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# Housing Discrimination

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# HOUSING DISCRIMINATION

*Judge Leon Lazer:*

The next portion of the program deals with the Huntington housing discrimination case,[1] which will impact on suburban communities throughout the state. Since the property involved is in Huntington, the case has particular import for this geographic area.

Our two speakers, Richard Cahn and Richard Bellman, are the lawyers who litigated this case. The one who had a little bit more success in the case is Dick Bellman of Steele, Bellman & Levine, who has been litigating housing discrimination cases for a good portion of his legal career. Richard has served in the office of General Counsel of the United States Commission on Civil Rights and has been Assistant Counsel for the NAACP. He served as General Staff Counsel for the National Committee Against Discrimination in Housing, and he specializes in civil rights and civil liberties cases. As a student, Dick was a Law Review editor at the University of Minnesota Law School.

*Richard F. Bellman:*

Thank you, Judge Lazer. Richard Cahn and I did not confront the same problem that the other speakers faced in terms of trying to figure out which Supreme Court cases warrant discussion. We hit upon the *Huntington*[2] case in this section on housing not simply because we are here today in Huntington, but because this was the only ruling in the housing area issued by the Supreme Court last Term.

The Fair Housing Act (Title VIII),[3] which was adopted in 1968, is the major piece of legislation dealing with housing discrimination in this country. Generally, since the statute was adopted, the Supreme Court has avoided interpreting the sub-

1. Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989).

2. *Id.*

3. 42 U.S.C. § 3601 (1968).

stantive provisions of this law. Over the years, there have been a few decisions at the Supreme Court level—decisions, in fact, favorable to fair housing plaintiffs—pertaining to the procedural issue of standing to sue under the statute.[4] The Supreme Court, however, studiously has avoided reviewing—by denial of *certiorari*—any case in which it would be called upon to set forth interpretations as to the substantive standards of the law. A brief discussion of some of these cases will set the framework for the *Huntington* litigation. The cases all involved challenges to governmental interferences with efforts to build low cost housing by denying necessary local approvals such as rezoning to multi-family classifications.

The first of the cases where *certiorari* was denied involved Arlington Heights, a suburb outside of Chicago.[5] This case arose in the late 1970's and its factual situation was similar to that of the *Huntington* case. A low income housing sponsor, seeking to build subsidized housing in a predominantly white suburb on a parcel of land donated for this purpose by a local church, requested that the land be rezoned for multi-family development.[6] Because of the economic constraints, low cost or subsidized housing, as a practical matter, can only be constructed in a multi-family context. The application was denied, and the developer undertook its federal court challenge.[7]

The plaintiff housing sponsor in *Arlington Heights* asserted as its principal claim that the zoning denial violated the equal protection clause of the fourteenth amendment of the Constitution.[8] The complaint also contained a claim that the Fair Housing Act was violated by the municipal action.[9] The plaintiff, in presenting its fourteenth amendment argument, alleged

4. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

5. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

6. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252, *remanded*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

7. *Id.* at 210.

8. *Id.* at 209.

9. *Id.*

that the denial of rezoning had a discriminatory impact on minority people, many of whom lived in Chicago and needed housing outside the inner city.[10] The Seventh Circuit agreed with the plaintiff, finding that the denial of rezoning was a violation of the fourteenth amendment, basing the holding on an impact theory and without evidence that Arlington Heights officials intended to discriminate.[11]

The decision then was reviewed by the Supreme Court.[12] The case was heard, however, precisely at the time when the Supreme Court was redefining and limiting the reach of the fourteenth amendment. This process of redefinition occurred first in the case of *Washington v. Davis*,[13] a matter involving alleged discrimination in public employment. In that case, the Supreme Court held that a denial of equal protection only can be established upon a showing of intentional discrimination.[14] Proof of disparate racial impact or effect would be insufficient to make out a violation of the fourteenth amendment.[15] The *Davis* case was followed almost immediately by the appeal in *Arlington Heights*.[16] Relying on its new interpretation of the fourteenth amendment, the Supreme Court stated in *Arlington Heights* that the Seventh Circuit had been in error in upholding the housing sponsor's challenge to the zoning denial and reversed.[17]

This ruling did not conclude the *Arlington Heights* matter. Rather, the Supreme Court went on to state that there existed another issue not yet decided by the Seventh Circuit: whether the plaintiffs could prove a violation of the Fair Housing Act

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10. *Id.*

11. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 412-15 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

12. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

13. 426 U.S. 229 (1976).

