BEYOND HOLLOW VICTORIES: THE AFFIRMATIVE OBLIGATIONS REMEDY FOR EXCLUSIONARY ZONING—*PARK VIEW HEIGHTS CORP. v. CITY OF BLACK JACK*

I

INTRODUCTION

Success in litigation challenging an exclusionary zoning ordinance provides no guarantee of success in actually securing the housing that the judgment entitles the plaintiffs to build.[1] Where an invalid zoning ordinance has stymied the construction of a particular housing project, courts have traditionally offered injunctive relief to prevent defendants from interfering with plaintiffs' plans. Because the injunction does not require defendants actively to facilitate the construction, and because municipal antagonism may actually deter plaintiffs from proceeding with the project, the injunctive remedy frequently fails to provide plaintiffs with effective relief.

Recently, courts have recognized that the goal of exclusionary zoning litigation is not merely to invalidate a given ordinance, but to build housing.[2] In an effort to promote the construction of housing, courts have experimented with more forceful remedies. Occasionally, a court will direct issuance of a building permit enabling the plaintiff to proceed with construction[3] or issue an injunction requiring that "defendants affirmatively take whatever steps are necessary to allow the [plaintiffs] to begin construction."[4] Yet even these more substantial remedies fail to make plaintiffs whole when spiraling costs and the inability to obtain increased federal funds render construction economically infeasible.[5]

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1. *See, e.g.,* Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (in each case the courts held zoning ordinances unconstitutional, but the proposed housing was not constructed).

2. *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Berenson v. Town of New Castle, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979). *Cf.* Mallach, *Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation,* 6 RUT.-CAM. L.J. 653 (1975); Mytelka & Mytelka, *Exclusionary Zoning: A Consideration of Remedies,* 7 SETON HALL L. REV. 1, 26 (1975).

3. The issuance of permits provided relief for plaintiffs in Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972) (per curiam), and in Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

4. *E.g.,* Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 697 (W.D.N.Y. 1970).

5. In addition, developers face extensive litigation costs. Specific project lawsuits usually last at least two years, but may drag on even longer. Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* Eastlake v. Forest City Enterprises, 91 HARV. L. REV. 1373, 1384-85 (1978).

Recognizing the inadequacies of each of these remedies, the Eighth Circuit in *Park View Heights Corp. v. City of Black Jack*[6] granted a novel form of relief. Plaintiffs had successfully challenged, as a violation of Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act),[7] a zoning ordinance which prevented plaintiffs from beginning the construction of a proposed low-cost housing project. After the ordinance was invalidated, however, plaintiffs could no longer afford to build their project. In order to provide an effective remedy, the Eighth Circuit required the City of Black Jack to cooperate with plaintiffs in facilitating the building of the kind of low- and moderate-cost housing which might have been constructed but for municipal opposition, spiraling costs, and other difficulties.[8] This form of relief goes far beyond those forms granted in cases where the original project remains viable and a municipality can provide redress simply by permitting the construction to progress. The significance of *Black Jack III* lies both in the affirmative obligation imposed upon the municipality and in the recognition that only the construction of housing would provide plaintiffs with effective relief.

This Comment will focus on the *Black Jack III* decision. After analyzing the remedy, the Comment will address theoretical and practical objections to granting this form of affirmative relief. Finally, the Comment will assess the merits and limitations of the decision.

II

EXCLUSIONARY ZONING AND THE COURTS' RESPONSE

A. An Overview

Traditionally, a court which finds an exclusionary zoning ordinance illegal simply strikes down the ordinance.[9] If completion of construction turns upon the municipality's willingness to cooperate with plaintiffs, however, mere invalidation of the ordinance is a hollow victory.[10] A municipality can circumvent a court's decision either by adopting a revised, but

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6. 605 F.2d 1033 (8th Cir. 1979), *cert. denied,* 445 U.S. 905 (1980) [hereinafter cited as *Black Jack III*]. *Black Jack III* is the last of several court decisions arising out of the proposed construction of the Park View Heights project in Black Jack, Missouri. For the purposes of this Comment, *"Black Jack III"* refers to both the district court decision, 454 F. Supp. 1224 (E.D. Mo. 1978), *rev'd,* 605 F.2d 1033 (8th Cir. 1979), and the Eighth Circuit decision dealing with the issue of relief. Related cases dealing with standing and liability, respectively, *Black Jack I* and *Black Jack II,* are discussed in the text accompanying notes 42-72 *infra.*

7. 42 U.S.C. §§ 3601-3631 (1976 & Supp. III 1979).

8. Black Jack III, 605 F.2d 1033, 1040 (8th Cir. 1979).

9. *E.g.,* Smookler v. Township of Wheatfield, 394 Mich. 574, 232 N.W.2d 616 (1975); Nat'l Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

10. Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning,* 74 MICH. L. REV. 760, 768 (1976) [hereinafter cited as *Inadequacy of Judicial Remedies*].

equally exclusionary ordinance,[11] or by rezoning other areas without changing the status of the developer's parcel.[12] To challenge the new ordinance, plaintiff would have to return to court. The unavailability of effective relief and the prospect of protracted litigation might dissuade developers from initiating or continuing their challenge, or even from considering construction in the area.[13]

A recent case in point is *Appeal of Girsh,*[14] in which the Pennsylvania Supreme Court struck down an ordinance which barred construction of apartments. The township subsequently rezoned, but excluded plaintiff's parcel from the newly created apartment district. Plaintiff unsuccessfully attempted to compel issuance of a building permit. After the municipality announced plans to condemn plaintiff's property for a public park, plaintiff sued to prevent condemnation. When the Supreme Court of Pennsylvania, after five years of litigation, finally ordered issuance of a building permit, plaintiff found development of his property unprofitable.[15]

Sponsors of low-cost housing are particularly ill-equipped to deal with delays.[16] Developers are usually faced with short time limits on their options to purchase designated parcels. Even if a developer owns the property, delays may tie up the investments and increase costs.[17] Unlike a builder of luxury apartments, a developer of low- and moderate-income housing cannot pass along the added costs.[18] Unless the developer can obtain additional subsidies, the project may fold. The post-litigation record of specific housing projects is consequently bleak: after an average of two years of litigation, housing frequently remains unbuilt.[19] In *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach,*[20] for example, the Fifth Circuit found unconstitutional the city's refusal to allow the housing project access to the municipal sewer system. Subsequent to the decision, however, a moratorium was imposed upon federal funding, precluding construction of the project.[21]

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11. *See id.* at 767.

12. Note, *Judicial Relief in Exclusionary Zoning Cases: Pennsylvania's Definitive Relief Approach,* 21 VILL. L. REV. 701, 702 (1976). *See, e.g.,* Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 378, 167 N.E.2d 406, 411 (1960).

13. *See* Black Jack III, 605 F.2d 1033, 1039 (8th Cir. 1979).

14. 437 Pa. 237, 263 A.2d 395 (1970).

15. Hartman, *Beyond Invalidation: Judicial Power to Zone,* 9 URB. L. ANN. 159, 161-62 (1975).

16. Mallach, *supra* note 2, at 664. Consequently, delays may entirely defeat a low-income project. Brief for Appellants, at 35 & n.48, Black Jack III, 605 F.2d 1033 (8th Cir. 1979). Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy,* 6 MICH. J.L. REF. 625, 638-39 (1973). Sager, *supra* note 5, at 1385.

