4-11-1973

Brief for Appellants

UNITED FARMWORKERS OF FLORIDA HOUSING PROJECT, INC., et al.,

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3804

UNITED FARMWORKERS OF FLORIDA
HOUSING PROJECT, INC., et al.,

Appellants,

-v-

CITY OF DELRAY BEACH, FLORIDA,
et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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-against-

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CERTIFICATE REQUIRED
BY FIFTH CIRCUIT LOCAL
RULE 12(a)

The undersigned, counsel of record for appellants, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 12(a).

1. American Friends Service Committee has been providing technical assistance to the appellant, United Farmworkers of Florida Housing Project, Inc., and has donated monies to cover the cost of the option to purchase the land involved in this matter. If appellants prevail and the housing project involved is constructed, the American Friends Service Committee would be repaid those sums it advanced on the option.

2. Florida Rural Legal Services, Inc. is

providing counsel to the appellants. This organization also has advanced monies to cover the court costs in this litigation, which monies would be recaptured in the event that appellants prevail.

Richard F. Bellman

RICHARD F. BELLMAN
Attorney of record for Appellants

Dated: April 11, 1973.

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1. Whether Delray Beach's determination to deny water and sewer service to the Farmworkers Organization's housing development can survive constitutional scrutiny on the ground that the decision was furthering a compelling state interest.

2. Whether the District Court applied appropriate standards in determining that there was an absence of evidence warranting a finding that Delray Beach officials had engaged in purposeful discrimination.

3. Whether Delray Beach's refusal to service the farm-workers' project violates the Federal Fair Housing Law.

4. Whether the appellants were entitled to maintain this suit as a class action on behalf of low-income minority farmworkers of Florida who are in need of decent housing opportunities.

5. Whether the Florida Department of Pollution Control and the Palm Beach County Area Planning Board illegally acquiesced in Delray Beach's discrimination against the Farmworkers Organization.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR APPELLANTS*

STATEMENT OF THE CASE

This case arises out of an effort by a farm laborers' organization to build a desperately needed federally subsidized housing project for farmworkers in Palm Beach County, Florida.

* In this brief the symbol "a" refers to the Appendix; "P's Ex" refers to plaintiffs' exhibit; "Ct. Ex." refers to court exhibit; "Tr" refers to original trial transcript; "Def's Ex." refers to Defendant Delray Beach Exhibit.

Appellants are United Farmworkers of Florida Housing Project, Inc. (hereinafter Farmworkers Organization) and four individual minority farmworkers who are in desperate need of decent housing for themselves and their families. The Farmworkers Organization is a non-profit corporation which was established to sponsor and construct housing developments for farmworkers. Its members are farm laborers, most of whom are Black and Spanish-speaking.

The Farmworkers Organization was blocked in its efforts to construct a housing development on a five acre site in Palm Beach County immediately adjacent to the corporate limits of Delray Beach. The project, which was to be financed under a special Department of Agriculture program, was halted by a decision of the City Council of Delray Beach denying water and sewer service to the proposed development.

The complaint was filed in the United States District Court for the Southern District of Florida on August 19, 1972 [1a-10a]. It was alleged inter alia that Delray Beach's rejection of the water and sewer application was discriminatory and had the purpose and effect of depriving the appellants of equal protection of the laws and rights secured under the Federal Fair Housing Law and civil rights statutes.

The defendants-appellees are the City of Delray Beach, Florida and the members of its City Council; the Palm Beach County Area Planning Board and its Director; and the Florida Department of Pollution Control and its Director.

Simultaneously with the filing of the complaint, the Farmworkers Organization filed a motion for a preliminary injunction seeking an order directing Delray Beach and its officials to commit the City to provide water and sewer service to the project site. The Farmworkers Organization's application to the Federal government for funds for its housing development was at that time not being further processed by Federal officials because of Delray Beach's refusal to grant this commitment. Hearings before the District Court on this motion were held on October 30 and November 13, 1972. At the close of these hearings the Court, with the consent of the parties, advanced the trial on the merits and consolidated it with the hearings on the preliminary injunction [24a].

On December 1, 1972, the District Court filed a twenty-one (21) page memorandum opinion in which it adopted an extremely limited reading of the Fourteenth Amendment [24a-38a]. The Court, focusing exclusively on whether the appellants had shown an overt discriminatory motive on the part of Delray Beach officials, stated, "The greater weight of the evidence indicates that the application was denied by the City for valid, municipal purposes, its policies on zoning and annexation. There is just no satisfactory evidence of any racial or ethnic discrimination" [37a]. The Court also stated that there was "no evidence sufficient to shift to the City the burden to show the absence of racial or ethnic discrimination . . ." [37a]. The Court further held that this matter could not proceed as a class action [24a-25a] and questioned whether the position of

the Farmworkers Organization was "bona fide" because the group had been recently incorporated and therefore foreclosed from entitlement to emergency equitable relief [37a]. The appellants were denied all relief [38a] and a final order was entered on December 6, 1972, dismissing the action [39a]. Notice of Appeal was filed on December 20, 1972 [39a].

STATEMENT OF THE FACTS

1. The Farmworkers of Palm Beach County

Palm Beach County is located along the Southeast Florida coast and consists of a coastal strip containing a large number of resort and retirement communities. The bulk of the residential building activity in Palm Beach County recently has been devoted to the construction of multi-family units, predominantly costly condominium-type highrise structures [P's Ex. 14, pp. 3-6]. The total population of Palm Beach County is about 350,000, of whom about 64,000 are minorities [P's Ex. 20, p. 42].

Directly west of affluent coastal strip lies the major land area of Palm Beach County. The bulk of this section of the County is engaged in farm endeavors. There are approximately 40,000 farmworkers in Palm Beach County, virtually all of whom are minority citizens of either Black, Spanish-speaking or Puerto Rican backgrounds. It is estimated that there are

about 13,500 Palm Beach County farmworkers living in a racially segregated environment in migrant labor camps removed from the rest of Palm Beach County generally [176a-179a, 327a, 351a; P's Ex. 14, pp. 37-39].

The incomes of Palm Beach County farmworkers are extremely low [P's Ex. 14, p. 38; 177a]. In addition, they are compelled to compete for housing in a county where nearly one-third of the households have incomes below poverty level [P's Ex. 14, p. 16]. As a general matter, because of the poverty of farmworkers, urban housing is virtually unavailable to them [P's Ex. 14, p. 14].

The housing conditions experienced by Palm Beach County farmworkers are disastrous. There are about 105 migrant labor camps scattered throughout the farm belt. Common attributes of these camps are dilapidated, barrack-like structures lacking essential health facilities such as adequate heating, bathrooms and kitchens. Overcrowding, vermin infestation and unsanitary conditions prevail, threatening the health and safety of the occupants of such units and the farmworker population as a whole [P's Ex. 14, pp. 37-39, A1-A6; 178a-179a, 324a, 394a].

Because of the severe shortage of housing for farmworkers, the rents charged for such camp facilities (many of which are grower connected) are excessively high. Farmworkers

frequently pay a high percentage of their very low incomes for inadequate housing. And, because of the shortage of housing generally, farmworkers must compete with one another for the intolerable camp facilities [P's Ex. 14, pp. 9, 25-27, 38, 50].

The immediate demand for decent new housing for farmworkers in Palm Beach County is at least 15,000 units [324a]; yet, there has been virtually no response to this extreme need by public or private interests in the area other than by the Farmworkers Organization itself. [P's Ex. 14, pp. 9-14].[1/]

2. The Low-Income Minority Residents of Delray Beach

Equally as critical is the housing problem confronted by low-income minority residents of Delray Beach. In 1970, the population of Delray Beach was 19,366, of whom 7,952 were non-white. Many of Delray Beach's minority citizens are also farmworkers. About 6,400 of Delray Beach's non-whites reside in the area known as Planning Unit 5, the City's historically segregated, blighted and depressed community. Approximately sixty per cent of all residential units in Planning Unit 5 are deteriorated or dilapidated with over forty per cent of the structures

1/ The District Court on several occasions noted its recognition of the housing problem confronted by Palm Beach County farmworkers [181a, 463a].

in the area existing in "poor environments" [P's Ex. 13, pp. 6, 19-21; 273a; 416a; Ex. 12, Map]. The Delray Beach City council itself has declared that "unsanitary and unsafe inhabited dwelling accommodations" exist in Delray Beach, and "there is a shortage of safe and sanitary dwelling accommodations in the City of Delray Beach, Florida, available to families of low income at rentals they can afford ..." [P's Ex. 13]. Delray Beach also has confirmed the poverty that exists in the City, having pointed out that 21% of its households have incomes of less than $3,000.00 per year [P's Ex. 13, pp. 15-16].

