A COHERENT METHOD FOR WEIGHING THE DISCRIMINATORY EFFECT OF EXCLUSIONARY ZONING: *HUNTINGTON BRANCH, N.A.A.C.P. V. TOWN OF HUNTINGTON*, 844 F.2d 926 (2d Cir. 1988)

In enacting Title VIII of the Civil Rights Act of 1968,[1] Congress sought to prohibit discrimination in the sale and rental of housing and to replace racial ghettos with integrated housing.[2] Federal courts have interpreted Title VIII as proscribing the use of exclusionary zoning[3] to prevent the construction of subsidized housing where this zoning has a discriminatory effect.[4] Courts have disagreed, however, on a method

1. Title VIII is commonly known as the "Fair Housing Act." 42 U.S.C. §§ 3601-3631 (1982 & Supp. III 1985).

2. The bill's author, Senator Mondale, intended this legislation to replace segregated neighborhoods with "truly-integrated and balanced living patterns." 114 CONG. REC. 3422 (1968). Title VIII provides in pertinent part:

> it shall be unlawful—
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> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

42 U.S.C. § 3604 (1982 & Supp. III 1985).

In addition, Title VIII declares that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1982).

3. Exclusionary zoning is defined as "[a]ny form of zoning ordinance which tends to exclude specific classes of persons or businesses from a particular district or area." BLACK'S LAW DICTIONARY 506 (5th ed. 1979). The exclusionary zoning at issue in this Comment excludes multifamily housing or subsidized housing. *See infra* notes 38, 45, 59, 68 and accompanying text.

4. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1287-90 (7th Cir. 1977) (*Arlington Heights II*), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Parma, 494 F. Supp. 1049, 1052-53 (N.D. Ohio 1980), *appeal dismissed without opinion*, 633 F.2d 218 (6th Cir. 1980). These courts recognized two forms of discriminatory effect. First, the assailed act may be discriminatory if it has "a greater adverse impact on one racial group than on another." *Arlington Heights II*, 558 F.2d at 1290. Second, an act may have a discriminatory effect "if it perpetuates segregation and thereby prevents interracial association." *Arlington Heights II*, 558 F.2d at 1290; *see generally*, Schwartz, *The Fair*

for the analysis of an alleged discriminatory effect and on a standard for balancing the effect against any asserted justifications.[5]

By incorporating elements of prior decisions,[6] the Second Circuit Court of Appeals, in *Huntington Branch, N.A.A.C.P. v. Town of Huntington*,[7] has created a comprehensive analytical framework for considering a zoning policy's discriminatory effect and its justification. The court held that exclusionary zoning's disproportionate impact[8] on minorities can show a discriminatory effect regardless of intent.[9] The

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Housing Act and "Discriminatory Effect": A New Perspective, 11 NOVA L. REV. 71, 72 (1986) (citing *Arlington Heights II* in discussing discriminatory effect).

5. *See* United States v. City of Black Jack, 508 F.2d at 1185-88 (balanced a prima facie case of discriminatory effect against a compelling governmental interest); *Arlington Heights II*, 558 F.2d 1283 (7th Cir. 1977) (considered strength of the discriminatory effect, intent, defendant's interest, and plaintiff's motivation); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (balanced discriminatory effect against those legitimate governmental interests which cannot be met through less discriminatory alternatives).

6. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (interpreted a similar provision in Title VII as prohibiting an act having a greater adverse impact on minorities, regardless of intent); United States v. City of Black Jack, 508 F.2d 1179 (applied Title VII analysis to Title VIII cases); *Arlington Heights II*, 558 F.2d at 1293 (balanced in favor of private plaintiffs seeking to enjoin defendant's interference with plaintiffs' construction of housing project as opposed to those plaintiffs seeking to compel defendant to build housing); *Rizzo*, 564 F.2d at 149 (considered those legitimate, bona fide governmental interests which cannot be met through less discriminatory alternatives.)

7. 844 F.2d 926 (2d Cir.), *aff'd. per curiam.*, 109 S. Ct. 276 (1988).

8. "Disproportionate impact" resembles the "greater adverse impact" test for discriminatory effect. *See supra* note 4 for a discussion of the "greater adverse impact" test. Disproportionate impact should be distinguished from a comparison of the absolute numbers of two populations. Schwartz, *supra* note 4, at 77. Where whites constitute a great majority, as in *Huntington*, a comparison of absolute numbers of persons that a policy affected would erroneously show the white population suffering a greater adverse impact because more whites than blacks would be affected. Disproportionate impact analysis can show that a larger percentage of the black population is affected, in comparison to the percentage of the white population or their combined population. *Id.* According to the 1980 census, 95% of Huntington's 200,000 residents are white and 3.35% are black. *Huntington*, 844 F.2d at 929. Of the 48 census tracts in Huntington, six contained 70% of the black residents, concentrated in two neighborhoods. While 7% of all the Town's families needed subsidized housing, 24% of the black families required such housing. *Id.*

