual discussion, we have analyzed, in depth, the various nonracial justifications asserted by adversaries of Park View Heights for the passage of the ordinance and the exclusion of the project. We believe we have established that none of these reasons is sound or supports a compelling state interest. In Lackawanna, Crow, Banks, Mahaley, and Dailey, discrimination was found, in large part, on the basis of a lack of showing of persuasive nonracial reasons, and we think the evidence warrants a similar result here. As the Court observed in Dailey, general denials of an intent to discriminate are simply not sufficient. 425 F. 2d at 1039-1040.

4. Discriminatory purpose may be established by proof that public officials effectuated the discriminatory designs of individuals, and a wide latitude is permitted in proving such discriminatory designs.

Since "the discriminatory designs of individuals" are at the heart of the racial purpose issue, Dailey v. City of Lawton, supra, 425 F. 2d at 1039, and since the purpose of a community is so difficult to assess, Wright v. City of Emporia, supra, the courts have been liberal in receiving evidence which will shed light on public sentiment. We believe that all of the kinds of evidence which we have detailed in our factual discussion are admissible to establish discriminatory purpose.

In Dailey v. City of Lawton, supra, the Court described the evidence of racial purpose in that case, and it parallels what we have here, including telephone calls, statements by distributors of petitions, Hutton-type testimony, and the like:

Except for military personnel from Fort Sill, Lawton is in large measure a racially segregated city. The North Addition is predominately white. The housing project is designed to serve low-income groups which consist of Negroes, Spanish-Americans, and poor whites. The signers of the petitions in opposition were all white. The racial situation was discussed in connection with the circulation of the petitions. The project sponsors received numerous anonymous phone calls which opposed the project on a racial basis. The one dissenting member of the Planning Commission testified that the opposition was based on racial bias. The evidence is sufficient to show that the public bodies acted as they did because of the opposition to the project by the residents of the North Addition. 425 F. 2d at 1035

In Kennedy Park Homes v. City of Lackawanna, supra, the Court admitted and commented on very similar "purpose" evidence to that being offered by the United States in this case. A long and strident letter by the leader of a community organization complaining of an "integrated, low-cost housing development" being placed in our "choice suburban community" by the ruthless, totalitarian hierarchy of the sponsoring church (which was of the writer's own denomination), is set out in full in a footnote. 313 F. Supp. at 686-87. The letter uncannily parallels the actions and statements in this case by Francis Huss. The Court also quoted a statement by an unidentified man at a public meeting that speeding up integration from "the gradual way" then in vogue "will only

cause more unrest and misunderstanding." Id., at 687. This kind of evidence will be offered through Boyer, Mittelstadt and other witnesses. Threats and rumors of violence to minority families if they moved to the third ward were also mentioned in the court's opinion, Id. at 683. That kind of testimony will come in this case from Rev. Jones and Rev. Repp, among others.

In Coppedge v. Franklin County Board of Education, 273 F. Supp. 289 (E.D.N.C. 1967), aff'd 394 F. 2d 410 (4th Cir. 1968), the issue, as here, was community hostility to desegregation, and whether it made a freedom of choice plan unworkable. In concluding that such community hostility existed, the Court relied heavily on threatening and harassing telephone calls, most of them anonymous, to black families by private parties. The Court also admitted newspaper articles which contributed to the atmosphere in the community.

We will offer no evidence in this case that is different in character from the kind which has been admitted in Lackawanna, Dailey and Coppedge.

5. Testimony by Black Jack Zoning Commissioners to the effect that they were unaware of the racial composition of Black Jack is inherently incredible and raises an inference that they acted for discriminatory reasons.

We have noted in our factual discussion that Black Jack's Commissioners claimed not to know if the population of Black Jack -- which is in fact nearly 99% white according to the census -- has a majority of white persons. We submit

that such testimony is inherently incredible. Inability to recognize that Black Jack is predominantly white recalls what the Court said in United States v. Flagler County Board of Education, 457 F. 2d 1402, (5th Cir. 1972):

In the long march from Mansfield this Court has seen, heard, or heard of everything -- everything, that is, until today.

