

In the
Supreme Court of the United States

ROBERT WARTH, ET AL.,

Pettioners,

v.

IRA SELDIN, ET AL.,

Respondents.

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SUPREME COURT, U. S.

C. I.

No. 73-2024

Washington, D. C.
March 17, 1975

Pages 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

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 ROBERT WARTH, ET AL.,
 Petitioners,
 v. No. 73-2024
 IRA SELDIN, ET AL.,
 Respondents.
 -----X

Washington, D. C.

Monday, March 17, 1975

The above-entitled matter came on for argument at
 11:49 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. EMMELYN LOGAN-BALDWIN, ESQ.
 510 Powers Building
 Rochester, New York 14614, for the petitioners.

JAMES M. HARTMAN, ESQ.
 Harris, Beach and Wilcox
 Two State Street
 Rochester, New York 14614, for the respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-2024, Warth against Seldin.

You may proceed whenever you are ready, Mrs. Logan-Baldwin.

ORAL ARGUMENT OF MRS. EMMELYN LOGAN-BALDWIN

ON BEHALF OF THE PETITIONERS

MRS. LOGAN-BALDWIN: Mr. Chief Justice, and may it please the Court: This case is before the court by a writ of certiorari to the Second Circuit Court of Appeals. The District Court for the Western District of New York originally dismissed the complaint on two grounds: None of the petitioners had alleged standing to sue and that no crime was stated.

The Second Circuit Court of Appeals affirmed solely on the ground none of the petitioners had standing to sue.

Thus the record before this Court consists only of the complaint of the plaintiffs, the motion papers of the respondents on the motion to dismiss, and the affidavits in opposition to that motion to dismiss. The record, then, as it stands, must be reviewed by assuming that all of the material allegations of the complaint are true, and the complaints must be read in the light most favorable to the construction of this allegation by the complainant to grant any relief that could be possibly granted with a fair and liberal reading of that complaint.

The basic complaint of the petitioners is that the zoning ordinance of the town of Penfield, New York, on its face and as applied is illegal and unconstitutional, being racially discriminatory.

The question before this Court is whether any of the petitioners have alleged injury in fact and that injury being within a zone of interest of a constitutional or statutory provision which petitioners allege that the respondents violated.

The petitioners before the Court are basically three groups, or three categories. First of all, the petitioners are low and moderate minority income persons who claim that they have been forbidden or excluded from residing in the town of Penfield by the operation of the Town of Penfield's racially exclusionary zoning ordinance.

Secondly, the petitioners are organizations and associations of persons whose members have been actively involved in efforts to amend the zoning ordinance of the Town of Penfield to permit the construction of low, moderate, multiracial income housing there, although it actually made proposals for the construction of such housing in the town of Penfield, all to no avail.

The first of these groups --

QUESTION: They don't need an ordinance to make it multiracial, do they?

MRS. LOGAN-BALDWIN: Your Honor, our contention is that the homebuilders and other private builders and entities have actually made proposals in the form of housing construction which would be within a range which can be purchased by low and moderate multiracial persons. The town has arbitrarily refused to grant variances, exceptions, and so forth to a very rigid zoning law which dictates the construction only of very expensive and exclusive housing. So that the application of the zoning ordinance dictates a racial stratification in population.

QUESTION: May I inquire, is there a concrete zoning application refusal in this record?

MRS. LOGAN-BALDWIN: There are a number of instances, your Honor, of attempts --

QUESTION: Specific cases with the parties involved, your clients?

MRS. LOGAN-BALDWIN: Yes, your Honor. And let me clarify that. The Second Circuit Court of Appeals in its position suggested that there really weren't that kind of concrete proposals. I submit, your Honor, that that is a misreading of the record. The fact is that both the Rochester Homebuilders and other entities such as Penfield Better Homes, which is a member of petitioner Housing Council, have actually tried to have such construction approved by the Town of Penfield. All those efforts have been denied, all those

applications. The Penfield Better Homes application to rezone was denied by the town on the basis that the housing was not appropriate or consistent with the use of the adjacent properties, which is single-family dwellings.