17. Mytelka, *supra* note 2, at 26.

18. Mallach, *supra* note 2, at 662.

19. Sager, *supra* note 5, at 1385 n.41.

20. 493 F.2d 799 (5th Cir. 1974).

21. Conversation with Richard F. Bellman, attorney for plaintiffs in United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974), (Sept. 12, 1979).

Recognizing the ineffectiveness of simply invalidating an ordinance,[22] courts have experimented with other remedies. Some courts have enjoined interference with proposed projects.[23] Other courts have directed the issuance of necessary permits, such as building permits which redress wrongs[24] by enabling plaintiffs to proceed with construction.[25] Not all courts, however, will provide such relief, even if issuance of the permit is conditioned upon compliance with all relevant regulations.[26] Even assuming judicial willingness to direct issuance of a permit, plaintiffs frequently need more than a permit in order to proceed with construction.[27] When development is no longer financially possible, for example, issuance of a permit is useless.

In an effort to provide plaintiffs with effective relief, some courts have ordered rezoning. In *Oakwood at Madison, Inc. v. Township of Madison,*[28] for instance, the New Jersey Supreme Court required the defendant township to submit a revised zoning ordinance to the trial court for approval. Remedies granted by other courts include directing the granting of a variance[29] or the rezoning of plaintiff's land for multi-family use.[30] Several

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22. *E.g.,* Casey v. Zoning Hearing Bd., 459 Pa. 219, 230, 328 A.2d 464, 469 (1974) ("Obviously, if judicial review of local zoning action[s] is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief.") (quoting Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedure,* 120 U. PA. L. REV. 1029, 1082 (1972)).

The benefits of simple invalidation accrue primarily in suits challenging an entire zoning scheme. Simple invalidation can be useful in some cases as an important tool to remove exclusionary zoning requirements such as minimum lot sizes. It leaves courts time to develop standards of compliance and provides a useful method of stripping away controls not central to an overall zoning plan. Additionally, it is always a justifiable response to discrimination. *Developments in the Law—Zoning,* 91 HARV. L. REV. 1427, 1700 (1978).

23. *E.g.,* City of Richmond v. Randall, 215 Va. 506, 211 S.E.2d 56 (1975) (the court enjoined the legislative body from taking action which would disallow the suggested, reasonable use of the property).

24. *See* note 3 *supra.*

25. *E.g.,* United Farmworkers of Fla. Hous. Project Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 69 (W.D.N.Y. 1970); Surrick v. Zoning Hearing Bd., 476 Pa. 182, 382 A.2d 105 (1977). The court may direct issuance of various kinds of permits. *Crow v. Brown* involved a building permit, while plaintiffs in *United Farmworkers* sought permission to hook into a sewer system.

26. *See, e.g.,* Berenson v. Town of New Castle, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1969). The court reversed a lower court decision mandating the issuance of a building permit to plaintiffs contingent upon their compliance with amended zoning regulations. The court wrote: "[T]o whatever extent plaintiffs' proposals may necessitate approval pursuant to the Freshwater Wetlands Act, they will secure such approval prior to being granted any building permit." *Id.* at 524, 415 N.Y.S.2d at 680.

27. *See* Rubinowitz, *supra* note 16, at 626.

28. 72 N.J. 481, 371 A.2d 1192 (1977).

29. Brunetti v. Mayor and Council, 130 N.J. Super. 164, 325 A.2d 851 (1974). *But see* Castroll v. Township of Franklin, 161 N.J. Super. 190, 391 A.2d 544 (1978).

30. Berenson v. Town of New Castle, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979). *See also* Surrick v. Zoning Hearing Bd., 476 Pa. 182, 382 A.2d 105 (1977). *But see* City of Richmond

other courts have experimented with innovative affirmative relief.[31] Since more than one barrier may impede the construction of a housing development,[32] a decree may award plaintiffs a combination of remedies.[33]

The remedy devised by the Eighth Circuit in *Black Jack III* goes further than previous measures by imposing upon the municipality an affirmative obligation to work with plaintiffs even though the project which spawned the litigation can no longer be built.[34] Although the remedy is far-reaching, it is available only in certain cases, usually brought under the Fair Housing Act,[35] which involve specific housing projects. In the vast majority of exclusionary zoning lawsuits, by contrast, plaintiffs challenge an entire municipal or regional zoning scheme.[36] The plaintiffs in such challenges are usually would-be residents who ask to live somewhere in the municipality but do not request relief as to a specific parcel. Site-specific relief is thus inappropriate for the area-wide violations challenged in most actions.[37] In the limited instances where the *Black Jack III* remedy would apply, however, the decision marks a significant victory for exclusionary zoning plaintiffs.

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v. Randall, 215 Va. 506, 513, 211 S.E.2d 56, 61 (1975), where the court refused to rezone, emphasizing that courts have no power to rezone land or to order a legislative body to do so. The court, however, granted an injunction enjoining the legislative body from taking action which would disallow the sole reasonable use suggested by plaintiffs. There is, in fact, little difference between granting such an injunction and requiring the issuance of a permit, since the effect upon plaintiffs of either approach is identical. Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation,* 12 URB. L. ANN. 21, 34 (1976).

31. For example, the Third Circuit in Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), *cert. denied,* 435 U.S. 908 (1978), mandated the construction of the Whitman Park Townhouse project. In Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972), the court required the Commissioners of Roads and Revenues of Fulton County and other county officials to meet with representatives of the Atlanta Housing Authority within ten days to appoint a joint committee which would draw up a list of general areas in which low-rent public housing might be appropriate. *Id.* at 395. The committee had thirty days to draw up the list. Within sixty days after completion, the joint committee had to prepare detailed site evaluation and planning reports, singling out specific localities within the general areas on the list that would be appropriate for low-rent housing. *Id.* at 395-96. In addition, the court required the Atlanta Housing Authority to meet with the Commissioners of Roads and Revenues to implement the joint committee's recommendations. The results of the meeting had to be reported to the court. *Id.*

32. Mallach, *supra* note 2, at 653.

33. *E.g.,* Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970).

34. Because Park View Heights could no longer be built, another court might have held the issue moot. *See* text accompanying notes 38-72 *infra.*

35. *E.g.,* Kennedy Park Homes Ass'n. v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970).

36. Plaintiffs might, for example, attack a regional zoning scheme which makes no provision for any low-income housing.

37. Such relief would be inappropriate for two reasons. First, since plaintiffs do not request relief as to a specific parcel of land, the problem of selecting a construction site arises. Second, since such zoning ordinances deal with municipal or regional planning, the imposition of affirmative relief by the court might create an erratic pattern of growth unless the court first allows the municipality an opportunity to amend its zoning scheme.

B. An Innovative Response: Park View Heights v. City of Black Jack

1. The Case

a. The Facts

In 1969, St. Mark's United Methodist Church and the Methodist Metro Ministry decided to sponsor a low to moderate income, multi-racial housing development to be called Park View Heights.[38] They organized the Inter-Religious Center for Urban Affairs (ICUA), which acquired an option to purchase 11.9 acres of land in an all-white, unincorporated portion of Saint Louis County, Missouri. St. Mark's and the Metro Ministry then submitted an initial application for federal funding to build apartments.

Shortly thereafter, area residents rose in opposition to the proposed apartment complex.[39] Despite the protests of area residents, the United States Department of Housing and Urban Development (HUD) issued a "feasibility letter" for Park View Heights, which was "tantamount to a contractual obligation to assist [the] project."[40] Upon learning of this letter, residents began a drive to incorporate as a municipality. Despite the strong "fiscal, planning, and legal" objections of the Saint Louis Department of Planning,[41] the Saint Louis County Council incorporated the City of Black Jack on August 6, 1970.

