

EXCLUSIONARY ZONING—CITY OF MEMPHIS v. GREENE

A glance at the history of the housing industry in this country clearly indicates that housing has been and continues to be segregated by race.¹ This is true in spite of the fact that Congress has often addressed this issue. Section 1982 of Title 42 of the United States Code² reads in relevant part that “all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

In *City of Memphis v. Greene*,³ black residents brought a class action suit which tested the scope of both section 1982 and the thirteenth amendment.⁴ The issue addressed was whether a decision, initiated by white residents of the city which closed the north end of a street (West Drive), violated these provisions. The United States Supreme Court held that the official closing of a public street, resulting in a benefit for white residents of that street and an inconvenience disparately impacting black residents of a neighboring community, is neither a badge of slavery prohibited by the thirteenth amendment⁵ nor any impairment of property interests protected by section 1982.

In 1970, residents of Hein Park, a white residential community in the city of Memphis requested that the city close West Drive. West Drive traverses Hein Park, in a north-south direction, which is bounded by a predominantly black area to the north. Their alleged purpose was to decrease the amount of through-traffic using Hein Park streets, enhance the safety of children who live and walk to school through Hein Park, and minimize the effects of traffic pollution in the residential community.⁶ On April 1, 1974, black residents and two civic associations brought a class action suit

1. See e.g., R. BABCOCK AND F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970'S (1973); National Committee against Discrimination in Housing and Urban Land Institute, *Fair Housing and Exclusionary Land Use* (ULI Research Report No. 23, 1974).

2. Immediately after the Civil War, the United States Congress enacted, over presidential veto, a statute known as the Civil Rights Act of 1866. In 1870 that statute was reenacted and a major part is presently codified as sections 1981 and 1982 of Title 42 of the United States Codes.

3. 451 U.S. 100 (1981).

4. U.S. CONST. amend. XIII, provides: “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.”

5. The U.S. Supreme Court stated in *Jones v. Alfred Mayer Co.* that through the thirteenth amendment Congress not only sought to dissolve the bonds of master and slave, but also to determine the badges and incidents of slavery, whether or not the product of governmental action, and to remove these badges and incidents by legislation. 392 U.S. at 439-40 (1968).

6. *City of Memphis v. Greene*, 451 U.S. at 103 (1981). Jackson Avenue and Springdale Street (West Drive) are two four lane streets which are heavily used by residents of the black community to the north of Hein Park. Before the closing, a significant amount of the southbound traffic on Springdale Street would continue south into Hein Park on West Drive; the majority of drivers in that traffic were black. Due to the location of Overton Park to the south of the Hein Park community, the traffic would travel either east or west to the next through street before continuing south again to the center of the city of Memphis. The closing of West Drive would require this traffic to turn east or west before it even entered Hein Park.

in district court seeking an injunction against the city. The complaint alleged that the street closing violated their rights under the thirteenth amendment and section 1982.

The district court dismissed the complaint on the grounds that the street closing did not have a disproportionate racial impact, that racially discriminatory intent or purpose had not been proved, and that the city adhered to the normal procedures in authorizing the closing. The decision was reversed and remanded by the United States Court of Appeals for the Sixth Circuit which focused on the fact that the complaint alleged that the city of Memphis granted to white residents the benefits of privacy and tranquility associated with a dead-end street without granting the same benefit to similarly situated black residents.⁷ Accordingly, if the plaintiffs wanted relief under section 1982, they would have to prove racially discriminatory motivation, intent, or purpose on the part of the white residents tantamount to a violation of equal protection.⁸