I think this case falls beyond even those other cases which the Second Circuit suggested of concrete housing proposals. All efforts here have been totally frustrated, a far worse situation than any of those other cases.

I might point out with respect to the Rochester Home Builders, they allege in their complaint not only have they made these various and numerous applications for exceptions to the zoning ordinance, but that the Town of Penfield has threatened that if they pursue this lawsuit, if they try to rectify the exclusionary zoning ordinance, that they will not be allowed to do business in the ordinary course of doing business with the public officials of the town, in the ordinary course of construction of exclusive housing in the town.

QUESTION: Is Penfield Better Homes, the one that you mentioned had a plan denied, did they ever seek to review the action of the zoning commission in the New York courts?

MRS. LOGAN-BALDWIN: They did not. They possibly, as we indicate in our brief, could have done so. But the mere fact that they did not pursue that course, of course, does not prevent them from proceeding as part of a membership organization to the Federal court to get redress for these illegal

acts pursuant to the statutes of the Constitution.

QUESTION: How long before the filing of this suit in the District Court had the Penfield Better Homes application been turned down? Does the record show that?

MRS. LOGAN-BALDWIN: It does, your Honor. The Penfield Better Homes application is included in the record as a part of the affidavit of Mrs. McNabb, and I believe the date is 1971 for the conclusion of the denial of that. And the immediate preceding acts, the acts immediately preceding the filing of this complaint, were specific and concrete proposals of another organization Metro-Act of Rochester for the Town of Penfield to amend its zoning ordinance so that this construction could take place.

QUESTION: Is Metro-Act a builder?

MRS. LOGAN-BALDWIN: Metro-Act is a civic organization

QUESTION: Is it a builder?

MRS. LOGAN-BALDWIN: It is not a builder. It has not engaged in construction itself. It has engaged in a number of efforts to encourage construction. One of its members, Mrs. McNabb, this affidavit I have just referred to, is a member of Penfield Better Homes. So there is an interaction between the group plaintiffs and their efforts to build low and moderate income housing in the Town of Penfield.

QUESTION: If you prevail here, what type of remedy do you envisage?

MRS. LOGAN-BALDWIN: Well, the complaint asks for a declaratory judgment that the zoning ordinance is racially discriminatory and therefore illegal and unconstitutional and that there be an appropriate zoning ordinance drafted, proposed and enacted. Simply the same type of relief that this Court has granted in a number of the cases involving racial discrimination.

QUESTION: Is it only the standing issue here? I suppose it is, isn't it?

MRS. LOGAN-BALDWIN: This Court has only the standing issue, your Honor --

QUESTION: So if the court below was wrong below, it would still have to rule on whether there was a cause of action stated.

MRS. LOGAN-BALDWIN: Well, I think that the Court would have two choices in terms of dealing with this case. You could certainly remand to the Second Circuit telling it to proceed with the further consideration of whether a claim is stated on its face. I think, however, that this Court could also remand to the Second Circuit with directions because the record, I think, clearly establishes beyond a shadow of a doubt that a claim is stated. This is a typical claim of racial discrimination pleaded in the most traditional form, and there are many cases of this Court which would indicate this is a properly stated claim.

QUESTION: Are you suggesting that on this record we could make the determination to tell the Court of Appeals for the Second Circuit that the complaint stated a cause of action?

MRS. LOGAN-BALDWIN: I think the record would permit the Court to remand with direction. There are clearly two choices, though. The only question before this Court is standing and that is the only question which the Second Circuit reached.

QUESTION: Do you think there is an issue here of justicius as well as standing?