Delray Beach has failed to construct any low-income public housing to meet the critical need. The only subsidized housing constructed to date has been built by private developers under the U.S. Department of Housing and Urban Development (hereinafter referred to as HUD), Section 235 programs, a moderate to middle income-home ownership effort. There is a total of only 295 such units in Delray Beach. None of these units are available to low-income people or farmworkers generally because of income and credit requirements for qualification. One HUD 236 rental project is under construction [175a-176a, 305a]. Significantly, of the 503 housing units under construction, or constructed, under HUD sections 235 and 236 in Delray Beach, all but 17, or over ninety-six per cent, have been or are being built in Planning Unit 5, the impacted minority area which contains eighty per cent of the City's

non-white residents [P's Ex. 13; 279a].

3. The Effort to Build Farmworker Housing

In an effort to respond to the housing problem confronted by Palm Beach County Farmworkers, a group of farmworkers, called United Farmworkers of Florida, Inc., sought to locate a suitable site upon which it could sponsor and construct a low-cost housing project under a federal program administered by the Farmers Home Administration of the Department of Agriculture (FmHA).[2/]

The appellant Farmworkers Organization is an outgrowth of United Farmworkers, having been created in July, 1972, at the request of the FmHA that a separate entity be set up which would deal exclusively with the efforts to develop and construct housing. After it was established, the Farmworkers Organization followed through with the work previously started by United Farmworkers and became the organization processing the housing applications through FmHA [330a, 337a-338a].

The critical need for farmworker housing that exists in Palm Beach County necessitated the use of FmHA programs. Only these programs, which are relatively new, provided up to a ninety per cent outright grant and a ten per cent loan to the developing organization thereby making possible housing at a very low cost, which then can be rented at rates commensurate

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2/ The program in question was created pursuant to Sections 514 and 516 of the Housing Act of 1949 as amended. 42 U.S.C. 1471, et seq.

with farm labor incomes [178a-180a]. In addition, FmHA housing projects can be reserved exclusively for farmworkers and structured and operated to meet the particular needs of migrant farm laborers. This is particularly important since these same special characteristics and needs, derived from the nature of farm labor, excludes this group from all subsidized low-income projects available to other low-income peoples with other forms of year-round, stationary employment [176a].

The farmworker effort first resulted in the location of a project site considerably west of the urban growth of Palm Beach County. An option was obtained on that parcel and an application for FmHA funding was submitted in late 1971. That site was abandoned, however, because FmHA advised that the project site would have to be located adjacent to an urban community providing such services as schools, libraries, shopping districts, parks, and the like, and that it must have access to water and sewer facilities [174a, 312a-316a, P's Ex. 16].

The farmworkers then commenced an exhaustive search for a suitable site. This effort was complicated by the limited number of parcels zoned for multi-family residential development and available at a low enough price so as to make it feasible for this type of low-income housing program [174a]. Also complicating the search was a Palm Beach County moratorium on any zoning revisions and state and county agency requirements that multi-family housing developments have access to water and

sewage treatment and disposal services [314a-315a, 341a].

A five acre parcel, contiguous to Delray Beach's corporate boundary line, but lying in the jurisdiction of the County, was finally secured in early 1972. This site is situated in an area known as the "Germantown Pocket", a 300 acre area of land partially bordering on Delray Beach [P's Ex. 12; 209a-211a]. The site met the project requirements because it was zoned by Palm Beach County for multiple-family use at up to thirty-two (32) units per acre. The Farmworkers Organization housing proposal in fact calls for the construction of 70-90 units on the five acres - 14 to 18 units per acre. Also, the site is adjacent to an elementary school and is near community services, shopping districts, libraries, and the like. In addition, the price of the land is low enough to be compatible with the farmworkers project goal. Most importantly, the parcel is near outlets for municipal water and sewer services from Delray Beach [175a, 181a, 225a-229a, 317a, 342a-343a; P's Exs. 18 and 21].

The Farmworkers Organization's project which held a high-funding priority with FmHA, is particularly significant to Florida farm laborers because when completed it will be the first successful undertaking of its type for farm laborers in the state and the first under the FmHA program [182a-184a, 327a]. It is for this reason that the project was given a high-funding priority.

4. The Application to Delray Beach For Water And Sewer Services.

In April, 1972, farmworker representatives approached the City with respect to securing a commitment that the City would provide water and sewer services to the proposed project. At an initial meeting on April 13, the City's Director of Public Utilities advised a representative [3/] from the Farmworkers Organization that there would be no problem in securing services, as Delray Beach's water line ran right by the property and since the City sewer line was only approximately 800 feet away. He also stated that the City water and sewer services were being provided to residences outside the City limits. No mention was made on April 13 by the farmworkers' representative of the type of housing proposed for the parcel although the farmworkers' representative, at the close of the meeting, inquired as to whether the rates would be different for a non-profit corporation [341a-344a].

At a subsequent meeting between the farmworkers representative and the Director a week and a half later, the Director stated that there existed a policy requiring annexation by the City of a property outside the City before water and sewer

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3/ The Farmworkers Organization has been assisted in its efforts to build a low income project by the American Friends Service Committee and the Florida Rural Legal Services. The American Friends Service Committee is a non-profit organization whose work in Florida in connection with farmworker housing is funded by the United States Office of Economic Opportunity [171a-172a]. FRLS also is OEO funded.

services would be provided [344a-345a]. The City thereafter requested that the farmworkers submit a formal application for City services and on May 3, 1972, a letter was sent by the farmworkers requesting that Delray Beach provide confirmation that water and sewer services would be provided to the project. The letter stated that the project would pay all connection costs, but requested the services without annexation [P's Ex. 22].

On May 18, 1972, the farmworkers' application was considered by the Delray Beach City Council in a workshop session. At this meeting a farmworker spokesman advised the City of the nature of the housing development proposed. The discussion was extensive and, throughout, the four white members stated their opposition to this type of housing. Councilwoman Martin was the most openly antagonistic to the project and stated several times that the City should not provide these services to "those people" because they would be undesirable residents of the City and would create health, sanitation, and overcrowding problems [4/] [320a, 349a-350a]. Councilman Weeks suggested that

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4/ Councilwoman Martin's references to the future tenants of the proposed project as undesirables led the only minority member of the Council to take angry exception [350a]. Mrs. Martin in her testimony did not deny using the term undesirables [449a].

the farmworkers move the project further west [321a].

There also was substantial discussion as to whether the City was legally obligated to provide the services to the farmworkers [322a-323a, 348a-349a]. The City Attorney stated that he had called the State Department of Pollution Control in Tallahassee in an attempt to determine whether the City was legally obligated to provide the requested services [349a]. The workshop, whose discussion centered for most part on who would be living in this project and on the desirability of the future residents [323a], ended with the matter being referred to the City's Planning and Zoning Board for review and recommendation [322a].

On June 20, 1972, the Planning and Zoning Board recommended to the Council that the farmworkers' application be denied [98a]. The Board stated as its reasons for this determination that,

> (1) the future land use map designates the property in question for park purposes and (2) should the land not ultimately be used for park purposes, the density should not exceed 6 dwelling units per acre, which is less than that proposed by Florida Rural Legal Services [counsel to the farmworkers], [P's Ex. 5].

On June 26, 1972, at a regular meeting of the City Council, by a 4-1 vote, the Council officially denied the application [402a; P's Ex. 5, pp. 8-10 and P's Ex. 8].

A spokesman for the farmworkers made clear to the Council

at the June 26, 1972 meeting that they were not necessarily against annexation to the City; this spokesman advised the Council that the farmworkers had been opposing annexation only because they had appropriate zoning by the County for the proposed project and it was clear that the City would, in the event of annexation, rezone the parcel for a park or to a density lower than would be feasible for the project [393a-395a, see also 177a-178a].

It is also clear that Delray Beach premised its rejection of services solely on planning and zoning considerations. The City Manager testified that the application was not rejected because of any questions or capacity or ability of the City to furnish the requested services [106a, 162a; P's Ex. 8, p. 14].

Nor was there any question of the City's authority or policy in terms of servicing developments outside the City limits. The City has provided and continues to provide water and sewer services to outside developments [P's Ex. 6], and the City has adopted ordinances setting uniform rates for outside users of these services [P's Ex. 7; 69a-70a].

5. Delray Beach's Master Plan and Planning for the Germantown Pocket

Delray Beach's Master Plan was drafted to propose land

uses within as well as outside the corporate limits of the City. The county lands included in the Delray Beach Plan are referred to as the "reversed" area of Delray Beach -- land areas which may be annexed to no municipality other than Delray Beach and areas where no other municipality may be formed [27a]. The land area of Delray Beach, all of which is included in the Master Plan, encompasses approximately seven square miles; the reserved area, outside the City limits, consists of about 10 square miles [207a]. Delray Beach's Master Plan, setting forth proposed uses for the county land, in no way controls the zoning which is established by the county for these areas and Delray Beach has no authority to limit or control the actual use of these lands [100a, 163a].