14. *See id.* at 238-48.

15. *Id.*

16. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

17. *Id.* at 270-71.

based upon a showing of discriminatory racial impact, in the absence of proof of intentional racial discrimination.[18]

At this point, I must stress that, in a case of this nature, where a developer comes before the local zoning officials and applies for rezoning and is turned down, it is extremely difficult to show that a zoning denial occurred because the officials involved wanted to discriminate against potential minority residents of a housing development. Indeed, if a Title VIII argument is to be successful in this context, almost by necessity the claim must turn on an impact analysis, i.e., does the zoning denial in some way disproportionately discriminate against minority persons. A requirement of proof of intentional discrimination would render Title VIII a dubious remedy.

In any event, the Supreme Court, in *Arlington Heights*, noting the open question with respect to Title VIII, remanded the matter to the Seventh Circuit with instructions to decide whether an impact standard should apply.[19] Parenthetically, it never has been clear to me why the Supreme Court itself did not decide the Title VIII issue when it had the *Arlington Heights* case before it.

The Seventh Circuit, following this directive, considered the reach of Title VIII and, in a very important ruling rendered in 1977, held that a violation of the Fair Housing Act could be established by proof of disparate impact or effect and in the absence of proof of intentional discrimination.[20] The Seventh Circuit held that a prima facie violation of the Act could be shown in one of two ways. First, a plaintiff could establish a prima facie violation by showing either that the challenged decision had a greater adverse impact on a minority group than on the general population or, second, that the challenged decision perpetuated racial segregation in the community.[21] The Seventh Circuit held that, in the face of such a showing, the defendant municipality would be required to establish an over-

18. *Id.* at 271.

19. *Id.*

20. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288-89 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

21. *Id.* at 1290.

riding public interest in the action taken in order to rebut the prima facie case of discrimination.[22]

The Seventh Circuit articulated a four-part standard in reviewing the rebuttal case that included a review of the strength of the discriminatory impact proved by the plaintiff, a determination of whether evidence of some discriminatory intent on the part of the defendant (or the defendant's officials) was present, an evaluation as to how strong the defendant's interest was in the action taken and, finally, whether the plaintiff was attempting to impose upon the defendant municipality a burden of building low cost housing or only seeking to prevent interference with a private effort at construction.[23] *Arlington Heights* once again sought review by the Supreme Court, but, in 1979, *certiorari* was denied.[24] The impact standard under Title VIII clearly was in place.

The *Arlington Heights* ruling was followed by a series of circuit court decisions, all of which followed the Seventh Circuit's lead in holding that an impact standard would prevail under the Fair Housing Act.[25] As was the case in *Arlington Heights*, each of these rulings arose in the context of an effort to build low cost housing in the absence of critical public approval.

Three courts of appeal rulings applying the impact standard under Title VIII are of particular significance. In each of them, the Supreme Court followed with a denial of *certiorari*. One of these cases arose in the City of Philadelphia and involved former Mayor Rizzo.[26] The issue in *Rizzo* was whether the city had violated Title VIII by blocking a low cost housing project slated for a white section of the city.[27] Following the Seventh Circuit's lead in *Arlington Heights*, the Third Circuit

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22. *Id.* at 1293.

23. *Id.* at 1290.

24. 434 U.S. 1025 (1978).

25. Keith v. Volpe, 858 F.2d 467, 483 (9th Cir. 1988); Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982); United States v. City of Parma, 661 F.2d 562, 572 (6th Cir. 1981), *cert denied*, 456 U.S. 926 (1982); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

26. Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

27. *Id.* at 130.

concluded that a Title VIII impact analysis should apply.[28] The Third Circuit went on to require the city defendant to prove, in order to overcome the prima facie showing of discrimination, that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative course of action could be adopted that would serve the city's interest with less discriminatory impact.[29] This *Rizzo* test ultimately was applied by the Second Circuit in the *Huntington* case.[30]

In the so-called *Black Jack* case,[31] another Title VIII matter, which arose in a suburb of St. Louis, Missouri, the local residents of an unincorporated area of the county formed a new municipality, Black Jack, around the site of a proposed low cost housing project.[32] The new community, as its first item of business, enacted a zoning provision removing the multi-family zoning classification that was in place on the land upon which the housing project was to be built.[33] The rezoning effectively killed the project. The Eighth Circuit, applying an impact standard, held that Black Jack had violated the Fair Housing Act,[34] and the Supreme Court refused to hear the case.[35]

The third case involved an action brought by the United States against the Town of Parma, Ohio, a suburb of Cleveland.[36] The government challenged a series of municipal actions taken by Parma to block low cost housing.[37] Again, the lower courts applied an impact standard in reviewing and declaring illegal the local municipal action,[38] and the Supreme

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28. *Id.* at 147.