MRS. LOGAN-BALDWIN: I don't think, your Honor. I think if you refer to a question of rightness, if I understand your question correctly, I think there could be no such reading on this record. Rightness would involve a consideration of whether issues have reached a point of administrative finality. This zoning ordinance was adopted in 1962. We had had numerous applications of the zoning ordinance. Its pattern of enforcement is clear. The plaintiffs clearly can show that that pattern of enforcement is totally racially exclusionary.

QUESTION: This is why I asked you about the type of remedy you envisaged. And part of your answer was, I take it, that you would expect judicial enforcement of a drafting of a new ordinance.

MRS. LOGAN-BALDWIN: Well, I think, your Honors, that

in a case of racial discrimination, such an order directing affirmative relief has been a part of a district court's handling of a case, I think it would be appropriate here. I think, though, again, if I could focus on the one issue that is before the Court, and that is standing, and that as to the nature of relief, that is within the province of the district court. There, of course, has been no proof, no depositions, no interrogatories.

QUESTION: Yes, but it went off on the ground also that the complaint did not state a cause of action.

MRS. LOGAN-BALDWIN: The district court only, your Honor.

QUESTION: Therefore, either the Second Circuit or this Court has to say that it does state a cause of action before there can be a trial.

MRS. LOGAN-BALDWIN: That's correct.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch.

(Whereupon, at 12 noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue.

ORAL ARGUMENT OF MRS. EMMELYN LOGAN-BALDWIN

ON BEHALF OF THE PETITIONERS (Continued)

MRS. LOGAN-BALDWIN: The Town of Penfield, New York, is virtually 100 percent white population. In the 1960 Census its population was 12,601. Only 23 of those persons were black. In the 1970 Census the population of the town had practically doubled to 23,782 persons. At that time there were only 60 black persons.

The ordinance of the town is so drastic that there cannot be any construction there except exclusive housing.

QUESTION: Is Penfield immediately contiguous to Rochester?

MRS. LOGAN-BALDWIN: It is. It is one of the suburban towns which encircle the city of Rochester.

QUESTION: So that going from Rochester to Penfield, one would not be aware that there is --

MRS. LOGAN-BALDWIN: Not at all. In the entire metropolitan area persons work and live in both Penfield and Rochester, total interchange of population, your Honor.

QUESTION: And what is the zoning generally of Penfield? Does it include industrial and commercial zoning as well as residential?

MRS. LOGAN-BALDWIN: It does. It's a complete ordinance allowing most all kinds of uses of any full community. It's not essentially a bedroom community.

In terms of its zoning for residential purposes, however, 98 percent of the vacant land is zoned for single family dwellings. And the requirements of the ordinance are such that total lot size, house set back, side set back, the space of the house dictate that according to 1972 building figures you couldn't construct a single family dwelling there costing less than \$29,115. There is only .3 of 1 percent --

QUESTION: Does that include the cost of land acquisition?

MRS. LOGAN-BALDWIN: That would include the cost of land.

QUESTION: What is the land limitation, the minimum lot size?

MRS. LOGAN-BALDWIN: In terms of minimum lot size, roughly 20,000 square feet, your Honor.

QUESTION: Half an acre?

MRS. LOGAN-BALDWIN: Yes, sir. In terms of what the experts who examined this zoning ordinance suggest as a reasonable size of lot, that is, half that, roughly 10,000 square feet.

The zoning ordinance --

QUESTION: Who are the experts that you refer to?

MRS. LOGAN-BALDWIN: The experts are city planners who have filed an affidavit on behalf of the petitioners. It appears in the record beginning --

QUESTION: What are their qualifications to tell Penfield what it ought to have?

MRS. LOGAN-BALDWIN: Well, these are persons who actually are involved in drafting of ordinances, involved in the study of zoning ordinances. Two of these experts have participated in actual studies of zoning ordinances, including the Town of Penfield's ordinance, on behalf of the metropolitan governments of the Rochester area. And in that study which was conducted in 1970 the expert concluded that the only reason for the total absence of low and moderate income housing in the suburban towns, including the Town of Penfield, is racial prejudice.