Two months later, the Black Jack City Council enacted Zoning Ordinance No. 12 which barred any further apartment construction and made existing apartments nonconforming uses. Meanwhile, ICUA had formed the Park View Heights Corporation to promote the development of the Park View Heights project, and had assigned to the Corporation its option to purchase the designated 11.9 acres. Before the Corporation could begin building, however, Zoning Ordinance No. 12 was enacted, barring construction of the project.

b. Procedural History

This attempt to prevent construction precipitated the filing of two lawsuits against the City of Black Jack, one as a class action[42] by the ICUA,

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38. The project was sponsored under section 236 of the National Housing Act, 12 U.S.C. § 1715z-1 (1976), which permits periodic reduction in interest payments for the owner of a low-income housing project in order to reduce rentals for lower income families.

39. Their preliminary tactics included writing letters to federal administrators and elected officials, publishing circulars, and sending a delegation to present the Undersecretary of the Department of Housing and Urban Development (HUD) with petitions and arguments. United States v. Black Jack, 508 F.2d 1179, 1182 (8th Cir. 1974) [hereinafter cited as *Black Jack II*].

40. Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1211 (8th Cir. 1972) [hereinafter cited as *Black Jack I*].

41. *Id.*

42. The class included "all individuals of low and moderate income confined by economic or racial circumstance to the City of St. Louis who are eligible for low and moderate

the Corporation, and eight would-be residents of Park View Heights (*Black Jack I*),[43] and the other by the United States (*Black Jack II*).[44] The private parties filed *Black Jack I* in January 1971, challenging Zoning Ordinance No. 12 on a number of grounds.[45] The district court, dismissing all but one of these claims on procedural grounds, allowed the Corporation to challenge the ordinance as violative of the fifth amendment.[46] On appeal, however, the Eighth Circuit reversed and remanded, allowing suit on several grounds by all plaintiffs.[47]

By the time the Eighth Circuit remanded *Black Jack I*,[48] *Black Jack II*[49] had been brought by the United States Government. Although *Black Jack II* also challenged the validity of Zoning Ordinance No. 12, the Government sought only to have the ordinance declared invalid under the Fair Housing Act. Since *Black Jack II* was well into the discovery stage, the parties in *Black Jack I* entered into a stipulation in which they agreed to be bound by the disposition of *Black Jack II,* and *Black Jack I* was adjourned until the final disposition of *Black Jack II.* [50] One year later, the district court held for defendants, finding that no racial purpose had motivated the City of

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income housing, and who more particularly, would have been eligible for the Park View Heights Project." Brief for Appellants, *supra* note 16, at 1-2.

43. 335 F. Supp. 899 (E.D. Mo. 1971), *rev'd,* 467 F.2d 1208 (8th Cir. 1972). For purposes of this Comment the City of Black Jack is referred to as the defendant in the three *Black Jack* cases, although other defendants include the Black Jack City Council, the Zoning Commission of the City of Black Jack, and certain named individuals.

44. 372 F. Supp. 319 (E.D. Mo. 1974), *rev'd,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975).

45. The plaintiffs alleged violations of the right to travel, the fourth amendment, the fifth amendment, the equal protection clause of the fourteenth amendment, the supremacy clause, the thirteenth amendment, the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 (1976), the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1976), the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1976), and the National Housing Act, 42 U.S.C. §§ 1401-40 (1976).

46. Black Jack I, 335 F. Supp. 899 (E.D. Mo. 1971).

47. Black Jack I, 467 F.2d 1208 (8th Cir. 1972). The court held that both the ICUA and the Park View Heights Corporation had standing (1) to question whether the ordinance violated the thirteenth or fourteenth amendment, (2) to raise violations of the constitutional rights of individuals who desired to move into the proposed apartments, (3) to question certain alleged statutory violations, (4) to assert the individual plaintiffs' civil rights under 42 U.S.C. §§ 1981, 1982, and (5) to litigate claims under the Fair Housing Act of 1968. Finding no precedent for allowing a challenge to a zoning ordinance under 42 U.S.C. § 2000(d) or 42 U.S.C. §§ 1401-1440, the court dismissed those claims. With regard to the individual plaintiffs, the court permitted a challenge under the Fair Housing Act and held the controversy ripe for adjudication. 467 F.2d 1208, 1212-16 (8th Cir. 1972).

48. The Eighth Circuit remanded on September 25, 1972. *Id.* at 1208.

49. 372 F. Supp. 319 (E.D. Mo. 1974).

50. Brief for Appellants, *supra* note 16, at 5. The parties also stipulated that, should the United States fail to establish a violation or deprivation of rights secured by the Fair Housing Act, the thirteenth amendment, or the fourteenth amendment, the private action would be dismissed. Should the United States prove a violation, the private parties could then sue for damages: "[N]othing contained in this stipulation shall prejudice the parties plaintiff in proceeding with this action for the recovery of damages claimed to flow from the violation or deprivation so established." *Id.* at 5 n.4.

Black Jack's decisions to incorporate and to enact the zoning ordinance,[51] and that the ordinance had no racially discriminatory effect.[52] The Government appealed the *Black Jack II* decision,[53] and the Eighth Circuit reversed.[54]

The Eighth Circuit found a prima facie violation of the Fair Housing Act because Zoning Ordinance No. 12 had a racially discriminatory effect.[55] The burden then shifted to the city to prove that the ordinance furthered a compelling state interest.[56] The Eighth Circuit held that the ordinance furthered none of the three primary interests asserted by the city and that the other interests asserted were insubstantial in relation to the housing opportunities foreclosed.[57] Concluding that Zoning Ordinance No. 12 violated the Fair Housing Act, the Eighth Circuit remanded the case to the district court with instructions to enjoin permanently enforcement of the ordinance.[58]

The district court issued an order declaring the ordinance unlawful and enjoining the City of Black Jack from exercising municipal authority to obstruct the development of Park View Heights.[59] The district court further directed the city "affirmatively [to] take whatever steps are necessary to permit the construction and occupancy of the proposed Park View Heights Development."[60] Defendants continued to contest the finding of liability. Six years after the events which gave rise to the suit, on October 6, 1975, the liability issue was finally settled.[61]

The question remained, however, what relief was available to the private party plaintiffs in *Black Jack I.* Injunctive relief like that granted to the Government[62] in *Black Jack II* was no longer adequate by the time of trial. Because construction costs had increased with the passage of time,[63] the plaintiffs could no longer afford to build Park View Heights.[64] Conse-

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51. Black Jack II, 372 F. Supp. 319, 329 (E.D. Mo. 1974).

52. *Id.* at 330.

53. Prior to review, the parties in *Black Jack I* stipulated they would be bound by the final determination in *Black Jack II* as to whether the zoning ordinance violated Title VIII or the federal constitution. *Black Jack I* was thus adjourned until the disposition of *Black Jack II.* Brief for Appellants, *supra* note 16, at 5.

54. 508 F.2d 1179, 1188 (8th Cir. 1974).

55. *Id.* at 1186.

56. *Id.* at 1188.

57. *Id.* at 1187.

58. *Id.* at 1188.

59. The order was entered on January 9, 1975. For further provisions of the order, *see* Black Jack III, 605 F.2d 1033, 1038 (8th Cir. 1979).