29. *Id.* at 149.

30. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

31. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

32. *Id.* at 1182.

33. *Id.* at 1183.

34. *Id.* at 1184-85, 1188.

35. 422 U.S. 1042 (1975).

36. United States v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

37. *Id.* at 1051-52.

38. *Id.* at 1099.

Court refused to review the matter.[39] Thus, by as late as the mid-1970's, the impact standard under Title VIII was well ensconced within judicial precedents and the Supreme Court had refused to act in any way to detract from these holdings.

Now, we come to the *Huntington* litigation. Again, we have a conflict arising out of an effort by a low cost housing sponsor, in this case a Huntington-based organization called Housing Help, seeking to build needed housing for the community's lower income population.[40] In the early 1980's, Housing Help obtained a fifteen acre parcel of land in a white section of Huntington.[41] At that time, the only area in Huntington where a private developer could build multi-family housing was in the urban renewal section.[42] This section is a very small portion of town known as Huntington Station, situated near a Long Island Railroad station, and only a few blocks from this law school.

Under the ordinance, new multi-family housing could be built only in the urban renewal section or, if under the auspices of the Housing Authority (and approved by the town), such housing could be built anywhere in the municipality.[43] The Housing Authority in its entire history had built only one very small project in the urban renewal area and had never requested permission to build any other projects.[44]

Housing Help came into existence because of the real need for low cost housing in the community. It chose the site for its development and requested that the town change its zoning ordinance to allow developers to build multi-family housing anywhere in the community.[45] The town rejected this request, and the *Huntington* litigation began.[46]

Housing Help's challenge was based principally upon the Fair Housing Act. The organization alleged that the denial of

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39. City of Parma v. United States, 456 U.S. 926 (1982).

40. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 928 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

41. *Id.* at 930-31.

42. *Id.* at 929-30.

43. *Id.*

44. *Id.* at 930.

45. *Id.* at 931.

46. *Id.*

zoning for its project violated the Act because (1) the denial disproportionately harmed minority citizens in need of low cost housing, and (2) the effect of the zoning denial perpetuated patterns of residential segregation by locking the minority community into the confined geographic area around Huntington Station.[47] The district court disagreed with the allegations and ruled in Huntington's favor, dismissing the complaint after a full trial.[48] An appeal was taken to the United States Court of Appeals for the Second Circuit.[49]

In response, the Second Circuit came down with a very important ruling in the fair housing area. The court of appeals, in a decision authored by Judge Kaufman, held that the district court had interpreted incorrectly the Fair Housing Act when it required plaintiffs to prove intentional racial discrimination.[50] The Second Circuit made it clear that an impact standard would prevail in interpreting the Act and outlined the standards which would apply in a Title VIII case of this nature.[51]

The Second Circuit stated that the trial court should first look for racial impact.[52] Such an impact, if shown, would create a prima facie violation of the Act.[53] This prima facie case would be proven if the plaintiff could show that the denial of the housing disproportionately harmed the minority community or, alternatively, that the denial of the housing perpetuated patterns of racial residential segregation.[54]

The Second Circuit endorsed the sufficiency of Housing Help's proof of discriminatory impact.[55] Housing Help had shown that minority citizens were harmed disproportionately by the denial of its project because under the Town of Huntington's own Housing Assistance Plan—a plan adopted by the Town Board and filed with HUD—approximately one-quarter of the town's population who needed housing subsidies was mi-

47. *Id.* at 928-29.
48. *Id.*
49. *Id.*
50. *Id.* at 935.
51. *Id.* at 935-36.
52. *Id.* at 934.
53. *Id.*
54. *Id.* at 937.
55. *Id.* at 938.

nority.[56] Townwide, the need for housing subsidies existed only with respect to seven percent of the population.[57] Housing Help also showed that the waiting lists for existing subsidized housing units in Huntington were made up disproportionately of minority people.[58]