9. *Huntington*, 844 F.2d at 934. The Supreme Court left this question to the courts after holding that intent was an element necessary for a violation of the equal protection clause. Washington v. Davis, 426 U.S. 229 (1976). The Court reversed the First *Arlington Heights* decision insofar as it was based on an equal protection violation without a showing of intent; however, the Court remanded for a decision on plaintiff's discriminatory effect claim. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (*Arlington Heights I*). Though the Supreme Court made no ruling

court concluded that it must balance the discriminatory effect against those legitimate governmental interests which cannot be served through a less discriminatory alternative.[10]

In *Huntington*, plaintiffs[11] sought to construct a private, low-income housing project[12] in a predominantly white neighborhood of single family homes.[13] The Town Board rejected plaintiff's proposal[14] to amend the Town's zoning ordinance, which limited construction of multifamily housing projects to a largely minority urban renewal zone.[15] Thereafter, plaintiffs brought suit under Title VIII,[16] alleging that the Town had caused an unlawful discriminatory effect. Specifically, plaintiffs alleged that the Town restricted integrated multifamily

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on an intent element in Title VIII claims, the Seventh Circuit subsequently considered intent in deciding *Arlington Heights II*. *Arlington Heights II*, 558 F.2d at 1292. *See infra* notes 48-49, 60-64 and accompanying text (discussing *Arlington Heights II* intent inquiry).

10. *Huntington*, 844 F.2d at 939. *See infra* notes 51-56, 72-76 and accompanying text (discussing legitimate governmental interests).

11. The named plaintiffs were the Huntington Branch of the National Association for the Advancement of Colored People, Housing Help, Inc., Mabel Harris, Perrepper Crutchfield, and Kenneth Cofield. 844 F.2d at 926. Plaintiffs represented a class of

> [a]ll black, Hispanic and lower income persons in need of lower cost housing opportunities in Huntington and surrounding areas and who would qualify for residency in the proposed Matinecock Court and other Section 8 projects in Huntington, and who seek to reside in and insure opportunity for racially and economically integrated housing in Huntington. "Section 8" refers to a federal program that provides subsidies for newly-constructed and substantially-rehabilitated housing.

844 F.2d at 928 n.2.

12. *Id.* at 930. Housing Help, Inc. [hereinafter H.H.I.] obtained an option to purchase a 14.8 acre parcel for construction of a 162-unit housing project. *Id.* at 930-31. H.H.I. joined National Housing Partnership, which owns and manages federally subsidized housing, in filing a joint application with the Department of Housing and Urban Development [hereinafter H.U.D.] for Section 8 funding for the project. *Id.* at 931.

13. *Id.* at 930. The population within a one-mile radius of the proposed project site was 98% white. *Id.* at 931.

14. *Id.* at 932. Robert Ralph, director of H.H.I., filed a request asking the Town Board to amend the zoning ordinance and allow construction of multifamily rental housing on its project site, originally zoned for single family homes on one acre lots. *Id.* at 931. Facing public pressure, the Town Board adopted a resolution requesting that H.U.D. reject H.H.I.'s application for Section 8 funding. *Id.* at 931-32.

15. *Id.* at 930, citing Huntington Town Code, § 198-20(A). The relevant sections of the Town Code provide:

> Use regulations. In the R-3M Apartment District, a building or premises shall be used only for the following purposes:
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> (2) Multi-family dwellings which constitute an approved public housing project

housing to its urban renewal area and refused to rezone the site outside this area.[17] The District Court for the Eastern District of New York found that the plaintiffs failed to make a prima facie showing that the Town's actions had a discriminatory effect.[18] Additionally, it found that the Town had articulated legitimate, non-discriminatory reasons for its actions.[19] The Second Circuit Court of Appeals reversed, holding that plaintiffs had established a prima facie case of discriminatory effect on the Town's minority population.[20] The court further ruled that the Town had offered insufficient proof that it acted to promote a legitimate governmental interest and that no less discriminatory alternative existed.[21]

Title VIII proscribes the refusal to sell or rent a dwelling to any person "because of race."[22] In applying this language to claims based on the discriminatory effect of exclusionary zoning, courts have dis-

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to be owned, maintained and operated by the Housing Authority of the Town of Huntington.

(3) Multi-family dwellings where such dwellings constitute an element in a formally approved land use or a use plan for all or part of an urban renewal area which has been designated as such under the provisions of Article 15 of the General Municipal Law.

Huntington, 844 F.2d at 929. Thus, private construction multi-family housing was limited to the urban renewal area where 52% of the population were minority groups. *Id.* at 930.

16. *Id.* at 928.