Delray Beach's current Master Plan was not formally adopted by the City until October, 1972 [165a, 279a-280a]. The City asserts, however, that the Plan was adopted "in principle" in April, 1972, although there was no testimony that the April plan was identical to or even similar to the October plan eventually adopted. Prior to the adoption of this Master Plan, the City had no land use plan; the City controlled land use exclusively by the City's zoning ordinance. The zoning ordinance was limited, however, in application to City lands and, thus up to October, 1972, Delray Beach asserted no formalized planning goals for the county lands [165a-166a].

Under the new Master Plan, the Farmworkers Organization's

parcel of land is proposed for use as a public park; the lands immediately around this site in the Germantown Pocket are now proposed for single-family use [P's Ex. 11; 212a-214a]. Delray Beach's former City planner, James Smoot, who served in that capacity for over two years, tesitifed, however, that as of the time he left his employment with the City in early April, 1972, only three weeks before the Plan is asserted to have been adopted in principle, the working drafts of the Master Plan proposed a medium density, multi-family residential use for the farmworker's parcel (compatible with the housing project proposal) and similar zoning for most of the other land in the Germantown Pocket [215a-217a].

Smoot, who became Delray Beach's Planner in 1971, worked on the preparation of the Master Plan. In about the Spring of 1971, he assumed full responsibility for the development of the Plan and prepared the original drawings which he presented in public hearings in March, 1972 [196a-198a]. Smoot resigned the City Planning position to become chief zoning official for Palm Beach County. 5/

It should be noted that the Farmworkers Organization's parcel has carried the County multi-family-residential zoning

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5/ Smoot holds a Master's degree in planning. He worked in the planning department for the City of San Diego, California, before going to work for Delray Beach [195a].

classification for many years, probably dating back to 1957. Most of the surrounding parcels in the Germantown section also have been zoned throughout this period for multi-family use [300a, 303a-304a, 306a].

Smoot testified that the Germantown Pocket is a rectangular area lying adjacent to Delray Beach and is a transitional area for which no appropriate future land use has been indicated by development of the area to date and that 90 per cent of the land in the pocket is still vacant [220a-221a,303a]. Immediately to the north of the pocket is the deteriorating black community of Delray Beach (Planning Unit 5) and immediately to the south is an exclusively white residential development known as Tropic Palms. Smoot described the single-family uses proposed in the Master Plan for the Germantown Pocket as "inconceivable" [216a].

Smoot stated that as Delray Beach's planner he gave extensive thought to what would be the most appropriate use for the Germantown Pocket and that under his proposal there would have been a mixture of commercial and medium density multi-family residential uses in the area [214a-217a]. He testified that these uses were the most reasonable and appropriate from a planning standpoint in light of the "very significant" land development around the pocket [216a]. For example, Smoot testified that the pocket on the west borders existing industrial and

commercial uses and a major interstate highway (I-95) now under construction; on the east the pocket borders existing industrial uses and a railroad track; to the south the pocket borders a major thoroughfare which will be a connector between U.S. Highway 1 and the interstate highway; and to the north is Delray Beach's black population which could look to the commercial development in the pocket as a source of employment. These factors had led him to conclude that single-family residential zoning would be improper [216a-222a, 283a].

Smoot also testified that Palm Beach County had just reviewed and reconsidered, in connection with a review of all county zoning policies, the zoning in the pocket and on the Farmworkers Organization's parcel [225a-226a]. Smoot stated that the County again concluded that multi-family residential zoning was appropriate for this area [232a-233a].[6/]

Delray Beach, in denying the Farmworkers Organization's application, relied on the Master Plan designation of park use for the five acres in question. Smoot testified that in planning

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6/ Under the revised County zoning, which at the time of trial had gone through first hearings and readings by county zoning authorities, the Farmworkers Organization's parcel would be rezoned from a maximum 32 units to the acre to a medium density classification allowing 15 (and with special application up to 18) units per acre, a classification consistent with the farmworkers development goal of a project of 70 to 90 units [232a-233a].

for the pocket, there had been recognition that some park space would be needed somewhere in the pocket as the area developed, but that a park could be located anywhere within the area [304a-305a]. Further, Smoot testified that it is an excellent planning principle to place multiple-family housing on this site in close proximity to the neighboring elementary school [258a].

Delray Beach offered no evidence to support the proposed park land designation for the subject property and the proposed single-family designation for most of the Germantown Pocket appearing in the October Master Plan. Nor did the City present evidence to explain why, or when, Smoot's designations for the pocket were changed. The first indication of the City's intention to revise the Master Plan for the Pocket area, that appears in this record in this matter, is the Planning and Zoning Boards' letter of June 20, 1972 to the City Council recommending denial of the Farmworkers Organization's application for water and sewer services [See p. 13, supra].

6. Delray Beach's Policies and Practices Involving the Provision of Water and Sewer Services Outside the City

Delray Beach professes to adhere to a policy requiring annexation as a condition for furnishing water and sewer services to areas outside the City. No ordinance effectuating this policy has ever been adopted. The City did introduce in

evidence a City Council resolution of 1962 which provides that an applicant for water service outside the City must agree to annexation [Def's Exs. 5A and 5B]. No comparable resolution was introduced concerning sewer service. The City ordinances setting rates for water and sewer services outside the City make no mention of any condition of annexation [P's Ex. 7].

The City, in fact, has not followed any consistent policy with respect to requiring annexation as a condition of providing water and sewers to areas in the County. The record shows that Delray Beach is currently servicing large numbers of water and sewer customers outside the corporate limits and these users range from single-family residences to apartment houses and condominiums; from commercial stores to entire subdivisions; from a resort club to an entire city [P's Ex. 6]. The following are among the more recent and/or larger unannexed developments being serviced:

a) The Del Raton Mobile Home Park was granted water service beginning May 12, 1972. The proposed use for this site under the City's Master Plan is commercial, not residential. A mobile home development is not even a use permitted under the Master Plan or the City's zoning ordinance. The applicant was white [P's Ex. 6; 102a, 239a-240a].

b) The 150-200 individual homes located in an area known as Delray Shores Subdivision, which is virtually

surrounded by Delray Beach, receives water and sewer service from the City. The services to these homes began during the summer of 1972 and the City did not insist on annexation of the homes in this unincorporated area. Delray Shores is an almost exclusively white community and each user in the area is billed separately by the City [104a, 266a-269a, 431a]. In addition, the Delray Shores Development encompasses about 700 as yet undeveloped acres to which the City has obligated itself to provide services without requiring annexation as this area is developed [104a].

c) In late 1969, the entire incorporated Town of Highland Beach, which has a population of over 2,000 people, began receiving sewer service from Delray Beach. Many of the Highland Beach residents also receive water service. No annexation has been required. Highland Beach is approximtely three miles long and a quarter of a mile wide and is situated on the Atlantic Ocean. The Town is contiguous to Delray Beach. Eighty per cent of the development in Highland Beach involves multi-family construction including several condominiums, and the town is an affluent, exclusively white enclave [104a-105a, 360a-363a, 374a, 270a, 273a; P's Ex. 6].

d) In 1970 Delray Beach extended sewer service to the Gulfstream Bath and Tennis Club which lies to the north of the City in the incorporated Town of Gulfstream on the Atlantic Ocean [421a; P's Ex. 6; Def's Pollution Control's Ex. 1].

In the above cases -- and the list is far more extensive

[See P's Ex. 6] -- the City abandoned its purported policy of requiring annexation and planning control in conjunction with the provision of water and sewer services. In other cases the City has adhered to the purported annexation policy, but has abandoned single-family planning designations set forth in the Master Plan in order to favor and accommodate developers of large tracts of land. Two instances occuring in 1972 reflect this deviation from Delray Beach's protestations of concern for proper land use controls and planning.

The first involves the handling of the so-called Brae property which consists of an over 80 acre tract. In 1972 the Delray Beach City Council agreed to provide water and sewer service to the Brae parcel with the owner agreeing to annexation. The Master Plan provides for single-family development on this site and the City's Planning and Zoning Board, in reviewing the Brae application, recommended compliance with the Master Plan designation. Nonetheless, the City Council ignored the Board's recommendation and the Master Plan and granted the developer multi-family zoning for the entire 80 plus acres. This multi-family zoning also represented a change from the County zoning which had provided for agricultural uses on the site [241a-245a, 300a-301a]. Brae, a white developer was introduced to City Planner Smoot as a personal friend of the City Manager [250a].

Another example involves what is known as the Muroff

tract where in 1972 about 36 acres were annexed and zoned for multi-family use. This parcel is designated on the City Master Plan for single-family use. It is also a parcel that the City Planner specifically concluded should remain low density to serve as a buffer between a multiple-family zoned area and an existing area of one-acre home sites. Muroff also is a white developer [253a-256a].