The Second Circuit also endorsed Housing Help's argument that denial of the housing perpetuated residential segregation in the town.[59] The proof presented to the court was that the urban renewal area, the only area under the ordinance where multi-family developments could be built, was over fifty percent minority.[60] By contrast, Housing Help's proposed project was slated for a community that is about ninety-eight percent white.[61] The district court had agreed that a substantial number of minority people would be moving into Housing Help's project.[62] With these facts, the Second Circuit concluded that Housing Help's project would break down patterns of segregation, thereby making out the prima facie case of a violation of the Fair Housing Act.[63]

The Second Circuit next addressed the question of what standard of review should be imposed to test the explanations presented by the town to justify blocking the project.[64] A rigorous test would make it more difficult for the town to overcome the prima facie case of discrimination. The Second Circuit ultimately imposed a very taxing standard on the town, concluding that Huntington would have to come forward and present bona fide and legitimate justifications for blocking the Housing Help project and that it had no less discriminatory alternative available to it other than stopping the development.[65] As I have al-

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 937-38.
60. *Id.*
61. *Id.* at 931.
62. *Id.*
63. *Id.* at 938.
64. *Id.* at 939.
65. *Id.*

ready noted, this standard was derived from the *Rizzo* case.[66] It is, indeed, a standard which imposes a heavy burden on a municipality that seeks to block needed low cost housing and is charged with violating Title VIII.

Obviously, if a municipality comes forward in its rebuttal case and shows, for example, that a severe environmental problem would result from a multi-family housing project, it would meet its burden of rebuttal to the showing of discriminatory impact. There could be other justifications, such as severe stress on local facilities such as schools, but the town's justifications would have to be real and serious. The Second Circuit concluded that Huntington's justifications simply did not measure up and that Housing Help was entitled to its rezoning.[67]

The Second Circuit did not stop at this point. The court went on to conclude that the local zoning ordinance, which locked multi-family construction into the urban renewal area, could not withstand a Title VIII review.[68] The reason for this was that the urban renewal area was inhabited largely by minority citizens.[69] The Second Circuit concluded that the ordinance would have to be amended to allow developers to build low cost housing, upon application and approval by the town, anywhere within the town's jurisdiction.[70]

Huntington then took an appeal to the Supreme Court of the United States and did not ask for *certiorari* but filed a direct appeal.[71] This procedure was followed because the Second Circuit had declared a portion of the town's zoning ordinance in violation of federal law, thereby affording Huntington the right of direct appeal.[72] With Huntington's papers filed, Brad Reynolds and his Justice Department jumped into the fray. The De-

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66. Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). *See supra* notes 26-30 and accompanying text.

67. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 940-42 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

68. *Id.* at 941.

69. *Id.* at 937-38.

70. *Id.* at 942.

71. *See* Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276, 277 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989).

72. *Id.*

partment of Justice filed an amicus brief with the Supreme Court,[73] arguing that the Court should undertake a full review of the Huntington matter.

The Justice Department's position was that the entire line of Title VIII cases that had been handed down by circuit courts over the years—including the rulings in *Arlington Heights*, *Rizzo*, *Black Jack*, and *Parma*—had all been decided incorrectly.[74] The Justice Department stated that only a standard of intentional discrimination should apply with respect to Title VIII challenges and that a showing of disparate impact alone should never constitute a violation of the Act.[75] Indeed, according to the Department of Justice, the most egregious lower court deviation from the proper road could be seen in the Second Circuit's *Huntington* decision itself.[76] Fortunately for Housing Help and those who need low cost housing in Huntington, the Supreme Court decided to avoid a full review and summarily affirmed the Second Circuit decision.[77]

Because this was a direct appeal and not a request for *certiorari*, the Supreme Court wrote an opinion to justify the reaffirmance of the Second Circuit conclusion that the town zoning ordinance violated federal law. The Supreme Court stated: "Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima facie case was inadequate."[78]

This reference by the Supreme Court to disparate impact, as it applies to housing cases, is the only comment by the highest court, in the twenty-one year history of the Fair Housing Act, relevant to the question of whether an impact or intent standard is required. It is, of course, difficult to determine whether, in some future case, the language by the Supreme Court in

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73. Brief for the United States as Amicus Curiae, Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989) (No. 87-1961).

74. *See id.* Brief at 10, 12-13.

75. *Id.* Brief at 15-16.

76. *Id.* Brief at 13-14.

77. Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276, 277 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989).