17. *Id.* at 928. The District Court for the Eastern District of New York initially held that plaintiffs lacked standing to sue. Huntington Branch N.A.A.C.P. v. Town of Huntington, 530 F.Supp. 838, 843-45 (E.D.N.Y. 1981), *rev'd*, 689 F.2d 391 (2d Cir. 1982) (*Huntington I*), *cert. denied*, 460 U.S. 1069 (1983). The district judge held that plaintiffs lacked standing because of their inability to obtain Section 8 funds. *Id.* at 843-45. The Court of Appeals for the Second Circuit reversed. *Huntington I*, 689 F.2d at 394. The Second Circuit also held that plaintiffs were not required to file a formal application for rezoning because the Town Board's resolution opposing the project made the pursuit of other remedies moot. *Id.* at 393 n.3.

18. Huntington Branch, N.A.A.C.P. v. Town of Huntington, 668 F. Supp. 762, 787 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd. per curiam*, 109 S.Ct. 276 (1988). This was actually the court's second holding of failure to establish a prima facie case. Previously, the court found that plaintiffs failed to apply for rezoning. *Id.* at 785.

19. *Id.* at 786-87.

20. *Huntington*, 844 F.2d at 937-38. *See infra* notes 57-69 and accompanying text (discussing the Second Circuit decision).

21. 844 F.2d at 939-41. *See infra* notes 72-76 and accompanying text (discussing the Town's justifications).

22. 42 U.S.C. § 3604 (1982 and Supp. III 1985). *See supra* notes 1, 2 (discussing the Fair Housing Act).

agreed as to whether Title VIII contemplates some consideration of the defendant's intent[23] and the nature and level of effect necessary to establish a violation.[24] Because Title VIII is similar to Title VII, in its language and purpose,[25] many courts have applied analytical methods derived from Title VII employment discrimination cases to housing discrimination claims.[26] Courts justify prima facie discriminatory effects that may violate Title VII through a showing of quantifiable

23. *See e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)(holding that an act which actually or predictably results in discrimination violates Title VIII); United States v. Starrett City Assoc., 840 F.2d 1096, 1101 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988) (following Title VII precedent in ruling against an intent requirement); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979) (plaintiff need not show discriminatory intent in denial of purchase of cooperative apartment). *But see* Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1292 (including intent in its evaluation of discriminatory effect). *See infra* notes 33-34, 48, and 62-64 and accompanying text (discussing intent considerations). *See generally* Schwartz, *Making and Meeting the Prima Facie Case Under the Fair Housing Act*, 20 AKRON L. REV. 291-314 (1986) (discussing plaintiff's prima facie case in individual housing discrimination, including a discussion of racial motive); Kmiec, *Exclusionary Zoning and Purposeful Racial Segregation in Housing: Two Wrongs Deserving Separate Remedies*, 18 URB. LAW. 393, 396-99 (inapplicability of intent to zoning).

24. In disparate or disproportional impact cases, courts typically view impact data in terms of absolute numbers of persons affected or their proportion to their populations. *See infra* notes 45-49, 65-68 and accompanying text.

25. Title VII, 42 U.S.C. § 2000(e) *et. seq.*, is similar to Title VIII in that it prohibits discrimination, in employment practices, "because of [an] individual's race." 42 U.S.C. § 20004-2(a). The courts have broadly construed both titles in order to effectuate these statutes' goals of integration in employment and housing, respectively. *See e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-12 (1972) (Fair Housing Act must be interpreted generously to encourage integration); Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971) (Title VII must be interpreted broadly to achieve its goal of equal employment opportunity). *See* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 158-60 (1976) (noting similarities, in language and approach, between Title VII and Title VIII). *But see* Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir.), *reh'g denied*, 517 F.2d 918, *cert. denied*, 423 U.S. 896 (1975) (doubting the applicability of Title VII methodology to Title VIII situations).

26. Title VII's disparate impact analysis is the primary contribution to Title VIII litigation. *See* notes 62-69 *infra*. The prima facie case method has only limited applicability, however, because Title VIII defenses are general welfare considerations rather than the quantifiable business justifications found in Title VII defenses. Comment, *supra* note 25, at 160-61. Attempts to employ Title VII defense analysis to Title VIII cases have tended to make plaintiff's burden of proof onerous. *See, e.g.*, Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 933 (2d Cir.), *aff'd.*, 109 S. Ct. 276 (1988) (criticizing requirement that plaintiff prove defendant's justifications were "pretextual," a test from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A*

"business necessity."[27] The nebulous justifications that are offered for exclusionary zoning practices resist such quantification, however, and attempts to apply Title VII analysis to these justifications are of dubious validity.[28] This gap in the applicability of Title VII analysis to Title VIII cases has required the courts to formulate various approaches in analyzing a discriminatory effect and weighing its significance.[29]

In *Griggs v. Duke Power Co.*[30] the Supreme Court held that an employment practice with a discriminatory effect can violate Title VII, regardless of the employer's intent.[31] The Court found that under Title VII, facially neutral tests that reject a disparate number of minority applicants in comparison to white applicants are, in effect, discriminatory.[32] Nevertheless, the Court concluded that an employer may defend an employment practice with a discriminatory effect through a showing of "business necessity." The Court suggested that a compelling correlation between the practice in question and a legitimate business purpose would be one such justification.[33] Although the Court

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Search for the Proper Standard, 27 UCLA L. REV. 398, 406 (1979) (noting that proving discriminatory intent is not necessary to establish Title VIII violation).