60. Black Jack III, 454 F. Supp. 1224, 1225 (E.D. Mo. 1978).

61. The City of Black Jack unsuccessfully petitioned the United States Supreme Court for certiorari, 422 U.S. 1042 (1975), and for a rehearing of its petition, 423 U.S. 884 (1975).

62. 508 F.2d 1179 (8th Cir. 1974).

63. Between 1970 and 1976, the cost of developing Park View Heights rose from $1,381,000 to $3,085,274. Brief for Appellants, *supra* note 16, at 16, 18-19.

64. Black Jack III, 454 F. Supp. 1223, 1226 (E.D. Mo. 1978).

quently, on the date set for trial, the parties entered into a consent judgment requiring the City of Black Jack to pay $450,000 in damages to the Corporation.[65] The decree precluded any further claim for damages on behalf of the plaintiff class, the ICUA, or the Corporation.[66] Although the decree did not prevent the plaintiff class from seeking further injunctive or declaratory relief, it required the opposing attorneys to attempt to resolve the question of relief without recourse to a court.

In October 1976, after unsuccessful negotiations, the class filed an action (*Black Jack III*) requesting that the city be directed "to undertake measures whereby it [could] reasonably be expected that, within a reasonable time, in the City of Black Jack, there [would] be available for multiracial, moderate-income occupancy, at least 108 dwelling units, roughly comparable in size, number of bedrooms, and quality to those which would have been constructed in Phase I of the Park View Heights Project."[67] The class sought to prove that, but for the city's conduct, the project would have been built.

A full year and a half after the parties submitted the cause for adjudication, the district court denied the plaintiff class any form of relief.[68] The court, employing a tort law analysis, found the economic factors[69] precluding the construction of Park View Heights to be intervening causes which relieved the defendants of liability.[70] In addition, the district court held

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65. For a full description of the terms of the settlement, *see* Brief for Appellants, *supra* note 16, at 9-10.

66. *See id.*

67. Black Jack III, 605 F.2d 1033, 1035 (8th Cir. 1979). The Park View Heights project had two phases. In Phase I, 108 units would have been built, in Phase II, 106. Although reference is often made to 108 units, plaintiffs arguably lost 214 units of housing.

68. Black Jack III, 454 F. Supp. 1223, 1226 (E.D. Mo. 1978). Plaintiffs had suggested methods by which the city could assure construction of at least 108 units of housing without expending municipal funds. Proposals included the adoption of an inclusionary zoning ordinance or a density bonus plan, and development of a low-cost housing program pursuant to 42 U.S.C. §§ 1437a-j. Black Jack III, 605 F.2d 1033, 1039 (8th Cir. 1979). The district court found that plaintiffs failed to establish an entitlement to further relief. Black Jack III, 454 F. Supp. 1223, 1228 (E.D. Mo. 1978).

69. Black Jack III, 454 F. Supp. 1223, 1227 (E.D. Mo. 1978). These economic factors included an inability to obtain additional federal subsidies, the cost of compliance with new building regulations to meet the new Minimum Property Standards of HUD, and added costs stemming from changes in the applicable building codes and the National Electric Code. *Id.* at 1226. The district court concluded that the inability to secure an increased subsidy was the most significant factor in the demise of Park View Heights. *Id.* St. Mark's and Metro Ministry had sponsored Park View Heights under the National Housing Act, 12 U.S.C. § 1715z-1 (1977). *See* note 38 *supra.* By 1976, a moratorium on certain new projects precluded additional funding for Park View Heights, although the original amount set aside by HUD was still available. In addition, the court attributed 20% of the rise in costs to compliance with the new building regulations. The court found these three factors unforeseeable, and consequently beyond the legal and equitable responsibility of the city. Black Jack III, 454 F. Supp. 1223, 1227 (E.D. Mo. 1978).

70. Generally, unforeseeable intervening causes of plaintiff's harm cut off defendant's liability. *See* W. PROSSER, THE LAW OF TORTS § 44 (4th ed. 1971).

that, absent a constitutional violation, courts cannot grant injunctive relief which interferes with the operation of a local government entity.[71] The Eighth Circuit again reversed and remanded.[72]

2. The Eighth Circuit Opinion in Black Jack III

a. Determining Liability and the Standard for Relief

Criticizing the district court's analysis, the Eighth Circuit flatly rejected the court's grounds for refusing to award plaintiffs any relief. The appellate court did not view the increased costs now precluding construction as intervening causes.[73] Having previously held the municipality liable, the Eighth Circuit stated that the increased costs should be considered merely as "possible factors" affecting the scope of relief.[74] The Eighth Circuit thus transformed the independent cause analysis for determining liability into a remedial principle. Instead of cutting off liability, the increased costs would, at most, limit the extent of relief. Because Park View Heights would have been constructed absent the enactment of Zoning Ordinance No. 12, the Eighth Circuit held that the district court should not have relieved the city of liability.[75]

Rejection of the traditional approach to the liability issue may not have been necessary to the court's decision. Although the court criticized the application of tort principles to zoning challenges based on racial discrimination, traditional tort reasoning would support the court's conclusion that foreseeable intervening causes do not relieve an actor of liability. As Dean Prosser wrote:

> Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which he has subjected the plaintiff has indeed come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility.[76]

When construction is delayed for any reason, costs may reasonably be expected to rise during the interim. The Eighth Circuit itself noted, in *Black Jack III,* that the increased construction costs were a foreseeable by-product of the extended litigation.[77] Accordingly, the court need not have departed from a tort law analysis in order to find for plaintiffs.

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71. Black Jack III, 454 F. Supp. 1223, 1228 (E.D. Mo. 1978).
72. Black Jack III, 605 F.2d 1033 (8th Cir. 1979).
73. *Id.* at 1039.
74. *Id.* at 1037.
75. *Id.* at 1039.
76. W. PROSSER, *supra* note 70, at 273 (footnote omitted).
77. Black Jack III, 605 F.2d 1033, 1039 (8th Cir. 1979).

Because the liability of the city had been established in a previous decision, the Eighth Circuit focused primarily on the problem of providing an appropriate form of relief. Relying upon the standard of relief applied in cases arising under Title VII of the Civil Rights Act of 1964,[78] the court held that plaintiffs merited relief which would "so far as possible eliminate the discriminatory effects of the past."[79] Guided by the purposes of the Fair Housing Act,[80] the court broadly construed section 812(c) of that Act, which permits issuance of any "appropriate" order,[81] to allow affirmative equitable relief for a violation of the Act.[82]

In a footnote, the Eighth Circuit summarily rejected the district court's contention that only constitutional violations warrant remedial injunctive relief that interferes with state and local government action.[83] The court held remedial injunctive relief appropriate if tailored to cure a violation of the Fair Housing Act.[84] Since the injunction granted in *Black Jack II* failed to provide adequate relief for the plaintiffs,[85] who still suffered from the unavailability of low-cost, integrated housing,[86] further relief was appropriate.[87]

b. The Remedy

The plaintiff class had requested an injunction requiring the municipality to take action likely to result in the development of low-cost housing.[88] The order proposed by the class was intentionally vague, placing the burden

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78. 42 U.S.C. §§ 2000e to 2000e-17 (1977). *E.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

79. Black Jack III, 605 F.2d 1033, 1036 (8th Cir. 1979) (quoting Louisiana v. United States, 380 U.S. 145, 154 (1964), *as quoted in* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

80. With Title VIII (the Fair Housing Act), Congress sought to replace ghettos with "truly integrated and balanced living patterns." Black Jack III, 605 F.2d 1033, 1036 (8th Cir. 1979) (quoting Senator Mondale, 114 CONG. REC. 3422 (1968)).