Here the District Court, after finding that Flagler County was operating a dual school system, ordered the immediate implementation of a unitary school system on August 7, 1970. The School District resisted, arguing that it did not know what the term "race" or "ethnic origin" contemplated. It contended that it could not assure that Negro students were not being discriminated against because it did not have a Congressional definition of the term 'Negro.' Id at 1402-03.

Professor Wigmore has written that proof of statements which, to put it charitably, do not conform to the facts -- and this testimony may fairly be so characterized -- is receivable against a defendant

as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the fact itself of the cause's lack of truth or merit. Wigmore on Evidence, §273 (3rd Ed. 1940).

We suggest that these Commissioners thought it would be bad for Black Jack's position in this litigation if they were to testify that the City is virtually all-white. That is why they did not know. The inference to be drawn from such testimony is compelling.

D. THE EVIDENCE IN THIS CASE SATISFIES THE REQUIREMENTS
FOR RELIEF PURSUANT TO 42 U.S.C. 3613

Under 42 U.S.C. 3613, the United States is entitled to relief if the evidence shows that the defendant has

(1) engaged in a "pattern or practice" of resistance to the enjoyment of equal housing opportunity; or

(2) denied equal housing opportunity to a group of persons, where the Attorney General has determined that such denial raises an issue of general public importance.

Although relief is appropriate if plaintiff satisfies any one of these requirements, we believe that the evidence is sufficient to establish both pattern or practice and denial of rights.

1. PATTERN OR PRACTICE

The words "pattern or practice" are not terms of art, but have their generic meaning. As Judge Pittman put it in United States v. Reddoch, PH EOH Rptr. Para. 13,569 (S.D. Ala. 1972), aff'd 467 F. 2d 897 (5th Cir. 1972):

[I]t is incumbent upon the government to show that any discriminatory act by the defendants was not an isolated, accidental or peculiar departure from a nondiscriminatory norm.

Accord: United States v. Real Estate Development Corp., 347 F. Supp. 776 (W.D. Miss. 1971).

The precise number of blacks rejected is not determinative in establishing a pattern or practice. United States v. Ramsey, 331 F. 2d 824 at 837, 838, n. 19 and 20 (on rehearing) (5th Cir. 1964); United States v. Mayton, 335 F. 2d 153 at 158, 159 (5th Cir. 1964); United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972). In United States v. Alexander and Cloutier Realty Co., PH EOH Rptr. Para. 13,570 (N.D. Ga. 1970) the court found a pattern or practice on the basis of defendant's extrajudicial admission of a discriminatory policy to a Department of Justice attorney and a single refusal to sell to a single black person pursuant to that policy. No minimum number of incidents is required to establish a pattern or practice; each case turns upon its own facts. United States v. West Peachtree Tenth Corp., 437 F. 2d 221 (5th Cir. 1971); United States v. Reddoch, supra.

In the present case, we do not have, as in the apartment house cases cited above, a simple refusal to rent to one or two blacks. The consequences of defendant's conduct are far more serious -- all of the prospective residents of Park View Heights, black and white, have been denied housing by Black Jack's ordinance. If, as we contend, this was done because of race, then the black prospective tenants have been denied dwellings because of their own race, and the white prospective tenants have been denied dwellings because of the race of their black neighbors. Cf. Sullivan v.

Little Hunting Park, 396 U.S. 229 (1969); Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969); United States v. Reddoch, supra.

In United States v. Ramsey, 331 F. 2d 824, 837, note 19 (5th Cir. 1964) (on rehearing), the Court discussed at some length the meaning of "pattern or practice" in the Civil Rights Act of 1960, which dealt with voting rights and was the first Congressional use of the term. The Court quoted Senator Keating's explanation of the term, which approximated the definitions in the cases cited above, and which concluded as follows:

Moreover, a single act such as enactment of a statute directed at Negroes would in itself constitute a pattern or practice of discrimination. 106 Cong. Rec. 7223.