78. *Id.*

*Huntington* is to be read to mean that an impact standard is correct or that the Court was leaving open the question of imposing an intent obligation of proof until some future time. The Supreme Court's language in the *Huntington* ruling, however, adopts an impact standard.[79]

One result of the *Huntington* litigation is to leave in place, at least for the time being, twenty-one years of litigation under the Fair Housing Act. A violation of the Act can be made out by a showing of racial impact, in the absence of racial intent.[80] The *Huntington* ruling now is being relied upon in a state court proceeding against the Town of Brookhaven, involving two housing projects.[81] This case is still awaiting decision by Judge Baisley of the Supreme Court of Suffolk County.[82] Under my reading of the *Huntington* decision, it seems clear that the housing projects in Brookhaven must be allowed to be built.

Finally, I would note that there was one additional significant action taken by the Supreme Court in the housing area last Term. This was the denial of *certiorari*, on the same day that the *Huntington* ruling was handed down, denying review of the *Starrett City* litigation.[83] Unfortunately, time does not allow me to detail the history of the *Starrett* case. Suffice it to say that the Second Circuit had held that the practice at Starrett City of maintaining racial quotas in order to ensure a racially balanced housing project violated the Fair Housing Act.[84] The Second Circuit, in a two-to-one decision, held that to deny black people the right to rent vacant apartments in order to maintain racial integration violated federal law.[85] As

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79. *Id.*

80. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

81. Suffolk Interreligious Coalition on Hous. Inc. v. Town of Brookhaven, No. 7532-84 (N.Y. Sup. Ct. Suffolk County filed March, 1984).

82. *Id.*

83. Starrett City Assocs. v. United States, 109 S. Ct. 376 (1988).

84. United States v. Starrett City Assocs., 840 F.2d 1096, 1103 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

85. *Id.*

it did with the *Huntington* case, the Supreme Court ducked the thorny issues raised by the *Starrett* litigation.[86]

Thus, the Supreme Court's record remains unchanged: for twenty-one years the Court has avoided taking any case which would lead to a ruling on the substantive provisions of the Fair Housing Act. We only can speculate as to why this situation has prevailed. Fortunately, from the point of view of civil rights proponents, the lower courts continually have interpreted the Fair Housing Act liberally, and the *Huntington* ruling is the latest example of that pattern.

*Judge Leon Lazer:*

Discussing the Huntington case with Dick Bellman is one of Suffolk's leading lawyers, Richard Cahn, an old friend to many of us. And, Dick, I must accuse you of playing a major role in creating that peculiar legislative body, the Suffolk County Legislature. Dick Cahn and Fred Block were the men who carried the question of one man-one vote, now called one person-one vote, to the Supreme Court of the United States.[87] It eventually led to the demise of the old Suffolk Board of Supervisors system as not justified as constitutional under the one person-one vote scheme.[88]

There was, of course, as no doubt none of you remember, the Lazer plan, consisting of sixteen districts. The Republican leader decided he could not copy that so he turned the plan into eighteen districts.[89] So, I, too, have had a hand in what now takes place in Hauppauge, New York, and that is not viewed with great admiration.

In any event, Dick Cahn is a Yale Law School graduate, and he was, of course, on Law Review, as you might expect. Dick is constantly in the federal and state courts, litigating cases involving political issues, civil liberties issues, and questions in which municipal governments are involved. He has, I suppose, represented more municipalities than anyone else in

86. Starrett City Assocs. v. United States, 109 S. Ct. 376 (1988).

87. Moody v. Flowers, 387 U.S. 97 (1967), *vacating* Bianchi v. Griffing, 256 F. Supp. 617 (E.D.N.Y. 1966).

88. Bianchi v. Griffing, 393 F.2d 457, 460 (2d Cir. 1968).

89. *See, e.g.*, N.Y. ELEC. LAW § 4-100 (McKinney 1978 & Supp. 1990).

this room. He is a former president of the Suffolk County Bar Association and was Chief Deputy Town Attorney for the Town of Huntington. He also teaches at Touro.

*Richard Cahn:*

Because of the lateness of the hour, I simply will content myself with a humble apology for being involved with the creation of the Suffolk County Legislature and pass on to the subject at hand. Richard Bellman has surprised me. His presentation today[90] is somewhat different from the presentations I have heard in previous years, both in court and out of court, about what a significant victory the *Huntington*[91] case was going to be for civil rights plaintiffs after the Supreme Court rendered its decision last year.

I want to say that, for some years, it has been fashionable to publish articles in the *New York Times* or the *Atlantic Monthly* or to travel the university lecture circuit to promote the notion that candidates for elective office are made by the media. It is further said that these candidates are *tabulae rasae* until some unscrupulous media person signs onto the campaign and plants suggestions in the ears of strategically placed and influential journalists. These suggestions are invariably about the wonderful virtues of the candidate, who is an all-time hero in the American pantheon of political candidates, even though no one knows it. As soon as the media broadcast it, of course, that is the message, and I think we are all somewhat less enthusiastic about what happens between political candidates and the media in those circumstances.