Also relevant to Delray Beach's alleged annexation policy regarding water and sewer services is the City's recent application for Federal funds to finance both water and sewer facilities. 7/ The facilities which Delray Beach proposes to construct will serve not only the City, but an entire "service area" including county lands west of the City's corporate limits. This area includes the Farmworkers Organization's parcel [437a-440a, P's Exs. 9&15; see also Memo. Opin., 29a-30a].

Significantly, Delray Beach has certified that in meeting the requirements for regional pollution abatement and water quality control, the City will provide water and sewer services, without conditions, to all areas within the service area designation. Based on this certification, the Delray Beach application was approved by both the Florida Department of

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7/ Delray Beach's application is for funding under the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1151 et seq. The grant sections of the law is now found at Sections 201 through 212 of the 1972 amendments, Public Law 92-500.

Pollution Control and the Palm Beach County Area Planning Board [P's Ex. 15; 53a-54a, 452a-453a].

The position of the Appellee Florida Department of Pollution Control is that Delray Beach must perform according to the promise made to that Department (contained in Inserts A&B of P's Ex. 15), which is that Delray Beach will unconditionally serve the area known as the Delray Beach Service Area. This Service Area includes the City, its reserve annexation area, and all the unincorporated area lying west to Florida's Turnpike. Interim treatment facilities are to be provided new developments by Delray Beach within its reserved annexation area until the regional system is fully constructed [429a-440a; P's Ex. 15, Insert A&B; P's Ex. 23; P's Ex. 9; Department of Pollution Control's Post Trial Memo. pp. 1-2].

7. Delray Beach's Past Practices With Respect to Minority Housing Projects Proposed for the Germantown Pocket

In 1971, an applicant applied to Delray Beach for water and sewer service to the very same site involved in this lawsuit and stated he was agreed to having the parcel annexed to the City. The applicant sought these services for a proposed federally subsidized housing project for lower-income and minority families. He had at that time a funding commitment from the Federal Housing Administration (FHA) for a Section 235 loan for a subsidized project [P's Ex. 1; Tr. 298-310].

The applicant proposed building 40 units on the site

or a density of eight units per acre. The Delray Beach response to the 1971 application caused the sponsor of the project to lose the funding commitment and forced him to abandon the project completely [Tr. 298-310].

The 1971 application for water and sewer service along with annexation was presented to the Delray Beach City Manager by Lewis Fields, a representative of the applicant. The City Manager at first advised the applicant that he foresaw no difficulties [Tr. 298-310].

The matter first came before the City Council at a workshop meeting. Members of the City Council, then unaware of the future tenants of the proposed subsidized project, stated they wished they could grant the request for water and sewer service the following evening at the official meeting, but the Council desired to follow the usual procedure of initially submitting the matter to the Planning and Zoning Board [Tr. 298-310].

The 1971 application was then forwarded to the Planning and Zoning Board which considered the matter and an enthusiastic recommendation of City Planner Smoot. The Planning and Zoning Board recommended, by 3-2 vote, approval to the Council. 8/

8/ Then City Planner, James Smoot testified that he was very much in favor of the 1971 proposal for a federally subsidized project on the site in question. Mr. Smoot stated: "My recommendation was favorable. I was very enthusiastic. The applicants were willing to build the roads to the project through no coercion on my part. Their density was low. They were adjacent to a school, which is an excellent land planning point in which you would like to put multiple-family projects in close proximity, that is, to the schools, particularly those projects that generate children; and I was very favorable to the project." [258a].

When the matter was returned to the Council with the nature of the project fully developed, the Council refused to act on the favorable recommendation of the Board, but instead returned the matter to Planning and Zoning for reconsideration. The reason given in the motion for resubmission was a desire to have all seven members of the Planning and Zoning Board vote on the matter [P's Ex. 2].

The second time the Planning and Zoning Board voted on the matter, one member who had previously voted for the application was absent, and the vote ended in a 3-3 tie [P's Exs. 3 and 4, item 6; Tr. 298-310].

During the period that the 1971 application for water and sewer service was pending, Mr. Fields discussed the application with then City Councilman, now Mayor, James Scheiffley, who told him that there was no possibility that that kind of project would get in this city [Tr. 303-304].

Also, during the time this proposal was before the City, Councilwoman Martin telephoned then City Planner Smoot to inquire what recommendation he would give to the Planning and Zoning Board. After being told that he was not ready to say, she asked if he knew "colored people" would be living there. Smoot testified that during his entire term as City Planner, he received at most a total of about half a dozen phone calls

from council members about pending matters [260a-261a].[9/]

The Council then met again to consider the application even though the Council still was without a recommendation from the full Planning and Zoning Board. On the motion of Councilwoman Martin, the Council voted to deny annexation and water and sewer service to the site [P's Ex. 3].

At trial Delray Beach City Manager Marriot testified that the City's denial of this 1971 annexation request was based primarily on the proposed density being incompatible with the City's "wishes" [86a]. However, the Planning and Zoning Board recognized that at that time there was no finalized land use plan, particularly with respect to the areas in question [P's Ex. 4, item 6, p. 1].[10/]

The District Court stated that it viewed the rejection of the 1971 application "as some evidence of an absence of discrimination in the City's dealings with the [Farmworkers Organization]" [36a].

9/ Mrs. Martin, although called as a witness by the City, did not contradict this testimony.

10/ As indicated above, Delray Beach had no formal land use plan for the county reserved areas until October 1972. See p. 15 supra.

8. Florida's Attempt to Regulate Sewage Disposal Systems

At trial, the in the Memorandum Opinion, there was some attention given to a new requirement to be effective in Florida that sewage treatment would be required to meet 90% treatment standards. Although Delray Beach's treatment was at approximately a 30-35% level, the Florida Department of Pollution Control guidelines provided for issuance of temporary operating permits while the 90% treatment level is being achieved. Furthermore, should any general moratorium on new hookups go into effect, the Florida Department of Pollution Control Board voted to allow low-cost housing projects to be hooked up to existing system in order not to prevent needed housing projects from being built [146a-147a; 29a].

9. The Roles of the Area Planning Board and Department of Pollution Control

The Palm Beach County Area Planning Board is an agent of the Florida Department of Pollution Control [P's Ex. 23] and as such formulated a Plan [P's Ex. 9] for a regional system of water distribution and sewage collection and treatment for Palm Beach County. The County was divided into broad areas which would be served with water and sewer by designated agents. Delray Beach was designated as service agent for one of the areas. This plan was formulated in order that federal funds could be obtained for construction of the physical facilities needed to

provide such services.

The Department of Pollution Control approved and adopted the Palm Beach County Plan. Delray Beach accepted its designation as service agent for its portion of Palm Beach County - a portion which includes the Farmworkers Organization's land. Based on the state's approval of the Plan, Delray Beach applied for a federal grant to construct a new treatment facility [P's Ex. 9 and 23; 452a-454a; see pp. 23-24 supra].

The Area Planning Board was notified of Delray Beach's refusal to agree to serve the Farmworkers Organization's land and the Board heard testimony of the Farmworkers Organization's representatives and from the City. Neither the Board or the Department of Pollution Control took any action on this complaint [455a-459a].

The Department of Pollution Control is authorized to take action designed to implement the Plan [P's Ex. 9 and 23; 458a-459a; Ct. Ex. 1].

ARGUMENT

I. DELRAY BEACH'S DETERMINATION TO DENY WATER AND SEWER SERVICE DEPRIVES LOW-INCOME MINORITY CITIZENS ACCESS TO DECENT HOUSING: THAT DENIAL CANNOT SURVIVE CONSTITUTIONAL SCRUTINY SINCE IT CANNOT BE A COMPELLING STATE INTEREST

A series of federal cases dealing with discrimination against members of minority groups, and particularly with local governmental actions which have thwarted the construction of housing for low-income minority persons, make it clear that the lower court applied the wrong standard in weighing appellants' claim that they had been denied equal protection of the laws. The trial court insisted that the appellants were required to prove an overt, invidious motive on the part of Delray Beach officials to discriminate against them on the basis of race or national origin in order to make out a violation of their rights [32a-37a].