27. In *Griggs*, the Supreme Court held that an employment requirement having discriminatory effect "must have a manifest relationship to the employment in question." 401 U.S. at 432. *See supra* notes 27 and *infra* notes 31, 33, 72-78 and accompanying text (discussing defendant's justifications).

28. In *Huntington*, the district court required plaintiffs to prove that defendant's justifications were "pretextual," following a test derived from Title VII disparate treatment cases. 844 F.2d at 933. The appellate court rejected this application of disparate "treatment" analysis to a disparate "impact" claim. The court reasoned that the former involves differential treatment of similarly situated groups while the latter examines the differential impact of a facially neutral policy on a particular group. *Huntington*, 844 F.2d at 933-34.

29. Courts have adopted approaches which are either "absolute," defining a threshold at which rights are violated or justification is sufficient, or "balanced," which weighs the legitimate competing interests. Comment, *supra* note 26, at 419.

30. 401 U.S. 424 (1971).

31. *Id.* at 429-32. The Court found discriminatory effect in an employment requirement disqualifying blacks at a "substantially higher rate" than whites. *Id.* at 426. Significantly, plaintiffs established that the defendants requirement, a high school diploma, would have a predictably greater effect on black applicants because only 12% of black males, as opposed to 34% of white males, could meet this requirement. *Id.* at 430 n.6. This focus on effect, in terms of both actual and predictable effects of facially neutral policies, necessarily excluded reference to intent, which required a far more subjective analysis. Comment, *supra* note 25, at 152-160.

32. 401 U.S. at 429-30.

33. *Id.* at 431. The Court held that the practice in question must have a "manifest

implicitly recognized the need to balance a discriminatory effect against competing interests, it failed to enunciate guidelines for lower courts to follow in weighing these factors.[34]

The Eighth Circuit Court of Appeals applied the *Griggs* rationale to a Title VIII claim[35] in *United States v. City of Black Jack*.[36] The court found that a zoning ordinance prohibiting multifamily, low-income housing[37] would prevent the great majority of blacks in the neighboring metropolitan area from obtaining housing in Black Jack.[38] This

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relationship" to a legitimate business purpose. *Id.* at 432. The Court found that neither the high school diploma requirement nor a standardized intelligence test disqualifying a greater percentage of blacks had any relation to job performance. *Id.* at 431. *See also* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 245 (5th Cir. 1974) (business purpose must be sufficiently compelling to override any racial impact and no alternative policy must accomplish the purpose as well with less differential racial impact); United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301, 308 (8th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1116 (1973) (practice with discriminatory impact must "not only foster safety and efficiency, but must be essential to that goal"). Examining quantifiable results to prove a requirement's validity is not readily applicable to zoning defenses, which are based on nebulous "quality of life" arguments. *See* Comment, *supra* note 25, at 170-71.

34. The Court merely concluded that the employment practice automatically disqualified a "disproportionate number" of blacks but failed to define the meaning of "disproportion" for later application. *Griggs*, 401 U.S. at 429.

35. United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). The Eighth Circuit expanded a previous application of the broad interpretation of Title VII goals to Title VIII and *Grigg's* use of a prima facie case approach. *See* Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021 (1975) (the "prima facie case" applies to discrimination in housing like other forms of discrimination).

36. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

37. The site for the housing project in question was in an unincorporated area until the proposed project became public and local residents initiated a petition drive leading to its incorporation within the City of Black Jack. *Id.* at 1182. Following incorporation, the City Zoning Commission prohibited the construction of any new multiple-family dwellings and made the present ones nonconforming uses. *Id.* at 1183. Other courts have cited such abrupt policy changes as evidence of discriminatory intent. *See, e.g.*, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977) (to find discriminatory intent, a court must consider the history and "sequence of events leading up to the challenged decisions," any departures from "normal procedural sequences," and departures from normal substantive criteria); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (sudden moratorium on new subdivisions and rezoning of plaintiff's site despite the City Planner's recommendations interpreted as intentional discrimination).