On remand, the district court found in favor of the defendants. Again, on appeal, the Court of Appeals for the Sixth Circuit held that the district court erred in focusing on the issue of whether the defendants had granted the benefit of a street closing to whites while denying similar benefits to blacks when they applied for street closings.⁹ In addition, the court of appeals held that the plaintiffs could demonstrate that the closing of West Drive constituted a "badge of slavery" under the thirteenth amendment, thereby violating section 1982, without proving unequal treatment. The court of appeals concluded that relief under section 1982 was required because: (1) the closing would benefit a white neighborhood and detrimentally affect a black neighborhood, (2) that the erection of a barrier at precisely the point of separation of the white and black neighborhoods would have the effect of limiting contact between them, (3) the closing was not a part of a citywide plan but was rather a "unique" step to protect one neighborhood from external influence which the residents perceived as "undesirable," and (4) there was evidence that property values might decline in the predominantly black neighborhood to the north of Hein Park.¹⁰

The United States Supreme Court granted certiorari to review whether a violation of section 1982 could be established without a proof of discriminatory intent.¹¹ The Court, in an opinion by Justice Stevens,¹² did not address this question but held that the street closing did not violate the rights granted to black residents of the community north of Hein Park under section 1982 or the thirteenth amendment.¹³ Summarizing its somewhat curious factual findings, the Court concluded that the city's decision to close West Drive was not motivated by racial considerations, but by the interests

7. *Greene v. City of Memphis*, 535 F.2d 976, 978 (6th Cir. 1976).

8. *Id.* at 979.

9. *Greene v. City of Memphis*, 610 F.2d 395, 400-01 (6th Cir. 1979), *rev'd*, 451 U.S. 100 (1981).

10. 610 F.2d at 404.

11. 446 U.S. 934 (1980).

12. *City of Memphis v. Greene*, 451 U.S. 100 (1981). Justice Stevens was joined in the majority opinion by Chief Justice Burger and Justices Stewart, Powell and Rehnquist. Justice White filed a concurring opinion. Justice Marshall, joined by Justices Brennan and Blackmun, dissented.

13. *Id.* at 124, 129.

of neighborhood safety and tranquility. Although the city gave a benefit to white property owners, there was no basis to infer that it would deny a similar benefit to black property owners. The Court further concluded that the street closing did not have an adverse impact on the value of black-owned property, but only created "some *slight* inconveniences" for black motorists.¹⁴ The majority described the interpretation given to section 1982 in *Tillman v. Wheaton-Haven Recreation Ass'n*,¹⁵ and other similar cases¹⁶ as broadly construing the language of section 1982 to protect the right of black citizens to obtain and use property on an equal basis with white citizens. The Court reasoned that in applying section 1982 to this case, the analysis must focus on the relationship between the closing of West Drive and the possible impairment of respondents' property interests or their rights.¹⁷ The Court also relied on *Jones v. Alfred H. Mayer Co.*¹⁸ to discern the extent to which the thirteenth amendment's protection could be invoked by Congress under the amendment's Enabling Clause. The majority found: (1) that the street closing could not be labeled a badge or incident of slavery, despite the disparate impact of that inconvenience on black citizens, and (2) that no racially discriminatory purpose motivated the Memphis City Council, but rather found that legitimate local interests motivated the closing.¹⁹ Unlike the majority, Justice White, in a concurring opinion, concluded that a violation of section 1982 requires some showing of racially discriminatory intent.²⁰

Justice Marshall, writing for the dissent, focused primarily on the symbolic significance associated with the closing of West Drive. He asserted that this message has a much more significant adverse impact than the majority believed because of its unfavorable psychological effects upon residents of the neighboring black community. This message had been predicted by the trial judge and duly noted by the appellate court.²¹ He cited testimony of affected black residents and a real estate agent familiar with the area to support that prediction. In addition, Justice Marshall observed that testimony of Memphis city officials strongly suggested that usual procedures were not followed in the decision to close West Drive.²² In light

14. *Id.* at 119 (emphasis added).

15. 410 U.S. 31 (1973).

16. *See also*, *Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229 (1969); *Hurd v. Hodge*, 334 U.S. 24 (1948).

17. 451 U.S. at 126.

18. 392 U.S. 409 (1968). In *Jones*, the Supreme Court held that section 1982 prohibits all racial discrimination, whether governmental or private, in the sale or rental of property.