I wanted to begin my talk this afternoon with that comment because I think that something quite similar happens when a litigation such as the *Huntington* case appears for the first time in the public eye. Civil rights lawyers, municipal officials, and attorneys have political agendas, and it is difficult for both sides to resist dressing up this new litigation for its public debut in clothes best designed to attract the favor of potential

90. *See* Bellman *supra.*

91. Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989).

political, media, or legal allies. Whether it be newspaper headlines, television interviews, or, ultimately, amicus briefs in the Supreme Court, the process somehow transforms the case into something larger than it really is. This is true for both the public and for the judges who must try to describe it as it really is. And, so it happened with the *Huntington* case.

The *Huntington* case was described by some of us municipal lawyers as potentially ringing the death knell of local zoning powers. It was touted by civil rights lawyers as potentially deciding, in a definitive fashion, that housing discrimination under Title VIII of the Civil Rights Act of 1968[92] may always be established without proof of discriminatory intent.[93] That, indeed, appears to be Richard Bellman's belief: that the Supreme Court now has established that principle.

My thesis today is that the *Huntington* case, in reality, settled neither of these propositions. The courts, quite likely, will sharply undercut the *Huntington* ruling in future cases by either effectively establishing or reinstating discriminatory intent as a necessary element of proof in a Title VIII zoning case or by imposing draconian proof requirements upon Title VIII plaintiffs so that the municipal defendant will always remain the "odds on favorite" to retain its extraordinary zoning powers.

First, a look at what the Supreme Court did and did not do. As Richard Bellman correctly has stated, the Court limited its review to the portion of the case implicating its mandatory jurisdiction. The Court expressly declined to review the Second Circuit ruling insofar as it related to the refusal to rezone the project site and insofar as it imposed site-specific rezoning relief.[94] That is to say, the Second Circuit directed the Town of Huntington to rezone a specific parcel of land[95] as to which

92. Civil Rights Act of 1968, § 801, 42 U.S.C. § 3601 (1968).

93. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

94. Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276, 277 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989).

95. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 942 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

there had never been a SEQRA[96] or environmental review process, as to which no formal rezoning application ever had been submitted, as to which there had never been a legislative vote, and as to which there had never been a public hearing.[97] This whole area of the Second Circuit's extraordinary ruling has never been passed upon by the Supreme Court and is reserved for a future day.

In language that Mr. Bellman and I interpret differently, the Supreme Court went on to say:

> Since appellants [the town] conceded the applicability of the disparate impact test for evaluating the zoning ordinance under Title VIII, we do not reach the question whether that test is the appropriate one. Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the *prima facie* case was inadequate.[98]

In interpreting that language, one has to place it in the context of all of the cases that the Court was about to decide. As to those cases, I agree more with Gail Wright-Sirmans than I do with Brad Reynolds.[99] The Court very methodically, in a number of different areas, curtailed the rights of civil rights plaintiffs in Title VII litigation; made it more difficult to establish a prima facie case; made it far easier for an employer-defendant to justify its alleged discriminatory practice; and, as also was noted, made it more difficult for prevailing attorneys to collect attorney fees. This was the same Court, with the exception of Justice Kennedy, who had not yet fully come aboard, that was doing all of these things in Title VII and, yet, was pulling its punches in the *Huntington* case. The Court could not escape making a decision since the *Huntington* case lay within the Court's mandatory jurisdiction.[100] However, in

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96. Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984 & Supp. 1990).

97. Huntington Branch, NAACP v. Town of Huntington, 668 F. Supp. 762, 784 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

98. Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276, 277 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989).

99. *See generally Employment Discrimination*, 6 TOURO L. REV. 55, 77-112 (1989).

100. *Huntington*, 109 S. Ct. at 277.

my view, it made its decision in such a careful and restricted fashion that the case does not mean much of anything as far as precedent is concerned.