38. 508 F.2d at 1182-83. The court contrasted the virtually all-white character of Black Jack with nearby St. Louis, which was 65.6% black. *Id.* at 1183. *See also*, United States v. City of Parma, 494 F. Supp. 1052, 1063-64 (N.D. Ohio), *appeal dis-*

exclusionary effect tended to preserve the area's segregated housing pattern.[39] Finding sufficient proof that the defendant's ordinance had actually or predictably resulted in racial discrimination, the court recognized a prima facie case of discriminatory effect.[40] Once plaintiff establishes discriminatory effect, the court held, the defendant must then demonstrate that the challenged ordinance furthers a "compelling governmental interest."[41] The court based the "compelling governmental interest" test on constitutional equal protection analysis.[42] As such, this rigorous test subjects defendant's justifications to a heightened scrutiny which few can survive.[43]

The Seventh Circuit Court of Appeals rejected the *Black Jack* approach in *Metropolitan Housing Development Corp. v. Village of Arlington Heights.*[44] In considering the discriminatory effect of the Village's refusal to rezone the plaintiff's site for low-income housing, the *Arlington Heights* court assessed its impact on area minorities[45] and its ten-

missed without opinion, 633 F.2d 218, (6th Cir. 1980) (interpreting the disparity between the actual and predicted percentage of black population in the Cleveland metropolitan area as evidence of racial housing segregation); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1185-88 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988) (finding a pattern of racial segregation in successive census reports in terms of increasing minority concentration by area). *But see In re* Malone, 592 F. Supp. 1135, 1167 (E.D. Mo. 1984), *aff'd without opinion sub nom.*, Malone v. Fenton, 794 F.2d 680 (8th Cir. 1986) (interpreting statistics showing that 25% of St. Louis City's black families could buy 45% of the homes in the largely white suburb of Fenton as proof of associational preference rather than segregation).

39. The court held that the ordinance effectively foreclosed 85% of the blacks living in the surrounding area from obtaining housing in Black Jack. 508 F.2d at 1186.

40. *Id.* at 1186.

41. *Id.* at 1185. The court defined a compelling interest in a three part test: first, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest the ordinance serves is constitutionally permissible and substantially outweighs private detriment; third, whether less drastic means are available to attain the stated governmental interest. *Id.* at 1186-87.

42. *Id.* at 1185 n.4.

43. The "compelling governmental interest" test has been described as equivalent to those tests used in equal protection analysis when a fundamental right or a suspect classification is implicated. Therefore the test is difficult to meet. *See* Schwartz, *supra* note 4, at 75. *See also* Gunther, *Foreword: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing the test as "strict in theory and fatal in fact").

44. 558 F.2d 1283 (7th Cir. 1977) (*Arlington Heights II*), *cert. denied*, 434 U.S. 1025 (1978). *See supra* note 9 (discussing *Arlington Heights II*).

45. 558 F.2d at 1291. Though the court recognized that the refusal had a disparate impact on the area's minority population, its findings concluded that, because 60% of the effected population was white, racially discriminatory effect did not exist. *Id.* Had

dency to preserve segregated housing patterns.[46] The court held that under Title VIII a discriminatory effect determination is a matter for the court's discretion.[47] In exercising this discretion, the court considered the strength of the effect, any evidence of intent, the defendant's interest in the action and whether plaintiff sought to enjoin the defendant's interference or compel the defendant to provide housing.[48] Because these factors are encountered in any Title VIII claim, the *Arlington Heights* test gained widespread acceptance.[49]

In *Resident Advisory Board v. Rizzo*,[50] the Third Circuit Court of

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the court used disparate impact analysis it would have compared the percentage of the black and white populations affected, rather than their absolute numbers. Schwartz, *supra* note 4, at 81. *See supra* notes 8, 31-32, and *infra* notes 65-66 and accompanying text (discussing the absolute number comparison).

46. 558 F.2d at 1290. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-10 (recognizing discriminatory effect both in terms of impact on a racial group and segregatory effect). *See also*, Farrell, *Integrating by Discriminating: Affirmative Action that Disadvantages Minorities*, 62 U. DET. L. REV. 553 (1985) (H.U.D. refusal to build public housing in minority areas because of "discriminatory effect").

47. 558 F.2d at 1290. *See also*, Park View Heights v. City of Black Jack, 605 F.2d 1033, 1039-40 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980) (district court should decide equitable relief issues and should seek to eliminate the discriminatory effect as far as possible).

48. 558 F.2d at 1290. The inclusion of an intent factor has been thoroughly attacked as irrelevant to impact and effect considerations. *See* Mandelker, *Racial Discrimination and Exclusionary Zoning*, 55 TEX. L. REV. 1217, 1244 (1977) (intent considerations are against the spirit of the fourteenth amendment and out of touch with the realities of exclusionary zoning). *But see* Comment, *A Last Stand on Arlington Heights: Title VIII and the Requirement of Discriminatory Intent*, 53 N.Y.U. L. REV. 150 (1978) (criticizing the *Arlington Heights* standard for finding Title VIII violations absent discriminatory intent). The distinction between claims against interference with a private housing project and those which seek to force the municipality to build housing has gained widespread acceptance. *See generally* Smith v. Town of Clarkton, 682 F.2d 1055, 1069-70 (4th Cir. 1982) (prohibiting a court from requiring local government to fund a housing project); Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 940 (2d Cir.), *aff'd*, 109 S. Ct. 276 (1988) (noting that a defendant faces a greater burden of proof when seeking to prevent construction of a private housing project).