The trial court imposed this burden in the face of a long series of cases holding that "equal protection of the laws means more than merely the absence of governmental action designed to discriminate." Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 902, 931 (2nd Cir. 1968). See also Griggs v. Duke Power Co., 401 U.S. 424

(1971); Hobson v. Hanson, 269 F. Supp. 401 (D.D.C. 1967) aff'd as modified sub non., Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Hawkins v. Town of Shaw, Miss., 437 F.2d 1286, aff'd en banc, 461 F.2d 1171 (5th Cir. 1971).[11/] Similarly, in Kennedy Park Homes Ass'n, Inc., v. City of Lackawanna, N.Y., 318 F. Supp. 669 (W.D.N.Y. 1970) aff'd, 436 F.2d 108 (2nd Cir. 1970), cert. den., 401 U.S. 1010 (1971), a case which will be discussed at greater length, infra, Mr. Justice Clark, sitting by designation in the Second Circuit, wrote, "Even were we to accept the City's allegations that discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under

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11/ The District Court's statement in Hobson appears to deal directly with the trial court's approach here:

> "The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." Hobson v. Hanson, supra, at 497.

a severe disadvantage which it cannot justify." 436 F.2d at 114. [12/]

The standard which emerges from the cases cited above, as well as from a series of cases dealing with public actions which have blocked low-cost housing projects, is that public officials will be held to the strictest standard of review. See Dailey v. City of Lawton, Oklahoma, 425 F.2d 1037 (10th Cir. 1970); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd per curiam, 457 F.2d 788 (5th Cir. 1972); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), enforced in, 304 F. Supp. 736, aff'd, 436 F.2d 306 (7th Cir. 1970), cert. den., 402

12/ In setting forth this proposition, the Second Circuit cited Southern Alameda Spanish Speaking Organization (SASSO) v. Union City, Cal., 424 F.2d 1037 (10th Cir. 1970) as well as Norwalk CORE v. Norwalk Redevelopment Agency, supra. SASSO involved a challenge by low-income Mexican-Americans to a zoning referendum action which had the effect of blocking a low-cost housing project which would have been located in a white community. The Ninth Circuit refused to inquire into the motivations ov the voters in the referendum, but held that the plaintiffs might prove their case without regard to purpose:

> "Appellants' equal protection contentions, however, reach beyond purpose. They assert that the effect of the referendum is to deny decent housing and an integrated environment to low-income residents of Union City. If, apart from voter motive, the result of this zoning by referendum is discriminatory in this fashion, in our view a substantial constitutional question is presented." 424 F.2d at 295.

U.S. 922 (1971); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); and most recently, Mahaley v. Cuyahoga Metropolitan Housing Authority, Civ. A. No. C-71-251 (N.D. Ohio, February 22, 1973). As specifically stated in Lackawanna and Crow, governmental action which prevent construction of low-cost housing and thereby effectively deprive minority citizens of access to decent housing, can only be sustained if there is a "compelling state interest" to justify that governmental action. See also, Shapiro v. Thompson, 394 U.S. 618 (1969); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hawkins v. Town of Shaw, Miss., supra.

In Crow, the court dealt with the denial of building permits for the construction of two separate "turnkey" public-housing projects in unincorporated, virtually all-white portions of Fulton County, Georgia, and with a county-wide policy of confining public housing developments to the heavily black sections of Atlanta proper. The district court, in ordering the issuance of the building permits and directing the county to implement a policy of dispersal of public housing, articulated an expansive equal protection theory, also reviewing the evidence within the compelling interest framework:

> Only a showing of compelling governmental interest could overcome a finding of unconstitutionality

> in such thoughtlessness and inaction on the part of municipal officials. 332 F. Supp. at 390.
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> * * *
>
> [I]t is abundantly clear that, in the absence of supervening necessity, any county action or inaction intended to perpetuate or which in fact does perpetuate the conditions just described cannot stand. Nor can county action or inaction which would thwart their correction be permitted to continue. 332 F. Supp. at 392.

On appeal, this Court affirmed, stating that "The district court accurately and incisively stated and applied the legal principles applicable to the issues raised in this case." 457 F.2d at 790.

In Hawkins this Court ruled that unequal distribution of municipal services to minority communities violated the Fourteenth Amendment. The Court, citing Lackawanna, applied the compelling interest test.[13/] When Hawkins was reconsidered, en banc, 13 of the 16 judges of this Court subscribed to the first panel's articulation of the proper test for equal protection matters. 461 F. 2d at 1172-74, 1176.

13/ The three-judge court in Hawkins wrote:

> The trial court thus erred in applying the traditional equal protection standard, for as this Court and the Supreme Court have held: "Where racial

The compelling interest standard has been applied most recently in a right to housing context in Mahaley v. Cuyahoga Metropolitan Housing Authority, supra. There, the district court ruled that the refusal of suburban communities in the Cleveland metropolitan area to enter into cooperation agreements with the Cuyahoga Metropolitan Housing Authority to permit the construction of public housing units denied equal protection of the laws to low-income, minority residents in the inner city. Relying particularly on Crow, Hawkins and Lackawanna, the court stated:

> "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

(Footnote 13/cont'd)

> classifications are involved, the Equal Protection and Due Process Clauses of the Fourteenth Amendment 'command a more stringent standard' in reviewing discretionary acts of state or local officers." Jackson v. Godwin, 400 F.2d 529, 537 (5th Cir. 1968). In applying this test, defendants' actions may be justified only if they show a compelling state interest. Loving v. Virginia, 388 U.S. 1 (1967). We have thoroughly examined the evidence and conclude that no such compelling interests could possibly justify the gross disparities in services between black and white areas of town that this record reveals. 437 F.2d at 1288.

> prima facie showing of discriminatory effect, the cities must come forward with a supervening necessity or compelling interest to overcome a finding of discrimination." (Slip Opin., p. 12).

It is the "compelling state interest" test which the trial court below erred in failing to apply. If the evidence is considered under this standard, there is no doubt that appellants would be entitled to prevail.[14/]

14/ Not only did the lower court fail to apply the compelling interest standard, but it also failed to review the evidence under any non-motive approach. The appellants note that in certain contexts, the Supreme Court has articulated an equal protection standard in which the challenged unequal classification is tested to determine whether the means selected to promote a legitimate governmental interest is the least onorous method of achieving that goal, and whether that means is substantially related to the objective of the legislative act. See Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971). See also Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-76 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Gunther, The Supreme Court 1971 Term, Foreward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 10-20 (1972).

The Second Circuit recently applied this revised non-motive test in an exclusionary zoning context and declared unconstitutional a "grouping" ordinance which prohibited groups of more than two (2) unrelated persons, as distinguished from traditional families consisting of any number of persons by blood, marriage or adoption, from occupying a residence in an area zoned for one-family occupancy. Boraas v. The Village of Belle Terre, Doc. No. 72-2040 (2nd Cir. February 27, 1973). Even were this "means" test to have been applied by the lower court in the instant matter, the evidence clearly shows that the denial of water and sewer services to the farmworkers' project is not the proper means of securing balanced and appropriate land uses in the Delray Beach area. See discussion, pp. 39-46, infra.

Initially, it should be noted that discrimination against appellants is discrimination on the basis of race or national origin and thus it is appropriate to apply the compelling state interest standard. Members of the Farmworkers Organization are predominantly black and Spanish-speaking, either Puerto Rican or Mexican American. The four individual appellants are minority persons and the class represnted is low-income farm laborers, almost all of whom are minority persons. The proposed housing would be constructed in a section of Palm Beach County away from the impacted traditional areas of minority residency, and the project will be inhabited by these predominantly black and Spanish-speaking farm laborers.

In each of the low-income housing cases cited above, the courts found equal protection violations where public actions thwarted development of housing which would probably be lived in by a large proportion of minority persons. Thus, in SASSO, the court in considering whether a proposed low-income housing project had been unconstitutionally interfered with, stated:

> ". . . Given the recognized importance of equal opportunities in housing, [citation omitted] it may be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families,

> who usually -- if not always -- are members of minority groups." 424 F. 2d at 295-96. [Emphasis added].

To the same effect, see Lawton, Lackawanna, and Hawkins.

Here, as in Lawton, SASSO, Lackawanna, Crow and Mahaley, the facts show that a non-profit organization representing minority persons and low-income minority plaintiffs are attempting to build subsidized housing to alleviate their pressing need for such housing and have been blocked by local governmental action. Moreover, at the Federal government's insistence, the project is proposed for a site other than in the traditional areas of minority farmworker residency - the racially impacted migrant labor camps.[15/] In response to the project proposal, Delray Beach has imposed zoning and land-use obstacles to block the development; denial

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15/ FmHA's requirement that the Farmworkers Organization's project be located away from the migrant labor camps and near an urban center is consistent with the national policy of disbursing low-cost housing and avoiding construction in segregated areas.

> "For better or for worse, both by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing. (Citations omitted). Among other things, this reflects the recognition that in the area of public housing local authorities can no more confine low income blacks to a compacted and concentrated area than they can confine their children to segregated schools." (Emphasis added). Crow v. Brown, 332 F. Supp. at 390.

See also Shannon v. HUD, 436 F. 2d 809 (3rd Cir. 1970); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio, 1972).

of the Farmworkers Organization's water and sewer service application admittedly is merely the means of effectuating the City's alleged land-use policies. This case, therefore, is directly analgous to the challenges to government action in the above-cited cases.

A review of the reasons advanced by Delray Beach for denying the Farmworkers Organization's water and sewer application quickly reveals that Delray Beach has no compelling interest in that denial. In fact, its interests are far less compelling than those rejected in previous cases, for example Lackawanna.