In United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969) the court found that the single act of the defendants in changing their restaurant into a "private" dining club immediately after passage of the Civil Rights Act of 1964, was sufficient to establish a pattern or practice since the effect of that single act was to deny blacks collectively the opportunity to use the restaurant.

It is now well settled that admissions of a discriminatory policy, standing alone, will support relief under 42 U.S.C. 3613. United States v. Reddoch, supra; United States v. Real Estate Dev. Corp., supra; United States v. Youritan Constr. Co., PH EOH Rptr. para 13,582 (N.D. Calif. 1973). In this

respect, the numerous discriminatory statements made on behalf of Black Jack listed in the "discriminatory purpose" section of our factual discussion are all persuasive as to pattern or practice.

2. DENIAL OF RIGHTS TO A GROUP OF PERSONS

Even without proof of a pattern or practice, the United States is entitled to relief under §3613 upon a showing of a denial of rights to a group of persons where "such denial raises an issue of general public importance." As the court said in United States v. Hunter, 459 F. 2d 205, 218, n. 17 (4th Cir. 1972):

In contrast to the 1964 Act, a pattern or practice of resistance is not an indispensable prerequisite for relief. Relief may be based on a single (unintentional) violation of the Act when by that violation a group of persons are denied their statutory rights and the case raises an issue of general public importance.

The question of general public importance is for the Attorney General, and his determination is not judicially reviewable. */

As we suggested in connection with "pattern or practice," we believe that dwellings have been made unavailable to all of the prospective tenants of Park View Heights, black and white, on account of the race of the blacks. If the court agrees, then all of the prospective tenants, as well as the sponsors and developers of Park View Heights, are in the "group of persons" who have been denied rights within the meaning of the second alternative of 42 U.S.C. 3613. **/

*/ This Court has previously orally denied defendant discovery as to the nature of any question of general public importance. See United States v. Bob Lawrence Realty Co., ___ F. 2d ___, No. 72-1655 (5th Cir. February 13, 1973), note 14, slip opinion pp. 20-21 and authorities there cited; United States v. Real Estate Development Corp., 347 F. Supp. 776 (N.D. Miss. 1972) (footnote 2 and authorities there cited).

**/ In Hunter, supra, and Real Estate Development Corp., supra, the phrase "group of persons" was broadly construed to include unidentified persons only indirectly affected by the discrimination.

Upon such a showing, the United States is entitled to injunctive relief under conventional principles of equity.

United States v. Reddoch, supra; United States v. Real Estate Development Corp., supra.

E. THE UNITED STATES IS ENTITLED TO INJUNCTIVE
AND AFFIRMATIVE RELIEF

In civil rights cases, an appropriate decree will not only require the defendant to discontinue its discriminatory practices, but also require affirmative steps to correct the effects of past discrimination and to make the victims of past unequal treatment whole. Louisiana v. United States, 380 U.S. 145, 154 (1965); Kennedy Park Homes v. City of Lackawanna, supra; United States v. Georgia Power Co., No. 71-3447 (5th Cir. February 14, 1973); United States v. Bethlehem Steel Co., 446 F. 2d 652 (2d Cir. 1971). In a case of this kind, if Black Jack is found to have engaged in discriminatory practices, we believe that an appropriate decree should not only require defendant to take all necessary steps to assure that Park View Heights can be built, but also order positive steps by the City to encourage equal opportunity, such as a requirement that the City require proof of compliance with equal opportunity legislation by all those whom it licenses or with whom it does business.

With respect to putting the victims in their rightful place, the evidence will show that Park View Heights suffered serious financial loss as a result of the City's action. A decree in a suit by the Attorney General is a proper vehicle for making the victims whole. United States v. Georgia Power Co., supra; United States v. Latherers Local Union No. 46, 328 F. Supp. 429, 441 (S.D. N.Y. 1971).*/

*/ We do, however, note the pendency in this court of Park View Heights v. City of Black Jack, C.A. No. 71-C-15(A), in which the victims to be made whole are parties.

CONCLUSION

For the reasons stated, the United States prays that,
at the conclusion of the trial, judgment be entered in
conformity with the prayer of the complaint.

Respectfully submitted,

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