Indeed, in the Solicitor General's brief, the Solicitor General urged the Court to take this case.[101] However, the Solicitor General also urged that, if the Court did not want to take the case, it should at least look at the briefs that the town filed in the district court and in the Second Circuit.[102] The town essentially urged the lower court to apply the *McDonnell Douglas* test[103] to the alleged refusal of the town to rezone the property owned by or optioned to the plaintiffs, as well as the *Griggs* test,[104] as combined with the *Arlington Heights* test,[105] insofar as the claim was addressed to the validity of the ordinance. The Solicitor General continued that, in the part of the case that implicated the Court's mandatory jurisdiction, the town did not argue that discriminatory intent was a necessary ingredient of the plaintiff's proof. So, therefore, urged the Solicitor General, if the Court wished to escape deciding this Title VIII case, as it frankly had escaped deciding all of the rest over the

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101. Brief for the United States as Amicus Curiae at 19, Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989) (No. 87-1961).

102. *See id.* Brief at 10-12.

103. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Once the plaintiff establishes a prima facie case of racial discrimination, the burden then "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. If the defendant meets this burden, the plaintiff must still be given the "opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." *Id.* at 804.

104. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Employment practices which are facially neutral but which have a discriminatory effect in operation must be shown to be related to job performance. *Id.* at 431-32.

105. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977). The four factors used to determine whether conduct absent discriminatory intent is violative for its discriminatory impact are:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

*Id.* at 1290.

past twenty years (as was done in *Arlington Heights I*,[106] which was not a Fair Housing Act case but came to the Supreme Court as a fourteenth amendment case), the Court had the means and the mechanism to do so simply by ruling that the test which was employed by the Second Circuit was not seriously disputed by the town, and that the town essentially lacked standing in the Supreme Court to challenge that test. Therefore, the Court could affirm on those facts without ever making a ruling as to the appropriate test to be applied in Title VIII litigation.

Undoubtedly due to the brief of the Reagan Justice Department (which, by the way, was an uncharacteristic submission, since the Court so often follows the lead of the Solicitor General, the so-called "Tenth Justice"),[107] the Court did not reach the question of whether the test applied by the Second Circuit was the appropriate test.[108]

The Supreme Court's record is essentially clean. It has not ruled that discriminatory effect without intent is appropriate, necessary, or sufficient to prove a Title VIII violation, and it certainly has not determined that the relief awarded by the Second Circuit was appropriate.[109]

My conclusion is that the Court not only left the door wide open, but also off the hinges, for a municipality to argue that relief in a civil rights case classically is to be fashioned in the first instance by the trial court, and that zoning powers are uniquely to be exercised by elected local officials whose decisions are to be afforded great deference by the Supreme Court.

Further, it is my opinion that, following *Village of Belle Terre v. Boraas*,[110] a municipality can continue to argue that environmental questions ought properly be considered first by local legislative and administrative officials, citing the *Village*

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106. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

107. L. CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987).

108. Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276, 277 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989).

109. *Id.*

110. 416 U.S. 1 (1974).

*of Euclid v. Ambler Realty Co.* case of 1926;[111] that those questions should not be decided in the first instance by the courts as the Second Circuit did in our case; that, clearly, the mere length of the litigation (which was the justification for the Court's award of site-specific relief), unconnected with any willful delay on the part of the municipal defendant, does not provide sufficient reason for the court of appeals to emasculate the district court judge who was intimately familiar with the facts, the witnesses, and the parties; and that the relief granted in a civil rights case should not be broader than necessary to remedy the violation. In this case, the plaintiffs never applied for site-specific rezoning, and the appropriate relief to have been awarded directly by the Second Circuit, in my view, would have been merely to strike the ordinance and then send the matter back so that the plaintiffs could make their application for site-specific zoning.

A future municipal defendant can continue to argue, as we did, that the federal courts' remedial powers do not extend to restructuring the operation of local and state government entities in the absence of a constitutional violation. That language comes out of the Supreme Court's decision in *Hills v. Gautreaux*,[112] leaving these arguments wide open.

In light of the Court's very careful tailoring of its language and its holding, it left it open to a future municipal defendant to claim that a Title VIII claim does necessarily include an element of intent. In light of the *Wards Cove*,[113] *Watson*,[114] and *Price Waterhouse*[115] cases, even if proof of a Title VIII violation does not include intent, the burden of proof remains always with the plaintiff.[116] The plaintiff's statistical proof is subject to strict scrutiny.[117] There must be a causal connection shown between the defendant's action, the statistical disparity,

111. 272 U.S. 365 (1926).
112. 425 U.S. 284, 298 (1976).
113. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).
114. Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988).
115. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).
116. *Wards Cove*, 109 S. Ct. at 2126.
117. *See id.* at 2124-25.

and the plaintiff's damage.[118] The defendant's burden is only to articulate, not to prove, a nondiscriminatory motivation for taking the action, which the plaintiffs then must prove was pretextual.[119]

The defendant has open to it the *Mt. Healthy School District v. Doyle*[120] test to show that it would have taken the same action "but for" the discriminatory motivation.[121] The action need not be justified by a showing that it is essential or indispensable.[122] Finally, the judiciary must proceed with care before upsetting zoning enactments, since courts are less competent than towns to make zoning decisions, just as courts are less competent than employers to make employment-related decisions.