81. Section 812(c) of the Fair Housing Act, 42 U.S.C. § 3612(c) (1976), provides:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

82. Black Jack III, 605 F.2d 1033, 1036 (8th Cir. 1979).

83. *Id.* at 1039 n.11. The court simply cited § 812(c) of the Fair Housing Act, 42 U.S.C. § 3612(c) (1976), and Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978). *See also* text accompanying notes 120-22 *infra.*

84. Black Jack III, 605 F.2d 1033, 1036 (8th Cir. 1979).

85. *Id.* at 1038-39. The district court had concluded that plaintiffs had failed to establish their entitlement to further relief. Black Jack III, 454 F. Supp. 1223, 1228 (E.D. Mo. 1978).

86. Black Jack III, 605 F.2d 1033, 1039 (8th Cir. 1979).

87. *Id.*

88. *See* text accompanying note 67 *supra.*

of producing a suitable plan upon the defendants.[89] The order finally issued by the Eighth Circuit shifted that burden to the plaintiffs, but imposed upon the city an affirmative duty to cooperate with the plaintiffs in bringing low-cost housing to Black Jack.[90]

The Eighth Circuit set five guidelines for the court on remand.[91] First, the court stressed the city's affirmative obligation, stating, "We can think of no reason why, in order to remedy its violation, the City should not be required to take affirmative steps along with the plaintiff class in its efforts to bring low cost housing to Black Jack."[92] The Eighth Circuit advised the lower court to bear in mind the objectives of the Fair Housing Act.[93] Second, the remedy was to achieve the goals of the Act without any unnecessary intrusion upon governmental functions.[94] Third, the lower court was to meet with both parties and propose joint conferences in order to attempt a settlement. If those conferences failed, the court could then formulate a decree.[95] Fourth, the court was to "consider the City's duty to seek out and make land sites available for purchase by the plaintiff class that are properly zoned and so located with reference to public facilities and services as to meet established criteria for low and moderate income family housing."[96] Fifth, the court was to consider the plaintiffs' willingness to accept responsibility in finding a developer. The municipality's hostility to low and moderate income housing had previously made plaintiffs reluctant to assume this task.[97] The Eighth Circuit concluded by expressing the hope that the parties could settle out of court, since spiraling construction costs would make it increasingly difficult to remedy the wrong already done.[98]

In sum, according to the Eighth Circuit, the city's liability for the failure of the Park View Heights project and for the resulting loss of housing did not end once its unlawful ordinance was struck down and damages were paid. Mere removal of the illegal exclusionary barrier was

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89. Black Jack III, 605 F.2d 1033, 1039 (8th Cir. 1979). Plaintiffs, however, suggested methods by which the city could encourage development of low-cost housing without the expenditure of funds. *See* note 68 *supra.*

90. Black Jack III, 605 F.2d 1033, 1039-40 (8th Cir. 1979). *See* text accompanying notes 160-76 *infra,* for an analysis of the remedy.

91. In accordance with section 812(c) of the Fair Housing Act, 42 U.S.C. § 3612 (1976), the circuit court remanded the case for consideration of the appropriate equitable relief. Black Jack III, 605 F.2d 1033, 1040 (8th Cir. 1979).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* The court quoted the statement made at oral argument by plaintiff's attorney that "no developer in his or her right mind at this point in time would go into the City of Black Jack and attempt to build low and moderate income housing . . . because the City of Black Jack has indicated its powerful and abiding hostility to such projects." *Id.*

98. *Id.* at 1041.

insufficient; the city was required to participate in a plan to achieve the construction of low-cost housing within its borders.

III

THEORETICAL AND PRACTICAL OBJECTIONS TO THE PROPOSED AFFIRMATIVE RELIEF

A. Theoretical Limitations Upon the Affirmative Equitable Powers of Federal Courts

A number of theoretical and practical problems arise from the granting of broad affirmative relief in exclusionary zoning cases such as *Black Jack.* Two central issues are (1) whether a federal court which awards extensive affirmative relief in a zoning case intrudes too far upon a state function, and (2) whether broad affirmative relief is appropriate for a statutory rather than a constitutional violation.

1. Intrusiveness of the Remedy Upon State Functions

Federalism considerations have led to a reluctance on the part of federal courts to intrude upon functions traditionally reserved to the political branches of state or local governments.[99] In *Reynolds v. Sims,*[100] for example, the Supreme Court upheld a district court's imposition of a temporary legislative reapportionment plan but applauded the restraint exercised by the lower court before reapportioning.[101]

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99. The school desegregation cases discussed in text accompanying notes 104-12 *infra,* however, present a striking example of judicial activism in an area usually controlled by local governments.

100. 377 U.S. 533 (1964).

101. *Id.* at 586-87. The district court, recognizing that legislative reapportionment is primarily a legislative function, had reapportioned only after giving the Alabama legislature an adequate opportunity to do so itself. *Id.*

The Supreme Court has also applauded judicial restraint. *E.g.,* White v. Weiser, 412 U.S. 783, 794 (1973); Minnesota State Senate v. Beens, 406 U.S. 187 (1972). In addition, commentators have acknowledged the effectiveness of affirmative relief in remedying the inequality presented in the legislative reapportionment cases. *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1309 (1976); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined,* 35 U. CHI. L. REV. 583, 592-93 (1968). Professor Kurland attributes the effectiveness of affirmative relief here to two factors: a simple standard (one man, one vote) and public acquiescence. *Id.* at 593. He suggests that it is the absence of both factors in school desegregation cases which creates problems in fashioning affirmative relief. *Id.* at 594-95. While this criticism applies by analogy to exclusionary zoning litigation involving low-cost housing, where neither a simple standard nor public acquiescence exists, the problems in fashioning affirmative relief for these cases should not justify scrapping a promising remedy when others have failed.

State and local governments are usually responsible for zoning.[102] In *Black Jack III,* the Eighth Circuit was sensitive to this state interest. While willing to grant plaintiffs additional relief, the Eighth Circuit cautioned the district court against fashioning relief more intrusive than necessary to remedy a violation of the Fair Housing Act.[103]

2. *Appropriateness of Affirmative Relief Absent a Constitutional Violation*

Federal courts enjoy broad equitable powers to grant a remedy commensurate with a given constitutional violation. For example, beginning with *Brown v. Board of Education,*[104] federal courts have granted far-reaching remedies in school desegregation cases.[105] District courts may consider all available techniques of desegregation.[106] The relief granted by courts includes busing,[107] establishing remedial programs,[108] and even placing a public high school directly under judicial control.[109] To insure compliance, courts often retain jurisdiction[110] and issue supplemental orders.[111] Furthermore, despite language in the school desegregation cases emphasiz-

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102. In its brief, the City of Black Jack relied upon the notion that zoning is a legislative function with which the court should not interfere. *See* Brief for Appellee at 16-18, Black Jack III, 605 F.2d 1033 (8th Cir. 1979). This view has, however, come under increasing criticism. Hartman, *supra* note 15, at 161-62. *Developments in the Law—Zoning, supra* note 22, at 1696.