19. 451 U.S. at 126. The Court recognized the wide discretion local government must be allowed in taking action to protect its legitimate interests, and in accommodating the conflicting interests affected by that action. *See, e.g.*, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

20. *Id.* at 135 (White, J., concurring).

21. It was said at trial that: "There is proof that this is just an invitation to vandalism and to defiance and confrontation from the people. Obviously the black people north of there [Hein Park] who [sic] are being told to stay out of the subdivision." 610 F.2d 395, 399 (trial record as quoted by appeals court). *See also, id.* at 404.

Justice Marshall similarly observed: "[T]he city is creating the barrier across West Drive by deeding public property to private landowners. Nothing will prevent the residents of Hein Park from excluding 'undesirable' pedestrians as well as vehicular traffic if they so choose." 451 U.S. at 138-39 (Marshall, J., dissenting).

22. 451 U.S. at 142-43 (Marshall, J., dissenting). Specific examples of deviations from the normal procedure noted included the city's permitting the street closing application to go through

of these observations, Justice Marshall further noted that evidence did exist to support a finding of purpose or intent to racially discriminate.²³ Finally, the dissent disagreed with the majority's conclusion that black property owners north of Hein Park would not suffer economic harm as a result of the street closing.

City of Memphis v. Greene in some ways is not a case of first impression, as again the United States Supreme Court is faced with an issue arising out of the thirteenth amendment and the post-Civil War legislation authorized by it.²⁴ The thirteenth amendment and its enabling legislation were revived in *Jones v. Alfred H. Mayer Co.*²⁵ In *Jones*, a section 1982 action was the beginning of the Court's trend of broadly construing that section as well as the Enabling Clause, section 2 of the thirteenth amendment. In *Sullivan v. Little Hunting Park*,²⁶ the Court extended section 1982 to prohibit racial discrimination in the provision of facilities or benefits incidental to, or associated with, the ownership or rental of property. Such discrimination interferes with a black person's right to lease or hold property on an equal basis with white persons. This line of decisions reaffirmed the reach of the thirteenth amendment prohibitions through section 1982 and expanded its protection to bar overt discrimination in the sale or rental of property. This reaffirmation, however, seems halted by *City of Memphis v. Greene*. The majority, implies that before an act is considered a badge or incident of slavery subject to the sanction of the thirteenth amendment and its enabling legislation, it must entail a complete deprivation of a right or privilege.

In concert with this criticism is the onerous burden placed on the plaintiff to prove racial motivation in order to establish a section 1982 violation. In *Arlington Heights v. Metropolitan Housing Corp.*²⁷ the Court took into account circumstantial and direct evidence to support a prima facie case of racial motivation. This is not evident in the instant case. The Court in *Greene* saw no discriminatory intent in the street closing, however, the majority accepted at face value the interests of neighborhood tranquility and child safety asserted by the city. It is questionable that if neighborhood tranquility and safety of school children are legitimate local concerns, a city-wide effort to promote residential safety of *all* school children, both black and white, was not suggested as a viable alternative to the street closing.

In *Greene*, it was known at the outset that the community north of Hein Park was predominantly black, that the majority of the traffic on West Drive consisted of blacks traveling to and from the community, and that the inconveniences associated with the closing of West Drive would weigh disproportionately on black citizens. However, the Court noted that "the slight inconvenience" of the drivers was a function of where they live and where

without the signature of one resident, despite the requirement that such applications be signed by all residents of the affected street; the city's failure to give notice to the black residents about the application under consideration to close West Drive; and City Council's granting only 15 minutes for opponents of the closing to state their cause.

23. *Id.* at 144 n.11.

24. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883).

25. 392 U.S. 409 (1968). In *Jones*, the petitioners alleged that respondent, Alfred H. Mayer Co., had refused to sell to them in the community of Poddock Woods in St. Louis County solely because they were black.