Delray Beach has never claimed that it could not provide water or sewer service because of lack of capacity to do so. Even were this a reason advanced by Delray Beach, it would not be sufficient to justify the City's denial of the necessary permits. The Lackawanna case also involved, among other issues, a refusal to grant necessary sewer permits. There, the Second Circuit noted that there was in fact a real sewer problem, that the sewer system was so overloaded and that open sewage flowed in the City - hardly the case in Delray Beach. The Second Circuit went on to say, quite simply: "Lackawanna is obligated to deal with its sewer

needs without infringing on plaintiffs' rights." 436 F.2d at 114. [16/]

Nor is the City's interest in annexing lands in its reserved area in issue. As the record below makes clear, the Farmworkers Organization has indicated its consent to

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16/ Provision of sewer services by Fulton County also became a matter of controversy in Crow v. Brown, supra, after this Court's affirmance and after building permits were issued for construction of the turnkey housing projects. The developers of one of these projects subsequently was advised by the County that a new County sewage disposal line would not be ready for service by the project's completion date and that the cost of increasing the capacity of the temporary sewage facility was too great to warrant such action. The District Court noted in an opinion dated October 10, 1972 that the County had anticipated completion of the new system by the completion date of the project and the developer had relied on these representations. The court did not find that the County had intentionally delayed the construction of the system in order to defeat the housing project but, nonetheless, ordered

> "The Commissioner of Road and Revenues of Fulton County shall be responsible for providing and maintaining adequate sewage facilities for each of the units of the "Boatrock" project by the date those units are ready for occupancy so that occupancy permits for those units will be issued. Any expense incurred in providing these facilities shall be borne by Fulton County." Crow v. Brown, Civ. A. No. 14954, N.D. Ga., October 10, 1972.

annexation -- provided that, when annexed, it can build at the necessary densities (see p. 13-14, supra).

What is in issue is Delray Beach's asserted interest in the development of the farmworkers' parcel with either park or single-family residential uses.[17/] The record below clearly establishes that Delray Beach has nothing approaching a compelling interest in either park or single-family residential uses on the parcel in issue.

First, as to the park designation. The City's Master Plan map shows a designation for park or single-family residential use - coincidentally - squarely on the parcel of land owned by the farmworkers. The park designation is admittedly quite hypothetical because it depends on the City, some day, buying the land. As to the necessity of placing a park precisely on the parcel in question, the

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17/ The City's interest in planning for uses on the Farmworkers Organization's parcel could be questioned in the first instance given that it is the County which presently has zoning jurisdiction over the parcel. However, the lower court found that because the parcel lies within Delray Beach's "reserved" area, the City does have an interest in planning and zoning in that area and the appellants will consider the evidence within that context.

only expert testimony on this issue was by former City Planner Smoot. He stated that when he planned for the Germantown Pocket, he concluded that some park space should be included in the area but that this need could be met anywhere in that area, much of which is still undeveloped. Clearly, on this record there is no compelling reason for blocking the farmworker's project because of the City's alleged concern for recreational space. 18/

The other land-use consideration asserted by the City for the project site - the need for single-family residential development - is equally unpersuasive. Both the park and single-family designations for the farmworker's land and the single-family designation for the surrounding area in the Germantown Pocket represent significant changes in the planning goals articulated for these areas by the former City Planner. For about two years Smoot carried the major responsibility for developing the City's Master Plan. That Master Plan had designated appellants' land, and the surrounding parcels, for multi-family developments at

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18/ Apparently, opponents of low-cost housing projects believe their opposition is more persuasive when couched in "ecological" terms. The contention that park space is needed at the precise location of a proposed low-cost housing development emerges as a recurring theme in these cases with "park space" arguments asserted in both the Lackawanna and Lawton matters.

densities consistent with the Farmworkers Organization's proposal. The City's Master Plan proposal was apparently revised sometime after early April, 1972 when Smoot had left his position with Delray Beach and after the farmworkers' plans had become public. The Master Plan was adopted in principle in late April. There is no evidence in the record concerning the use designation then placed on the parcel in issue. The first indication of a revised designation appearing in this record is found in the City Planning and Zoning Board's letter of June 20, 1972 recommending that the City Council reject the farmworkers' application [P's Ex. 7].

At trial the City made no attempt to justify the revised land-use designation. It did not call the planning officials responsible for making that change as witnesses; it presented no planning testimony. The only expert testimony concerning planning objectives for this parcel and area was from former City Planner Smoot.

Thus, the only planning testimony is that the single-family designation for the farmworkers' land and the Germantown Pocket in the October, 1972 Master Plan are "inconceivable". The testimony is that for a variety of reasons (see pp.17-18 , supra), medium density, multi-family

residential and commercial uses would be most compatible with existing land development in and around the Pocket. The record also shows that the Farmworkers Organization's parcel had carried a multi-family designation for more than a decade on the County's Zoning Map. Furthermore, Palm Beach County has just reviewed the land use goals for the Germantown Pocket and has again concluded that multi-family residential zoning is the most appropriate designation for this area (see p. 18, supra).

The evidence in this record also calls into question Delray Beach's purported commitment to controlling land uses in the reserved areas and assuring the "integrity" of the City's Master Plan. The City's concern for controlling planning and development in the County - a goal allegedly achieved by conditioning provision of City services on agreements to be annexed and to comply with the City's Master Plan - is certainly doubtful given substantial recent deviations from that "policy". The City has recently provided water and sewer service to developments outside its corporate limits and has not required annexation; these "exceptions" include apartment houses, condominiums, commercial stores, entire subdivisions, a resort club and an entire city (see pp. 20-21, supra). The integrity of the Master Plan certainly

was not preserved when the Brae (80 acres) and the Muroff (36 acres) tracts of land were annexed in 1972 and rezoned to multi-family, residential categories, notwithstanding their single-family designations in the Master Plan (see pp. 22-23, supra). Finally, Delray Beach itself has determined to discard its annexation requirements in connection with its application for Federal funding for its new sewage disposal system and has agreed to provide water and sewer service to its reserved areas without conditioning such service on annexation (see pp. 23-24, supra).

What emerges from this factual record is a situation where the appellee City has presented, at best, a dubious interest in blocking construction of the farmworkers' project. On the other hand, the City's action has frustrated the efforts to correct extraordinarily bad housing conditions by an organization composed of poor migrant farm laborers, virtually all of whom are minority citizens. The proposed project is particularly important because when it is constructed it will represent the first Florida project for farmworkers built under a special federally-subsidized program specifically intended to benefit migrant farm laborers and also because, for all practical purposes, this project represents the only type of subsidized housing for which migrant laborers can qualify given their very low incomes and transitory and

unpredictable employment.

It is clear that when the proper constitutional test is applied, rather than the narrow one adopted by the District Court, Delray Beach has far from satisfied the stringent compelling governmental interest standard; the City's rejection of the appellants' application for water and sewer service must be found to have deprived the appellants of equal protection of the laws.

II. THE DISTRICT COURT APPLIED INCORRECT STANDARDS IN DETERMINING THAT THERE WAS AN ABSENCE OF EVIDENCE WARRANTING A FINDING THAT DELRAY BEACH OFFICIALS HAD ENGAGED IN PURPOSEFUL DISCRIMINATION

The District Court's analysis of the facts was limited to a review of the evidence to determine whether Delray Beach officials had intended to discriminate in denying the water and sewer application. But even in undertaking this review of the evidence, the lower court failed to apply the strict standards of review required in civil rights and housing discrimination cases.

As a general proposition, a racial motive need not

be confessed or overt. The federal courts can and will search out an invidious purpose by sifting through the "immediate objective," the "historical content" and "ultimate effect" of contested actions. Reitman v. Mulkey, 387 U.S. 369, 373 (1967). See also Kennedy Park Homes Association v. City of Lackawanna, 436 F.2d at 112-13; Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). Moreover, the discriminatory effect of Delray Beach's action is persuasive evidence of its purpose, for a man is considered to intend the probable consequences of his conduct. Radio Officers Union v. Labor Board, 374 U.S. 17, 45 (1954); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

The District Court professed to having applied a rigid standard of review to seek out possible racial or ethnic discrimination. The court stated, however, that discrimination cannot be "established by mere suspicion and subtle inferences" and that the court was unable to find evidence sufficient to shift the burden of showing an absence of discrimination to Delray Beach [37a]. It is clear, however, that the District Court did not, in fact, apply appropriate standards so as to insure that "subtle" acts of discrimination did not evade its scrutiny.

The District Court placed a special emphasis on what it claimed to be an absence of statements by public

officials in connection with the farmworkers' application which would suggest racial bias or prejudice. [36a]. In this regard, however, the court indicated little concern for the fact that Councilwoman Martin referred to the future tenants of the proposed project as "those people" and "undesirable" [36a - 37a]. Mrs. Martin herself, did not deny using this terminology [448a]. Furthermore, the court did not consider City Planner Smoot's testimony with respect to the 1971 proposal for a subsidized development to be built on the parcel now optioned by the farmworkers. Smoot stated that Mrs. Martin called him and inquired whether he was aware that "colored people" would be living in the development - testimony uncontradicted by Mrs. Martin (see pp. 26 - 27, supra).