103. *See* text accompanying notes 94 & 95 *supra.*

104. 349 U.S. 294 (1955). *Brown* allows courts to consider transportation to schools, problems relating to administration, revision of school districts and attendance zones, difficulties caused by the physical condition of the school plant, as well as other factors in fashioning appropriate relief. *Id.* at 300-01.

105. Following *Brown,* the Court in Green v. County School Bd., 391 U.S. 430 (1968), placed upon the school board the affirmative duty to take necessary steps to eliminate racial segregation. *Id.* at 437-38. If school authorities fail to perform their affirmative duties, a court may order more specific action. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). In *Swann,* the Supreme Court declared that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.*

106. Davis v. School Comm'rs, 402 U.S. 33, 37 (1971). *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-31 (1971).

107. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30 (1971).

108. Milliken v. Bradley, 433 U.S. 267 (1977).

109. Morgan v. McDonough, 540 F.2d 527 (1st. Cir. 1976), *cert. denied,* 429 U.S. 1042 (1977).

110. *E.g.,* Green v. County School Bd., 391 U.S. 430, 439 (1968); Brown v. Board of Education, 349 U.S. 294, 301 (1955). *See also,* Rubinowitz, *supra* note 16, at 636-37; Special Project, *The Remedial Process in Institutional Reform Litigation,* 78 COLUM. L. REV. 784, 816-17 (1978) [hereinafter cited as *Institutional Reform Litigation*]. Retention of jurisdiction also facilitates judicial revision of the decree. *Id.* at 817.

111. Rubinowitz, *supra* note 16, at 636 n.45. Courts utilize supplemental orders primarily but not exclusively in school desegregation cases. *Id.* at 636. Courts have also used them to vindicate voting rights. *Id.* at 637.

ing the importance of education as a justification for the relief granted,[112] courts have extended the availability of broad affirmative relief to legislative reapportionment cases.[113]

The Eighth Circuit in *Black Jack III* adopted, in effect, the remedial approach of the school desegregation cases.[114] The school desegregation cases, however, involved constitutional violations. By contrast, because there is no constitutional right to housing, suits brought under the Fair Housing Act need not involve a constitutional violation.[115] Although the city's abrupt incorporation in the *Black Jack III* case could have led to a finding of racial discrimination violative of the fourteenth amendment,[116] the court never considered the constitutional issue because in *Black Jack II* the Government challenged the zoning ordinance only under the Fair Housing Act.[117] The Eighth Circuit consequently framed its remedy with reference to the statutory violation alone. The question therefore arises how far a court's remedial power extends absent a constitutional violation.

In the lower court, the City of Black Jack successfully argued that different standards of relief govern for constitutional and for statutory violations,[118] and that federal courts could not exercise their broad remedial powers absent a constitutional violation.[119] The Eighth Circuit correctly but summarily disposed of this argument by citing section 3612(c) of the Fair Housing Act, which permits affirmative relief for a statutory violation,[120] and *Resident Advisory Board v. Rizzo*.[121] The Third Circuit in *Rizzo* also faced the problem of framing an appropriate remedy for a violation of the Fair Housing Act. It applied, without discussion, the equitable powers analysis used by courts confronted with constitutional violations.[122] The *Rizzo* court failed to explain how a standard of relief employed in constitutional cases would be appropriate in remedying a statutory violation. The Eighth Circuit, merely citing *Rizzo,* similarly failed to address the issue whether courts should exercise broad remedial powers absent constitutional violations.

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112. "Today, education is perhaps the most important function of state and local government." Brown v. Board of Education, 347 U.S. 483, 493 (1954). *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (education is not a "fundamental" right).

113. *See* text accompanying notes 100 & 101 *infra.*

114. Although both sides briefed the school desegregation cases, the court never mentioned them.

115. Lindsey v. Normet, 405 U.S. 56, 74 (1972). *See* Kurland, *supra* note 101, at 538-89; *Inadequacy of Judicial Remedies, supra* note 10, at 771-72.

116. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on* Arlington Heights, 55 TEX. L. REV. 1217, 1250-51 (1977).

117. *See* text accompanying notes 48-50 *supra.*

118. Brief for Appellee, *supra* note 102, at 17-18, 22.

119. *Id.*

120. *See* note 81 *supra,* for statutory language.

121. 564 F.2d 126 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

122. *Id.* at 149.

Notwithstanding the Eighth Circuit's summary treatment of this issue, other cases provide clear support for its conclusion. Several courts have justified a grant of affirmative equitable relief without finding a constitutional violation. In *Davis v. County of Los Angeles,*[123] the Ninth Circuit wrote:

> There can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal job opportunities by qualified black workers.[124]

Furthermore, the Supreme Court held affirmative relief proper for a statutory violation in *Lau v. Nichols.*[125] Remanding the case for the fashioning of affirmative relief to remedy discrimination against non-English speaking Chinese students,[126] the *Lau* Court did not reach the equal protection claim but relied solely upon section 601 of the Civil Rights Act of 1964.[127]

While some form of affirmative relief is therefore justified, the question remains what standard should be used in awarding relief for a statutory violation. Since a constitutional violation may be seen as more serious than a statutory one,[128] a narrower range of available remedies might be appropriate for a statutory violation.[129] The courts, however, have not articulated different standards of relief. In fashioning appropriate relief for Title VII violations, for example, courts broadly seek to (1) eliminate past discriminatory effects, and (2) prevent future discrimination.[130] Significantly, several courts have assumed that this two-part standard of relief applies in

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123. 566 F.2d 1334 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1979).

124. *Id.* at 1342 (citing United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971)).

125. 414 U.S. 563 (1974).

126. *Id.*

127. 42 U.S.C. § 2000d.

128. For example, some judges would not allow executives a qualified immunity when they violate constitutional rights. *E.g.,* Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring); Sostre v. McGinnis, 442 F.2d 178, 205 n.51 (2d Cir. 1971) (en banc).

129. Language taken out of context from Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), would support this contention. In that case, the Court wrote: "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Id.* at 16. Since *Swann* involved no discrete statutory claim, however, it can be argued that the Court's emphasis upon constitutional violations was only natural and should not be accorded undue significance. *See* Brief for Appellants, *supra* note 16, at 38 n.50.

130. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); Davis v. County of Los Angeles, 566 F.2d 1334, 1342 (9th Cir. 1977). The aim of the court in Title VII cases is to make plaintiffs whole. Franks v. Bowman Transp. Co., 424 U.S. 747, 774 (1976) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)).

Title VIII cases as well.[131] The Seventh Circuit in *Moore v. Townsend*[132] proposed an equally far-reaching remedy. There the court suggested that having found a violation of 42 U.S.C. § 1982, "the District Judge had the power as well as the duty to use any available remedy to make good the wrong done."[133]

Congress exercises plenary control over the lower federal courts,[134] and its authority to enable the federal courts to grant broad affirmative relief is beyond question. In the case of *Black Jack III,* the Eighth Circuit was guided by the remedial provision of the Fair Housing Act, section 812(c). On its face, this section permits a wide variety of remedies,[135] including punitive damages,[136] compensatory damages,[137] specific performance,[138] injunctive relief,[139] and costs.[140] Furthermore, section 812(c) permits the courts to award any relief deemed appropriate[141] to prevent a future violation of Title VIII as well as to remedy the effects of past discrimination.[142]

While the negative injunction originally provided in *Black Jack II*[143] clearly falls within the remedial provision of the Fair Housing Act, the Eighth Circuit read section 812(c) very broadly to justify the type of affirmative relief eventually granted in *Black Jack III.* The court concluded that because this remedy alone could make plaintiffs whole, it was not only appropriate but necessary. Section 812(c) therefore permitted granting this form of relief. Because courts must select a remedy with reference to the

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131. United States v. Jamestown Center-in-the-Grove Apts., 557 F.2d 1079, 1080 (5th Cir. 1977); United States v. L & H Land Corp., 407 F. Supp. 576 (S.D. Fla. 1976); United States v. Henshaw Bros., 401 F. Supp. 399 (E.D. Va. 1974). *See* United States v. Warwick Mobile Home Estates, Inc., 537 F.2d 1148, 1150 (4th Cir. 1976).