QUESTION: But who are these experts?

MRS. LOGAN-BALDWIN: One, Mr. Kling, is a professor at the University of Rochester. He is generally known as an urban planner.

QUESTION: Professor of what?

MRS. LOGAN-BALDWIN: Professor of urban planning.

QUESTION: And degrees of what?

MRS. LOGAN-BALDWIN: I believe Mr. Kling had a Ph.D. in urban planning from the University of Michigan. He is presently teaching both at the University of Rochester and at

St. John Fisher College.

Mr. Taddiken is a member of the Municipal Research Agency of the City of Rochester, a research institution that undertook the study of zoning in 1970.

QUESTION: difficulty with his qualification, but I don't have any with the first one. That was the only question my Brother Blackmun was asking, what were their qualifications.

MRS. LOGAN-BALDWIN: Yes. Well, all of them have been as careers involved in considerations of what are permissible land uses and spaces in communities.

QUESTION: And expertise in the Constitution is what? Or should I say, "if any".

MRS. LOGAN-BALDWIN: They examined this ordinance from the standpoint of the health and safety factors --

QUESTION: They don't have to be experts.

MRS. LOGAN-BALDWIN: They don't have to be experts in the Constitution.

QUESTION: Are you suggesting that there is something inherently wrong or undesirable for people to want to have a lot that's a half-acre or an acre or two acres on which to rear their families?

MRS. LOGAN-BALDWIN: That is not inherently wrong. What I am suggesting --

QUESTION: What do the people do who want that kind

of space?

MRS. LOGAN-BALDWIN: There is nothing in this case that would prevent those persons freely owning that kind of property. This case is directed, your Honor, solely to the affirmative acts of officials of a town to so classify and so zone so as to exclude racial minorities. That is what the issue is, the affirmative acts. And there is nothing here in this case that would prevent ordinary uses of land by private individuals in terms of space if they wanted to acquire that space.

Are

QUESTION: /any of the single family homes owned by members of the racial minorities?

MRS. LOGAN-BALDWIN: The record doesn't address itself to that specifically, your Honor. There are, according to census figures 60 blacks as of the 1970 Census. There is a housing study in the record of the Town of Penfield itself which would seem to indicate that the persons with large incomes, of course, are occupying very, very expensive houses there. Of the zoning ordinance, only .3 of 1 percent permits multifamily construction, and there again the requirements of space for apartments and other amenities which are --

QUESTION: I gather it's not suggested that a member of a racial minority who can afford it, even one of the most expensive of the houses, is precluded from building or buying one by the ordinance, is it?

MRS. LOGAN-BALDWIN: No, not on its face. The effect of this ordinance as it applies is to exclude a whole class of people, and that class of people is defined, your Honor, as persons, minority persons who earn roughly between \$5,000 and \$11,000 per year and who can afford a single family dwelling costing no more than \$20,000 and an apartment unit no more --

QUESTION: Why do you limit that class to minority groups? Other people with the same income limitations have the same problem, don't they?

MRS. LOGAN-BALDWIN: Well, your Honor, that is the practical effect of this ordinance.

QUESTION: Don't the white and the black with the same income have the same problem of affording a house such as is normally built in Penfield?

MRS. LOGAN-BALDWIN: Arguably so, your Honor.

QUESTION: Arguably. Well, tell me why it isn't so.

MRS. LOGAN-BALDWIN: Well, in the last analysis, our allegations are that the ordinance is aimed at minorities, blacks and Spanish Americans, and in fact --

QUESTION: That isn't what I asked you. I asked you whether or not it would have the same -- the white would have the same problem of affording a house.

MRS. LOGAN-BALDWIN: Yes, but the impact of the ordinance is on the racial minorities, the blacks --

QUESTION: Why is the impact on them any more than on

the poor whites?