49. *See, e.g.*, Keith v. Volpe, 618 F. Supp. 1132 (C.D. Cal. 1985) (compared absolute numbers of persons affected and utilized *Arlington*'s factors as a threshold test for a prima facie case of discriminatory effect); United States v. City of Parma, 494 F. Supp. 1052, 1098 (N.D. Ohio), *appeal dismissed without opinion*, 633 F.2d 218 (6th Cir. 1980) (utilized *Arlington*'s factors to test whether a discriminatory effect was sufficient to constitute a prima facie case); Atkins v. Robinson, 545 F. Supp. 852 (E.D. Va. 1982), *aff'd*, 733 F.2d 318 (4th Cir. 1984) (employed *Arlington* approach exclusively).

50. 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

Appeals distinguished the *Arlington Heights* factors.[51] Choosing to reformulate the *Black Jack* prima facie case method, the Third Circuit replaced the "compelling governmental interest" requirement with a less stringent standard analogous to the Title VII "business necessity" test.[52] Noting the problems inherent in comparing Title VII defenses with Title VIII justifications, the court concluded that there must be a case-by-case analysis of a defendant's justifications, guided by two general considerations.[53] First, the discriminatory act must serve a legitimate governmental interest of the defendant, both in theory and practice.[54] Second, the defendant must show that no alternative could serve that interest with less discriminatory effect.[55] Because the defendants in *Rizzo* offered no valid justification for their acts, the viability of these considerations awaited testing in later cases.[56]

In *Huntington Branch, N.A.A.C.P. v. Town of Huntington*[57] the Second Circuit Court of Appeals employed disparate impact analysis[58] in

51. *Id.* at 148 n.32. The court interpreted the *Arlington* factors as "a standard upon which ultimate Title VIII relief may be predicated, rather than indicating the point at which the evidentiary burden of justifying a discriminatory effect will shift to the defendant." *Id.*

52. *Id.* at 148. The *Rizzo* court found the "compelling governmental interest" burden too onerous for a Title VIII defendant. *Id. But see* Comment, *supra* note 26, at 416 (*Black Jack* and *Rizzo* tests considered substantially similar).

53. 564 F.2d at 149. In doing so, the court referred to *Arlington Heights II*, but with the caveat that it considered *Arlington*'s four factors unsuitable for a determination of the merits. Instead, it found they were merely a standard for Title VIII relief. *Id.* at 148 n.32.

54. *Id.* at 149. This consideration is substantially similar to the first of *Black Jack*'s three part test for compelling governmental interest. *See supra* notes 41-43 and accompanying text (discussing the *Black Jack* approach).

55. 564 F.2d at 149. This consideration is substantially similar to the third part of *Black Jack*'s test for compelling governmental interest. *See supra* notes 41-43 and accompanying text. Thus, *Rizzo* rejects the balancing considerations of the *Black Jack* test as well as its onus as a constitutional test. *See* Comment, *supra* note 26, at 416.

56. *See* Burney v. Housing Authority of the County of Beaver, 551 F. Supp. 746, 768-70 (W.D. Pa. 1982) (defendant's concern that plaintiff's housing project would cause white flight by tipping the racial balance); United States v. City of Parma, 494 F. Supp. 1052, 1055 (N.D. Ohio), *appeal dismissed without opinion*, 633 F.2d 218 (6th Cir. 1980) (adopting the *Rizzo* test for analysis of defendant's justifications); United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988) (acknowledging similar considerations); Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 939 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988) (adopting an augmented *Rizzo* test for analysis of defendant's justifications).

57. 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988).

58. *See supra* note 8 (discussing disparate impact analysis).

finding that plaintiffs had established a prima facie case of discriminatory effect in the Town's exclusionary zoning practices.[59] Criticizing the lower court's use of the *Arlington Heights* approach,[60] the *Huntington* court chose to examine the defendant's justifications in light of the general considerations of *Rizzo*.[61]

The Second Circuit assailed the district court's emphasis on the Town's lack of discriminatory intent in denying plaintiff's request to rezone a property for low-income housing.[62] Rejecting any reference to intent in its analysis of the discriminatory effect claim, the court cited practical concerns[63] about the tendency of an intent inquiry to subvert the analysis of an act's impact.[64] The court also criticized the lower court's analysis of absolute numbers of persons affected by the zoning ordinance,[65] holding that the Town's refusal to rezone must be analyzed in terms of its proportional impact on minorities relative to its impact on the white population.[66]

The *Huntington* court also criticized the lower court's failure to con-

59. *Huntington*, 844 F.2d at 941.

60. *See supra* notes 47-49 and accompanying text (discussing the *Arlington Heights* approach).

61. *See supra* notes 51-56 and accompanying text (discussing the *Rizzo* considerations).