26. 396 U.S. 229 (1969).

27. 429 U.S. 252, 266 (1977).

they regularly drive—not a function of their race. This seems to be a dubious point for the Court to make, since in fact where the black residents can drive is in direct correlation with their race.

The closing of West Drive was not as blatant a form of racial discrimination as refusing to sell or rent property to blacks. Usually, because there is only circumstantial evidence of racial motivation, a plaintiff's success in proving it depends on the fact finder's own biases and feelings about race.²⁸ Because of this, the Court could have adopted the "effects" test suggested in *United States v. City of Black Jack*.²⁹ In essence, instead of attempting to prove racially motivated "intent," the plaintiffs would demonstrate the caustic "effects" of the action.

In *City of Black Jack*, the United States brought action against the City under Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act).³⁰ The allegation was that the City had denied persons housing on the basis of race by adopting a zoning ordinance which prohibited the construction of any new multiple-family dwellings. The United States Court of Appeals for the Eighth Circuit reversed and remanded the district court's decision holding that there was no compelling governmental interest that would offset the racially discriminatory effect of the ordinance. The Fair Housing Act, like section 1982, was enacted to further support the enforcement of the thirteenth amendment.³¹

Reliance on the "effects" test balances the plaintiff's burden of proof between the plaintiff and the defendant. Following the analysis of the Court in *City of Black Jack*, once the plaintiffs could make a prima facie showing of discrimination, the defendants would have to meet the strict scrutiny requirements of equal protection.³² As Justice Marshall argued in his dissent in *Greene*, there appears to be ample evidence to support a prima facie case of discrimination in violation of the thirteenth amendment.³³ The majority concedes that the closing of West Drive results in a benefit to white residents while simultaneously imposing a disadvantage on black residents. The erection of the barrier would limit contact between the white and black neighborhoods. Also, there was evidence that as a result of the street closing, property values might decline in the black neighborhood. Finally, allowing the white residents the discretion to physically prohibit all "undesirable" traffic from entering Hein Park is to allow them to practice exclusionary zoning at the expense of psychological welfare of black citizens. That the majority was able to circumnavigate these facts seems astounding.

The governmental interests asserted in *City of Black Jack* as justification for the ban on further apartments were enumerated as follows: (1) control of road traffic, (2) prevention of overcrowding of schools, and (3) prevention of devaluation of adjacent single-family homes. None of the above rationale was considered sufficiently "compelling" to justify the pro-

28. See, Brown, Givelber & Subrin, *Treating Blacks As If They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1, 13 (1975).

29. 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

30. Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1968).

31. *City of Black Jack*, 508 F.2d at 1184.

32. *Id.* at 1185, n.4.

33. *Greene*, 451 U.S. at 137-47.

posed municipal action.³⁴ The local interests asserted in *Greene*, those of decreasing the amount of through-traffic and enhancing the safety of children who live and walk to school in the area, closely approximate the first two interests asserted in *City of Black Jack*. It is therefore doubtful that these interests would be considered compelling were the "effects" test to be applied in *Greene*.

The holding in *Greene* stifles any progress made in light of the broad reading of section 1982 and the protections of freedom under the thirteenth amendment outlined in *Jones v. Alfred H. Mayer Co.* Legislation which entitles *all* citizens to "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property,"³⁵ is in practice a hollow promise when read as a mere assertion of narrow contractual property rights. Though the question of an intent requirement for a section 1982 cause of action appears open, the myopic fact finding in *Greene* leaves no principles for determining the scope of the rights protected by section 1982 or, for that matter, the thirteenth amendment. Subtle methods of discrimination masked by an assertion of local interests become the rule rather than the exception. The effect is exclusionary zoning which purposefully separates communities by race to enhance the rights of a few while denying the same rights to many others. As a result, the pattern of housing segregation in this country will flourish.

JULIE E. HALL

34. *City of Black Jack*, 508 F.2d at 1186-87.

35. 42 U.S.C. 1982 (1866).