It should be recognized that an analysis of the *Huntington* case and the Supreme Court's language in that case gives no comfort to plaintiffs and holds perils for municipal defendants, particularly insensitive or careless ones who do not use zoning powers with care. But the *Huntington* case, particularly the Second Circuit's decision, is being distinguished by the lower courts.[123] Ironically, it has been cited by Judge Mukasey of the Southern District of New York as standing for the proposition that, ordinarily, fashioning of the remedy is first considered by the district court.[124] Judge Goettel, also of the Southern District of New York, pointedly quoted our case as providing a reaffirmation that Title VII cases are relevant to Title VIII cases, in recognition of the fact that the two statutes are part of a coordinated scheme of federal civil rights laws enacted to end discrimination.[125] These are all signs that the *Huntington* case will not be followed. Finally, and again from the lower courts, Judge Connors, in *Strykers Bay Neighborhood Coun-*

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118. *Id.* at 2124.
119. *Id.* at 2126.
120. 429 U.S. 274 (1977).
121. *Id.* at 285-87.
122. *Id.*
123. *See, e.g.*, Jones v. Deutsch, 715 F. Supp. 1237, 1244 n.12 (S.D.N.Y. 1989).
124. Consolidated Gold Fields v. Anglo Am. Corp., 713 F. Supp. 1455, 1456 (S.D.N.Y. 1989).
125. People of State of New York, by Abrams v. Merlino, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988).

*cil, Inc. v. City of New York*,[126] after analyzing the facts involving an urban renewal area in New York City, dismissed the complaint[127] and refused to grant class certification.[128] In so doing, he essentially followed all of the wrong rules, to judge by the Second Circuit's decision in the *Huntington* case.[129]

At this point, the Town of Huntington has rezoned the subject property, the project has not been built, no site-plan application has been submitted, and it may well be that the plaintiffs, who have yet to come forward with a site-specific plan, will never do so for lack of funding.

*Question from Panelist Eileen Kaufman:*

Mr. Cahn, why, in light of your forecast that when the Supreme Court resolves the substantive issues of Title VIII it will come out on the side of the municipalities, did the Town of Huntington make the decision not to push the argument that the disparate impact test is inappropriate in this litigation?

*Richard Cahn:*

Well, the Town of Huntington argued that the disparate treatment test of the *McDonnell Douglas* case,[130] which includes an intent factor, was to be used in analyzing the town's refusal to rezone the property.[131] The town argued in the district court and in the Second Circuit that it was the four-

126. 695 F. Supp. 1531 (S.D.N.Y. 1988).

127. *Id.* at 1538-44.

128. *Id.* at 1538.

129. *See* Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276 (1988) (per curiam), *reh'g denied*, 109 S. Ct. 824 (1989).

130. A prima facie case of facial discrimination may be made by the complainant by showing:

(i) that he belongs to a racial minority;

(ii) that he applied and was qualified for a job for which the employer was seeking applicants;

(iii) that, despite his qualifications, he was rejected; and

(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

131. Huntington Branch, NAACP v. Town of Huntington, 668 F. Supp. 762, 776 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

pronged *Arlington Heights* test,[132] coming out of the Seventh Circuit, that applied to the rest of the case, and that there had to be some element of discriminatory intent in order for a plaintiff to pass the *Arlington Heights* test.[133] We very carefully distinguished between the two situations.[134]

I think that *Wards Cove*[135] and *Price Waterhouse*,[136] along with the other cases that you have heard about today, have rendered the distinction between *Griggs*[137] and *McDonnell Douglas*[138] obsolete. I think that the rules in those two cases will probably fold into some new rule in Title VII and, ultimately, will carry over into Title VIII when the Supreme Court is ready to rule.

132. For the test, see *supra* note 105.

133. *See* Huntington Branch, NAACP v. Town of Huntington, 668 F. Supp. 762, 775-77 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926, 936 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989).

134. *Id.*

135. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

136. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

137. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

138. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).