62. *Huntington*, 844 F.2d at 933-34. Actually, this was the court's second holding after summarily dismissing the lower court's contention that plaintiffs lacked standing. *Id.* at 932. *See supra* notes 17-18 and accompanying text.

63. 844 F.2d at 935. The Second Circuit quoted *Black Jack*, which noted that "clever men may easily conceal their motivations." *Id.* at 935 (quoting United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)). The court also emphasized the applicability of Title VII analysis to Title VIII situations. 844 F.2d at 935.

64. *Id.* The Second Circuit noted the lower court's concentration on "pretextual" justifications for the defendant's actions and its finding that plaintiff's failure to prove segregative intent was a factor in the Town's favor. *Id.*

65. *Id.* at 933. Though the Town of Huntington is more than 95% white, the lower court compared the poor population of whites (22,160) to that of minorities (3,671) in finding that minorities were not disproportionately affected. *Id.* The lower court also failed to consider the racial make-up of the waiting lists for subsidized housing, which was 45% minority. *Id.* at 929.

66. *Id.* at 938. *See supra* note 8 (criticizing an analysis based on absolute numbers). The court concluded that *Griggs* required this disparate impact analysis. *Id.* at 938. The court blamed *Arlington Heights II* for the confusion over the content of the prima facie case of disparate impact. *Id.* at 935. The lower court used *Arlington*'s four factors as a test for the existence of a prima facie case, rather than as a standard for determining the appropriate relief, as *Rizzo* interpreted them. *Id. See supra* notes 32-34, 48, 49, 53 and accompanying text (discussing *Arlington Heights II* factors and *Rizzo*).

sider the role of the Town's zoning policy in perpetuating the Town's largely segregated housing patterns.[67] The court found that by restricting the construction of low-income housing to a predominantly minority urban renewal area, the Town's zoning ordinance impeded integration.[68] Thus, the court found that the Town's refusal to rezone established a prima facie case of discriminatory effect, both in its impact on minorities and its segregatory effect.[69]

In analyzing the Town's justifications, the court augmented the general considerations of *Rizzo* with a specific method for assessing the Town's concerns.[70] The court delineated two types of problems claimed by the Town in its refusal to rezone the project site. First, it characterized "plan specific" problems that could be resolved through reasonable design modifications.[71] Second, "site specific" problems could be analyzed under *Rizzo's* "legitimate and bona fide" standard.[72] While the court stated that "plan specific" disputes could be resolved at the time plaintiffs applied for rezoning, it offered no criteria for a reviewing court to use in weighing unresolved disputes.[73] In finding the Town's "site specific" objections insubstantial,[74] the court dismissed the Town's claim that limiting multifamily housing to the urban

67. 844 F.2d at 937-38. The lower court concentrated on segregative intent, rather than existing segregated housing patterns. *Id.* at 933.

68. *Id.* at 937. Restricting low-income housing to largely minority neighborhoods may also have a discriminatory effect in the denial of funds for such housing. Farrell, *supra* note 46, at 565-69.

69. 844 F.2d at 938. *See supra* note 46, discussing *Trafficante's* two forms of discriminatory effect.

70. 844 F.2d at 939. The court noted the difficulty in applying Title VII analysis to Title VIII cases, owing to the variety of reasons supporting zoning, none of which allow for *Griggs* analysis. *Id.* at 936. Beyond recognizing that a town's interest in zoning is significant, the court sought to balance those interests against those discriminatory effects which it held significant. *Id.* at 937.

71. *Id.* at 939. However, the court offered no guidance in interpreting what would constitute a "reasonable" design modification and who would make such modifications. *See infra* notes 83-85 and accompanying text (discussing application in future Title VIII disputes).

72. 844 F.2d at 939. The court held that a substantial site specific objection is one that would "justify a reasonable official in making this determination." *Id.*

73. *Id.* The court dismissed as "plan specific," problems with fire protection, proximity to a railroad and an electric power substation (which could be cured through landscaping), inadequate recreation and parking areas, and undersized units. *Id.* at 940. *See also*, Keith v. Volpe, 618 F. Supp. 1132, 1154-55 (C.D. Cal. 1985) (considering problems of population density and diminished contribution to the tax base).

74. 844 F.2d at 940.

renewal area furthered the design of the zoning ordinance by encouraging development in that area.[75] Instead, the court suggested that the less discriminatory alternative of tax incentives could satisfy this objective.[76]

In balancing the discriminatory effect of the zoning policy against the Town's remaining justification that it was acting within the scope of its authority,[77] the court incorporated *Arlington Heights'* consideration of the remedy sought.[78] Thus, the court struck the balance in favor of plaintiffs seeking to enjoin defendant's interference and its discriminatory effect.[79]

The *Huntington* court correctly noted that where the central concern of a discriminatory effect claim is a policy's impact on a minority population, an inquiry into the policy's intent is specious and irrelevant to the analysis of that claim.[80] The only logical method for analyzing a policy's disproportionate impact upon a group is to examine the percentage of persons affected in a minority group relative to the percentage of persons affected in the majority.[81] On this point, the *Huntington* court clarified a longstanding source of confusion in Title VIII

75. *Id.* The court dismissed other specific objections to the site, such as traffic, health and sewer considerations because they were unsupported at trial. *Id. See also, Keith*, 618 F. Supp. at 1153-55 (dismissing as pretextual: objections to a housing site based on an expected increase in traffic; burden to schools; and a city policy of dispersing low income tenants by restricting them to 35% of a housing development).