Also, with respect to the 1971 proposal Mr. Fields representing the applicant, testified that city officials were deposed to granting his application until they learned of the nature of the project. Later, Fields stated that another councilman (now the Mayor) told him there was no possibility that "that kind" of development could be located in the area in question (see pp. 25 - 26, supra). The lower court did not only fail to conclude that the history of the 1971 application evidenced discriminatory intent on the part of City officials - the same officials involved in blocking the farmworkers' proposal; the court went so far as

to find that the treatment of the 1971 proposal was some evidence of an absence of discrimination in the instant matter [36a].

References by Delray Beach officials to low-cost housing as inviting residents who are "undesirable" and views that such housing is in a unique category, simply cannot be considered racially-neutral expressions, especially when those officials making such remarks were aware that most of the tenants of the proposed developments were to be minority citizens. The lower court's treatment of this testimony contrasts vividly with the approach taken by the District Court in Crow, where the officials responsible for blocking the turnkey housing projects withdrew development approvals in order to insure that "nice" housing would be built in the areas in question. The court refused to accept this explanation as neutral, found that the alleged concern for "nice" housing was discriminatory and concluded that the officials acted primarily because they were concerned that minority citizens would be the occupants of the proposed projects. 332 F. Supp. at 389.

More important, to have focused at all on the presence or absence of racial remarks is to have ignored

the teachings of Dailey v. City of Lawton, supra. In Lawton, the plaintiffs challenged the denial of a rezoning application for development of a subsidized housing project in a predominantly white area of the City. Lawton officials argued that race was not discussed at public meetings and there was no evidence of prejudice on the part of public officials. The Tenth Circuit, however, affirming the trial court's finding of purposeful discrimination, held that statements of racial bias or prejudice need not be shown:

> "If proof of a civil rights 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." 424 F.2d at 1039.

See also Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E. 2d 581, 584 (N.Y. Ct. of Appeals, 1954).

The lower court's focus in the instant case on the absence of public opposition to the farmworkers' housing proposal [36a], also imposes an impermissible burden on the appellants. Public opposition, like racial statements where present, may well be pertinent to a finding of discrimination; community opposition constituted an element of the proof in both Lawton and Lackawanna. Racial

discrimination is, however, an elusive factor and it is fair to surmise that opponents of low-cost housing are becoming more guarded in their activities and may not engage in public protests, especially where it is clear that their local officials have no intention of granting necessary permits to those sponsoring the housing. For the trial court to have emphasized the absence of public opposition is to have ignored the Supreme Court's warning that the Fourteenth Amendment prohibits "sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275 (1939). 19/

The District Court also erred in deciding that there was insufficient evidence to shift to the City the burden of showing an absence of racial or ethnic discrimination. In making this ruling, the court did not give proper consideration to the following critical facts: (1) Delray Beach officials revised the designations on its Master

19/ This same increasing cautiousness with respect to publicizing opposition to low-cost housing also is evidenced in the restraint shown by Delray Beach city council members at the June 26, 1972 final meeting which was tape recorded [see 381a-402a] as compared to the antagonistic attitude openly expressed at the May 18, 1972 workshop session (see p. 12, supra).

Plan for the farmworkers' parcel and the Germantown Pocket at or about the time that the Farmworkers Organization submitted its application for city services for a low-income minority housing development, thereby rendering the proposed project allegedly unacceptable in terms of land use; (2) the City on numerous occasions has deviated from the alleged policy of requiring annexation and uses in conformity with the City's land development goals before granting water and sewer services to projects in the reserved area of the County in order to service white residential and commercial developments, but it rigidly imposed the policy when the Farmworkers Organization sought these same city services; and (3) Delray Beach deviated during 1972 from the Master Plan in annexing and rezoning the 116 acres involved in the Brae and Muroff tracts, again white residential developers, but refused to deviate from the Plan with respect to the farmworkers' five acre parcel.

The federal courts repeatedly have indicated that shifts and revisions of public policies and the imposition of new barriers which result in the frustration of efforts by minority groups to achieve equal opportunities are inherently suspect. Such shifts in and of themselves raise prima facie inferences of discrimination, necessitating

that those responsible for the governmental practice show that their policies are legitimate, necessary and non-racial. See Dailey v. City of Lawton, supra; Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 192 (4th Cir. 1966); Cypress v. Newport News, 375 F.2d 648 (4th Cir. 1967); United States v. Duke, 332 F.2d 259 (5th Cir. 1964); Louisiana v. United States, 380 U.S. 145 (1965).

An inference of discrimination clearly arose when it was established that Delray Beach had changed the Master Plan designation for the farmworkers' land. Since we deal with housing for minority farm laborers, the City was obligated to show in a convincing manner that this revision predated the farmworkers' application and was based on valid planning goals. Instead, we are left with a record in which the new single-family designation has been described by the prior City Planner as inconceivable and in which the City has presented no planning testimony to justify the new designation. 20/ The Tenth Circuit's language in Lawton, again, is pertinent:

> "The appellants argue that a finding

20/ The Fourth Circuit's statement in Chambers v. Hendersonville City Bd. of Educ., supra, a case involving dismissal of black teachers and cited by the Lawton court, also is instructive:

> "Innumerable cases have clearly established the principle that under circumstances such as this where a history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts." 364 F.2d at 192.

> of discriminatory intent is barred because the project was opposed on the grounds of overcrowding of the neighborhood, the local schools, and the recreational facilities and the overburdening of the local fire fighting capabilities. The testimony in this regard was vague and general. No school, fire, recreational, traffic or other official testified in support of the appellants' claims. The racial prejudice alleged and established by the plaintiffs must be met by something more than bald, conclusory assertions that the action was taken for other than discriminatory reasons." 425 F.2d at 1039-40.

Similarly, the substantial and numerous deviations from the alleged annexation policy for exclusively or predominantly white developments and the action in contradiction of the Master Plan in the Brae and Muroff situations show that Delray Beach in fact has no objective land-use planning goals or criteria. The imposition of a subjective policy in the instant matter raises an inference of discrimination and the appellee City, therefore, was obligated to justify, in light of the past exceptions, the necessity for holding rigidly to the planning and annexation program in the farmworkers' case. "Absent objective criteria, covert subversion . . . could occur." Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969).

The City did attempt to explain away several

of the exceptions to its annexation policy on the basis that provision of services were needed to alleviate health problems - and the trial court readily accepted these explanations [32a-34a]. But these "health considerations" explanations cannot withstand analysis.

a) According to the appellee City, The Del Raton Mobile Home Park was granted water service because of an alleged health problem and annexation was not required because mobile homes are not a permitted use under Delray Beach's zoning laws (see p.20 , supra). The obvious question that arises is why the City found it necessary to have deviated from its land use goals simply to have kept a single white businessman in operation. If the City deemed it so important to protect this developer, it could have amended the City zoning laws to sanction mobile home developments and insisted upon annexation, or alternatively, it could have denied the service, thereby causing this developer to use his property in a manner consistent with city goals.

b) Granting water and sewer services to the Delray Shores Subdivision because of health considerations provides no explanation at all as to why this community was not annexed (see pp.20-21 supra).This subdivision is virtually surrounded by the City and is unincorporated - precisely a situation where enforcement of the annexation

program was called for. If Delray Shores sewage disposal system was being threatened by state pollution control officials, then the community would have had no choice but to cooperate with Delray Beach and agree to annexation.

c) The testimony with respect to Highland Beach (see p. 21 , supra) by its Mayor is that this community sought permission in late 1968 to tie into Delray Beach's sewer system when developers of condominiums moved into this area [364a-365a]. These new housing developments, which were to service the very rich and exclusively whites, presented a potential pollution problem and state officials "recommended that [Highland Beach] take steps to see what we could do about arranging for something other than septic tanks" [364a]. Thus, Delray Beach agreed to allow Highland Beach to tie into its sewer system and did not insist on annexation in order to make possible development of new highrise condominiums along the Atlantic Ocean. No doubt, without this arrangement Highland Beach's growth, if permitted by health authorities, would have posed a health problem to the area. It is obvious, however, that had Delray Beach insisted upon annexation and had Highland Beach refused, the end result would simply have been a halt to condominium development, not the creation of a health problem.

The conclusory statements of health problems - no

health department officials were called by the City to testify - do not begin to meet the protective standards established by the court in Lawton. And with respect to the Brae and Muroff matters, the City did not even attempt to provide explanations. Indeed, one could question the appellee City's sincerity in claiming health concerns as the record clearly shows that probably the greatest health problem existing in Palm Beach County is the outrageous housing conditions farm laborers are compelled to live with.