132. 525 F.2d 482 (7th Cir. 1975).

133. *Id.* at 485 (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969)).

134. Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850).

135. *See* note 81 *supra.*

136. *See* Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974).

137. *See* Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), *cert. denied,* 419 U.S. 1027 (1974); Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976).

138. *See* Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975).

139. *See* Harrison v. Otto G. Heinzeroth Mortgage Co., 430 F. Supp. 893 (N.D. Ohio 1977); Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976), *aff'd in part, vacated in part,* 564 F.2d 126 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978); Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975); United States v. Henshaw Bros., 401 F. Supp. 399 (E.D. Va. 1974).

140. *See* Moorehead v. Lewis, 432 F. Supp. 674, 680 (N.D. Ill. 1977), *aff'd,* 594 F.2d 867 (7th Cir. 1979).

141. Fort v. White, 383 F. Supp. 949 (D. Conn. 1974).

142. *See* United States v. Jamestown Center-in-the-Grove Apts., 557 F.2d 1079, 1080 (5th Cir. 1977).

143. Black Jack II, 508 F.2d 1179, 1188 (8th Cir. 1974).

extent of the specific violation,[144] some forms of relief might have exceeded the *Black Jack* court's discretionary bounds.[145]

B. Practical Limitations of Affirmative Relief

Generally, affirmative relief promises to promote the development of housing more effectively and efficiently than other forms of relief.[146] By making it more difficult for a municipality to circumvent a court's decision, affirmative relief such as requiring the issuance of a permit should provide greater assurance that a plaintiff's project will be built. The prospect of effective relief may also encourage developers to bring suit by increasing the chances of construction and, consequently, of profit.[147]

The use of affirmative relief in exclusionary zoning cases, however, entails three major problems: (1) the need for continuing judicial supervision to ensure compliance, (2) the relative ineffectiveness of even affirmative relief where low-cost rather than luxury housing is concerned, and (3) the danger that awarding affirmative relief will lead to "spot zoning."

1. Necessity for Continuing Judicial Supervision

Critics of affirmative relief note the essentially negative nature of judicial power.[148] Decrees which prevent someone from doing something are usually more easily enforced than those which require someone to perform a task.[149] Certainly, affirmative relief entails problems of judicial enforcement and on-going supervision.[150] Yet courts have adequately dealt with

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144. "As with any equity case, the nature of the violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

145. This is true even in a school desegregation case. In Milliken v. Bradley, 418 U.S. 717 (1974), the Supreme Court refused to allow an interdistrict remedy absent a virtually impossible finding of constitutional violations by all school districts covered by the desegregation plan. *Id.* at 744-45. More recently, the Supreme Court has limited the discretion accorded district courts in fashioning equitable relief. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 443-44 (1976) (Brennan, J., dissenting). In one housing discrimination case, Hills v. Gautreaux, 425 U.S. 284 (1976), the Supreme Court held that federal courts have the authority to consider a metropolitan area remedy. This issue did not arise in *Black Jack* since the discrimination complained of involved only one municipality.

146. *See generally* Berenson v. Town of New Castle, 67 A.D.2d 506, 524; 415 N.Y.S.2d 669, 680 (1979).

147. *Developments in the Law—Zoning, supra* note 22, at 1698. The advantages of affirmative relief are most apparent in cases in which a developer seeks approval to build a specific project upon his parcel, as opposed to suits in which the prospective residents challenge an entire zoning scheme. Although a developer may initially challenge the entire ordinance even in a specific project case, the developer usually does not care whether the zoning scheme continues to be exclusionary, as long as he or she receives site-specific relief. Hyson, *supra* note 30, at 22. *See also* text accompanying notes 34-37 *supra.*

148. *See* Kurland, *supra* note 101, at 595. Although Professor Kurland discusses the Supreme Court, his remarks are apposite to the lower federal courts as well.

149. *See* Mallach, *supra* note 2, at 670.

150. *See* Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures,* 120 U. PA. L. REV. 1029, 1040 (1972); *Institutional Reform Litigation, supra* note 110, at 813.

problems of judicial enforcement and supervision in contexts such as busing in the school desegregation cases.[151] Using their equitable powers, courts have revised injunctions to clarify ambiguities, to cope with noncompliance, to reflect altered factual circumstances or legal standards, and to reformulate ineffective measures.[152] There is no apparent reason why exclusionary zoning cases should involve any greater difficulties than school desegregation cases.

2. Relative Ineffectiveness for Low-Cost Housing

Affirmative relief will often be effective in situations involving middle and upper income multi-family units.[153] Builders of such housing are less likely to encounter the strong community opposition encountered by developers of low income housing,[154] in part because middle and upper income buildings may generate revenue surpluses for the municipality.[155] In addition, developers of luxury housing may have selected a site, thus facilitating the framing of a specific decree.[156] By contrast, because in most exclusionary zoning actions a specific site has not been selected, the court must frame a vague decree which may lead to additional litigation.[157]

Although affirmative relief may be more effective when luxury rather than low income housing is concerned, its comparative efficacy matters less than its usefulness to low income housing plaintiffs. Affirmative relief may be the best way to ensure that a given project will be completed.

3. Danger of "Spot Zoning"

Affirmative relief is comparable to "spot zoning" in that it grants a permit only to the developer who brings suit; thus, it could create an erratic pattern of growth.[158] The fear that affirmative relief will lead to spot zoning may be reasonable when plaintiffs challenge an entire municipal or regional zoning scheme. It is less warranted, however, in the circumstances

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151. *See* text accompanying notes 104-11 *supra.*

152. *Institutional Reform Litigation, supra* note 110, at 817-21. For example, the violence which erupted in response to a South Boston school desegregation decision, Morgan v. Kerrigan, 401 F. Supp. 216, 225 (D. Mass.), *aff'd,* 530 F.2d 401 (1st Cir. 1975), *cert. denied,* 426 U.S. 935 (1976), warranted issuance of supplemental orders. *Institutional Reform Litigation, supra* note 110, at 820.

153. Note, *A Wrong Without A Remedy: Judicial Approaches to Exclusionary Zoning,* 6 RUT.-CAM. L.J. 727, 728 (1975) [hereinafter cited as *Judicial Approaches*].

154. *Id.* at 728-31; Krasnowiecki, *supra* note 150, at 1040. Luxury developers may argue that high rent brackets generate surpluses for the municipality. *Judicial Approaches, supra* note 153, at 729-30.

155. *Judicial Approaches, supra* note 153, at 728.