76. 844 F.2d at 939. *See infra* note 85 (discussing this alternative).

77. This approach, in effect, incorporates a *Black Jack* balancing component into the *Rizzo* approach, which drew heavily from *Black Jack*. *See supra* notes 52-55 and accompanying text (discussing this incorporation).

78. 844 F.2d at 940. The court endorsed the Seventh Circuit's idea that "the balance should be more readily struck in favor of the plaintiff when it is seeking only to enjoin a municipal defendant from interfering with its own plans rather than attempting to compel the defendant itself to build housing." *Id.*

79. *Id.* at 941.

80. *Id.* at 935. Requiring proof of intent would make Title VIII irrelevant to all but the most blatant acts of intentional segregation. *See* United States v. City of Black Jack, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974), *cert. denied*, 434 U.S. 1025 (1978). Thus, an intent requirement would make Title VIII powerless to combat de facto segregation, as was its original intent. Comment, *supra* note 26, at 406.

81. Analysis of absolute numbers of persons affected will generally find a disparate impact only where racial minorities constitute a significant part of the population or where an act engenders an impact so disproportionate that the numerical minority is not reflected in the number of persons affected. *See* Schwartz, *supra* note 4, at 77. When an inquiry should reflect the extent of a discriminatory effect, it is senseless to treat a minority as though equal in number to the majority.

litigation.[82]

The *Huntington* court's most significant contribution to the resolution of Title VIII disputes is its concrete approach to the countervailing community interests in zoning controls and integrated housing.[83] Though the court granted the *Huntington* plaintiffs their preferred site,[84] the court's approach allows for creative resolution of competing interests through its acknowledgment of "plan" and "site" specific objections.[85] Under the *Huntington* approach, parties to Title VIII litigation can address specific objections through compromise. This compromise permits communities to resolve housing segregation problems that zoning controls would otherwise perpetuate.[86] Because resolution of plan and site problems may require protracted and highly technical negotiations, this aspect of Title VIII litigation should be entrusted to arbitration under the aegis of the Department of Housing and Urban Development.[87]

Huntington Branch, N.A.A.C.P. v. Town of Huntington provides dis-

82. *See* Comment, *supra* note 26, at 406-407 (arguing against an intent standard); Mandelker, *supra* note 48, at 1217-53 (discussing *Arlington Heights* racial motive or intent doctrine).

83. While recognizing the legitimacy of many zoning objectives, the court held that they cannot "automatically outweigh significant disparate effects." 844 F.2d at 937. Thus, by inquiring into the legitimacy of zoning objectives, the court allowed for a judgment more carefully crafted to the needs of the community. *See generally* Schwartz, *supra* note 4, at 95.

84. The court justified site specific relief in noting that this litigation spanned seven years, jeopardizing plaintiffs' development plans. Additionally, the Town failed to use H.U.D. community development grants to assist the development of low-income housing. *Huntington*, 844 F.2d at 941-42.

85. By dismissing all "plan specific" objections, the court shunts these problems off to another forum. *Id.* at 939-40. Although that forum or those considerations may be litigated at a later time, they can also be resolved through arbitration. The court's analysis indicates a receptivity to holding any objection as "plan specific" or otherwise capable of resolution through alternatives, such as a tax incentive for the urban renewal area. *Id.* at 939.

86. It deserves noting that zoning controls are usually based on existing, often segregated, housing patterns which act to preserve the status quo. *See* Mandelker, *supra* note 48, at 1217. Where H.U.D. denies Section 8 funding to projects proposed for racially impacted neighborhoods, exclusionary zoning controls can act to exacerbate existing housing shortages, preventing their solution. *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 133 n.7 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

87. After the *Huntington* decision, Congress enacted the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ 800-15, 102 Stat. 1619-36 (1988)(codified at 42 U.S.C. §§ 3601-3631). Under Section 810 of the Act, a complaint can be filed with H.U.D., requiring it to conduct an investigation, conciliation hearings, and enforce conciliation agreements. 42 U.S.C.A. § 3610(a)-(c) (West Supp. 1989).

parate impact analysis a clear and concise argument in its favor. When a housing problem creates legitimate controversy, rather than bigoted reaction, the *Huntington* approach provides courts with a framework for an equitable solution.

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