The law derived from the numerous civil rights cases indicates that simply because of the nature of the housing project involved, the burden was on the appellee City to show that its actions in blocking this development were not discriminatory. Moreover, the record here shows clearly questionable public actions and the imposition of subjective and inconsistent policies and criteria. Under these circumstances, the District Court was in error in ruling that the evidence was insufficient to shift the burden of proof to Delray Beach.

III. DELRAY BEACH'S REFUSAL TO SERVICE THE FARMWORKERS' PROJECT VIOLATES THE FEDERAL FAIR HOUSING LAW.

It is now well established that if the appellants show a violation of the Equal Protection Clause in this matter they also will have established their claims under the Federal Fair Housing Law of 1968, 42 U.S.C. 3601, et. seq.

This position is supported by the recent decision in Park View Heights Corp. v. The City of Black Jack, 467 F.2d 1208 (8th Cir. 1972). Black Jack involved an effort by a non-profit housing sponsor to build a federally subsidized housing development in suburban St. Louis County for low and moderate-income families. The sponsor purchased an 11.9 acre, multi-family-zoned parcel of land in an unincorporated section of the county. Local residents, upon learning of the development plans, commenced a drive to incorporate the area including the proposed project site. The incorporation was successful and the new city of Black Jack immediately enacted a zoning ordinance banning additional multi-family-residential construction in Black Jack. This new law effectively halted construction of the proposed housing development.

The housing sponsor and eight low-income citizens residing in deteriorated housing in St. Louis, who sought housing they could afford in St. Louis County, filed suit against Black Jack alleging that the Town's zoning law violated the Fourteenth Amendment and the Federal Fair Housing Law. The district court dismissed the complaint and the Eighth Circuit reversed, in a ruling which resolves numerous important procedural issues in housing civil rights cases. Among other things the appellate court held that both the sponsoring corporation and the low-income individuals could litigate their claims under the Fair Housing Law as well as under the Fourteenth Amendment. 467 F.2d at 1214.

The district court in Lackawanna also found jurisdiction under the Fair Housing Act, stating that that law "covers discriminatory conduct in fair housing situations by both public and private alleged wrongdoers." 318 F. Supp. at 694. Also in Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396, 404 (N.D. Ill. 1971), another case challenging a denial of zoning approval for a subsidized housing project, the court found jurisdiction under the Fair Housing Law.

IV. THE APPELLANTS WERE ENTITLED TO MAINTAIN THIS SUIT AS A CLASS ACTION ON BEHALF OF LOW-INCOME MINORITY FARMWORKERS OF FLORIDA WHO ARE IN NEED OF DECENT HOUSING OPPORTUNITIES

The district court held that this suit could not be maintained as a class action because the Farmworkers Organization could adequately represent all persons in the class of Florida farmworkers, most of whom belong to minority groups and who live in substandard housing /25a/. During the trial, the lower court sought to explain its reasons for denying class action status /191a-192a/. The court stated that one factor it considered was that for the most part, the low income plaintiffs and the class represented resided outside of Delray Beach. Also the court felt that proceeding as a class action would somehow complicate the issues.

The lower court clearly was in error in denying the appellants' class action application. This issue has arisen in several of the low-income housing project cases cited above and the courts consistently have held that class actions are proper in these matters. Thus, for example in Crow v. Brown, supra the district court permitted the suit to proceed as a class action on behalf of eligible persons currently on the Atlanta Housing Authority waiting list for public housing.

Probably the most complete analysis of this issue is found in Sisters of Providence of St. Mary of the Woods, v. City of Evanston, supra. There the court stated:

> We also find a proper class action under FRCP 23 (a) and (b) (2). Individual plaintiffs properly represent the class of persons who would inhabit the proposed housing. See Gautreux v. Chicago Housing Authority, supra., Hicks v. Weaver, supra., and English v. Huntington Township, [488 F. 2d 319 (2nd Cir. 1971)], all granting a class action to prospective users of the proposed housing. Defendants argue that since the property is zoned for 157 units the individual plaintiffs might well occupy 3 of those units and cannot be parties to a suit for rezoning to 360 units. This argument fails to comprehend the crux of the Complaint, that ultimately no housing will be built if rezoning is not granted since it is not economically feasible to build a lower density. Thus individual plaintiffs are suing for the building of housing itself rather than for any number of units as such. 335 F. Supp. at 402.

The Black Jack ruling also is relevant. Although the court did not deal with the precise issue of whether the plaintiffs would maintain their suit as a class action -- the issue was not reached because the lower court had dismissed the complaint -- the appellate court's discussion of the low-income-plaintiffs' standing to sue is pertinent to the class-action question. The court had little problem in finding that the individual plaintiffs had sufficient interest in the construction of low cost housing throughout the St. Louis metropolitan area to permit them to bring their action against Black Jack. Clearly, the claims of the St. Louis plaintiffs were in the nature of class claims as none of those individuals, themselves, would have had any special or particular right to reside in the project to be built in Black Jack.

In Black Jack, Crow and Sisters, as in the instant case, the discrimination practiced by public officials in excluding low cost housing opportunities is of a generalized impact on all low-income families in the area who live in inadequate housing. The housing units in the development in these cases would be open to a class of eligible tenants - the class represented in the lawsuits. In light of these precedents the trial court should have determined that this matter could be maintained as a class action.

V. THE FLORIDA DEPARTMENT OF POLLUTION CONTROL AND THE PALM BEACH COUNTY AREA PLANNING BOARD ILLEGALLY ACQUIESCED IN DELRAY BEACH'S DISCRIMINATION AGAINST THE FARMWORKERS' ORGANIZATION

The roles of the Department of Pollution Control and Area Planning Board in Delray Beach's water and sewer service denial to the Farmworkers' Organization is an important aspect of the controversy before the Court.

The Farmworkers' Organization sued these agencies because the Area Planning Board and the Department of Pollution Control gave affirmative assistance to Delray Beach by formulating the regional water distribution and sewage collection and treatment plan. Delray Beach's inclusion in the comprehensive plan was to the City's distinct advantage in helping solve critical pollution problems. Delray Beach accepted its designation as agent under the plan and assumed the duty of unconditionally serving the area of Palm Beach County which includes the farmworkers' parcel.

The farmworkers' representatives requested that the Area Planning Board take affirmative action which would compel Delray Beach to serve the farmworkers. Under these circumstances it was incumbent upon those public bodies aiding in the development and implementation of the regional water and sewer program to insure that no

racial or economic discrimination existed in the program, depriving minority groups access to the benefits of the public program activity.

The Area Planning Board ignored Delray Beach's discriminatory non-compliance with the Regional Plan after being advised at two local public meetings of the violation. The farmworkers also requested of the Area Planning Board and the Department of Pollution Control, that these bodies take affirmative action to bar Delray Beach's participation in the Regional Plan and Federal funding programs until the City stopped discriminating in the provision of water and sewer services.

The failure of these public agencies to take any action to compel Delray Beach to stop discriminating constitutes acquiescence in the City's discrimination.

It was just this type of official intran-science which the Seventh Circuit in Gautreaux v. Romney, 448 F. 2d 731 (7th Cir. 1971) declared to be violative of the Civil Rights Acts and the Constitution. In Gautreaux, HUD asserted that "numerous and consistent efforts" were made to pursuade the Chicago Housing Authority to act without discrimination. No such efforts were even alleged to have been made by the Area Planning Board or the Department of Pollution Control in the case

before this Court. The thrust of Gautreaux is to require public bodies, which aid a discriminator in its program activity, out of which the discrimination occurs, upon discovery either to stop participating or to compel non-discriminatory conduct on the part of the discriminator.

Shannon v. HUD, 436 F. 2d 809 (3rd Cir. 1970), also is analogous to this case. In Shannon, HUD was the funding agency for a housing project and allowed changes to be made in the project by a local agency. The effect of the changes was to perpetutate a pattern of concentrating low-income housing in a racially impacted area. The court found its participation in the project by HUD, where prima facie discrimination was apparant, constituted a violation of the Civil Rights Acts of 1964 and the affirmative action provisions of the Federal Fair Housing Law.

The Department of Pollution Control and the Area Planning Board ignored the farmworkers' complaint that those agencies were working hand in hand with Delray Beach on the same water and sewer program to which Delray Beach had denied the farmworkers access. These agencies continued to act in concert with Delray Beach to complete and implement a regional treatment system, while at the

same time the City was denying the farmworkers their rights to equal access to the benefits of that system. Gautreaux and Shannon instruct that public agencies may not constitutionally ignore discrimination practiced by local governmental bodies they are assisting. The victims of discrimination, particularly those seeking to obtain decent and integrated low-income housing, are entitled to the affirmative assistance of those public bodies in a position to obtain an end to the discrimination. The appellee agencies in this case failed to meet this standard.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and this cause remanded for the granting of a final judgment in accordance with the claims for relief set forth in the complaint.

Respectfully submitted,

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