156. *Id.*

157. *Id.* at 729. Although the *Black Jack* plaintiffs initially selected and even acquired an option on a site, that site was no longer available by the time the Eighth Circuit considered what would be an appropriate remedy. *See* text accompanying notes 62-64 *supra.*

158. *Developments in the Law—Zoning, supra* note 22, at 1701.

of *Black Jack III,* which involved specific housing projects.[159] When the original ordinance was not a product of careful regional planning but rather of calculated hostility to a given project, the court is less likely to be interfering with legislative "planning." Furthermore, the court in *Black Jack III* did not select a site but simply required the city to work with plaintiffs to assure the construction of low-cost housing in the City of Black Jack.

IV

LIMITATIONS OF THE *Black Jack III* REMEDY

Recognizing that only the construction of low-cost housing could provide effective relief for the *Black Jack III* plaintiffs, the Eighth Circuit introduced a remedy which significantly improved the chances that such housing would ultimately be built. The court limited the city's opportunity to evade the decision by imposing upon the municipality an affirmative obligation to aid plaintiffs. The decision promises to benefit all potential plaintiffs as well. Because the court required that the city make plaintiffs whole even though construction had been precluded by the rise in costs due to delay, the decision may discourage deliberate delay by defendants in future cases. In cases of extreme hostility to the proposed projects, however, this may not be enough. Even if a court can eventually force a city to accept a housing project, developers may still face protracted court battles before getting to the remedial stage.[160] Since construction grinds to a halt in the interim, municipalities hostile to such projects may opt to delay the completion of the project as long as possible. Nevertheless, *Black Jack III* represents a significant victory for plaintiffs in most specific-project lawsuits.

A fundamental problem with the *Black Jack III* remedy is its vagueness. Although the Eighth Circuit required that the City of Black Jack take "affirmative steps" with plaintiffs to construct housing,[161] the court did not specify what constitutes appropriate "steps."[162] The court also failed to detail the city's obligation to seek and make available alternative sites.[163] In discussing plaintiffs' responsibility for finding a developer,[164] the court never considered whether the city could object to the project as proposed by plaintiffs and, if so, under what conditions. Further, the court avoided the

159. *See* text accompanying notes 34-37 *supra.*

160. *See* text accompanying notes 14-21 *supra.*

161. *See* text accompanying notes 92 & 93 *supra.*

162. The court did, however, favor adoption of an inclusionary zoning ordinance over the other remedies proposed by plaintiffs. Black Jack III, 605 F.2d 1033, 1039 n.6 (8th Cir. 1979). *See* note 68 *supra,* for plaintiff's suggested remedies.

163. *See* text accompanying note 96 *supra.* The court suggested no methods by which the city could meet this obligation. The court may have had in mind duties comparable to those imposed in Crow v. Brown, 332 F. Supp 382 (N.D. Ga. 1971). *See* note 31 *supra.*

164. *See* text accompanying notes 91-98 *supra.*

question whether simply accepting a developer's plan to build over 108 units would terminate the city's obligation, or whether the city should compensate plaintiffs for housing which might have been built had the city not discouraged multi-family construction.[165]

Notwithstanding these unresolved issues, the framing of such a vague remedy may have been appropriate, in light of the circuit court's role in the litigation. In accordance with the Fair Housing Act, the Eighth Circuit left the question of relief to the district court.[166] Provision of a more detailed remedy would have usurped the function of, and perhaps unnecessarily antagonized, the lower court.[167] Moreover, an award of specific relief could produce further tensions, impeding cooperative efforts. A peaceable settlement may be better promoted by the vague but affirmative duty to cooperate which the court imposed.[168] Since the Eighth Circuit's instructions are so general, the district court will necessarily narrow the remedy on remand. Yet, the strongly worded circuit court opinion[169] makes it clear that plaintiffs must have effective relief.[170]

On remand, what the *Black Jack* plaintiffs ultimately receive will depend largely upon what they request. The class in *Black Jack III* suffered two kinds of injuries: the loss of 108 units of housing in the Park View Heights project,[171] and the loss of other units which might have been built had the City of Black Jack's tactics not chilled development of multi-family projects. Tactical considerations will determine whether the *Black Jack III* plaintiffs seek redress for both losses, and the kinds of remedies plaintiffs propose. If plaintiffs request more than the lower court is willing to give, the case will presumably return to the Eighth Circuit, giving that court an opportunity to refine its own decision. Since *Black Jack III* presently provides a powerful precedent for plaintiffs in specific-project cases, plaintiffs' lawyers may request a conservative remedy in order to assure that the circuit court opinion will remain intact.

To remedy the loss of the specific housing units, the city should, at a minimum, cooperate with the class in erecting a low-cost, multi-family project. Creating a remedy for lost housing opportunities poses an additional problem, because it is impossible to ascertain what housing would have been built without the municipality's violation.

Certain factors besides vagueness limit the applicability of *Black Jack III*. First, absent bad faith,[172] a court may avoid granting such an intrusive

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165. Had Park View Heights been built, plaintiffs could have enjoyed at least 228 units of housing, not just 120. *See* note 67 *supra.*

166. Black Jack III, 605 F.2d 1033, 1040 (8th Cir. 1979).

167. The Eighth Circuit has already reversed the lower court three times on claims based upon the municipality's discriminatory actions.

168. Black Jack III, 605 F.2d 1033, 1040 (8th Cir. 1979).

169. *Id.*

170. *Id.*

171. *See* note 67 *supra.*

172. *See* text accompanying note 116 *supra.*

remedy. Second, section 812(c) of the Fair Housing Act, which permits broad equitable relief, only covers actions brought under that Act. A constitutional violation would bring the court's broad equitable powers into play, but because no constitutional right to housing exists,[173] federal courts require a statutory basis for exercising similarly broad powers in zoning cases. Third, while *Black Jack III* is not limited to its facts, the decision does little for plaintiffs challenging an entire zoning scheme. As discussed previously, the decision's remedial provisions are applicable primarily to specific-project cases.[174] Finally, this decision may not control in a case where wholly unforeseeable increased costs preclude the development of a low-cost housing project.[175] As noted previously, the Eighth Circuit stated that the increased construction costs in *Black Jack III* were a foreseeable by-product of extended litigation.[176] Despite these limitations, the *Black Jack III* remedy offers the possibility of securing effective relief for plaintiffs in specific-project cases. Not only does this remedy improve the chances that needed housing will be built, but it also underscores the importance of effectively remedying violations of the Fair Housing Act.

V

CONCLUSION

Although the *Black Jack III* remedy presents theoretical and practical problems, it nevertheless is more likely to make the plaintiffs whole than more traditional forms of relief. Plaintiffs may not always need the *Black Jack III* remedy; the less intrusive remedy of directing issuance of a building permit may satisfy plaintiffs in some situations. When, however, a municipality's delaying tactics successfully defeat the project's construction, plaintiffs may require more expansive affirmative relief. By holding the municipality liable for the loss of housing, a court will greatly increase the likelihood that low-cost housing will be constructed. Perhaps most significant, however, is the premise underlying the *Black Jack III* approach: successful plaintiffs should receive housing or be permitted to build. Whatever remedy the plaintiff class finally receives, *Black Jack III* emphasizes the importance of providing a remedy which will significantly increase the odds that needed housing will be built once the court has struck down a racially discriminatory zoning ordinance.

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173. *See* note 115 *supra.*

174. *See* text accompanying notes 6-15 *supra.*

175. Sager, *supra* note 5, at 1385; Brief for Appellants, *supra* note 16, at 35 & n.48.

176. Black Jack III, 605 F.2d 1033, 1039 (8th Cir. 1979). *See* text accompanying note 77 *supra.*