MRS. LOGAN-BALDWIN: Well, those are the persons who are predominantly seeking this housing and against which the ordinance primarily excludes.

QUESTION: What evidence do you have that the blacks, the poor blacks rather than poor whites are excluded?

MRS. LOGAN-BALDWIN: Well, the first evidence, your Honor, is the housing study of Monroe County which was conducted in 1970 which indicated that the primary motivation for the exclusion of this type housing is to exclude blacks. The second indication is in the record in this 1972 study of the town itself which concludes that its impact is totally exclusionary.

QUESTION: I take it you say that in any event is the allegation, and all we have is the allegation, and if standing is established, then you have got the burden of proving that.

MRS. LOGAN-BALDWIN: Certainly, your Honor. That's precisely it.

QUESTION: Under the Federal rules, do you regard that as a well-pleaded fact or is it a conclusion?

MRS. LOGAN-BALDWIN: Well, those are the allegations, your Honor.

QUESTION: Well, is it a well-pleaded fact under the rules?

MRS. LOGAN-BALDWIN: Yes, that --

QUESTION: Is it not an opinion?

MRS. LOGAN-BALDWIN: No, I think it's a matter of fact on which evidence can be adduced.

QUESTION: Are there any Negroes that can buy \$21,000 houses in Rochester? Are you going to tell me that there are not any?

MRS. LOGAN-BALDWIN: No, your Honor.

QUESTION: I hope not.

MRS. LOGAN-BALDWIN: No.

QUESTION: No or yes. There are, are there not, in the Rochester community?

MRS. LOGAN-BALDWIN: That is correct, a house costing \$21,000, if that's the question.

QUESTION: In Penfield.

MRS. LOGAN-BALDWIN: In the city of Rochester was the question.

QUESTION: No, in this town right here.

MRS. LOGAN-BALDWIN: In Penfield?

QUESTION: Yes.

MRS. LOGAN-BALDWIN: I don't think the record speaks particularly to that question, your Honor.

QUESTION: Well, is there anything in the record that shows that there is no Negro in the Rochester area that can afford a \$21,000 house? The answer is no, because if it was in

the record, it wouldn't be true.

MRS. LOGAN-BALDWIN: Right.

QUESTION: So it is true that the fact that \$21,000 limit does not exclude all Negroes.

MRS. LOGAN-BALDWIN: Not all, that's right.

QUESTION: It does not.

QUESTION: Mrs. Logan-Baldwin, suppose we were to rule in your favor on standing and the Second Circuit or the District Court were to rule in your favor on the constitutional question, as a result of that ruling would there be any identifiable parcel of land or building that would be then available for your clients?

MRS. LOGAN-BALDWIN: Yes, your Honor.

QUESTION: Can you tell us from the record what the parcel would be?

MRS. LOGAN-BALDWIN: Well, the record has a report of the Town of Penfield which examines its total land area.

QUESTION: I mean simply as a result of the ruling that I have described, could you point to an identifiable parcel that would then be available?

MRS. LOGAN-BALDWIN: Yes, your Honor. There have been several proposals that we have talked about. Obviously --

QUESTION: Are they still pending?

MRS. LOGAN-BALDWIN: There are some so-called planned unit development proposals that are in some stage of

process.

QUESTION: But does the person own the land or have an option on the land?

MRS. LOGAN-BALDWIN: In the case of planned unit development, there is actually ownership or options, and those could proceed.

I think it's very interesting to note the experience of the Town of Penfield with the planned unit development ordinance, in order to accent what I am saying about racial prejudice. This type of an amendment to the ordinance is ordinarily viewed as a way in which you can construct low and moderate multiracial income housing. They announced the ordinance, but when builders sought to use that ordinance to construct this housing, the town board specifically responded and reacted to citizen pressure suggesting that this would permit those people to move in and property values to go down and reduce the permissible .. so that what started out to be the utilizing of the ordinance for the construction of this type housing resulted in either those projects being abandoned completely --

QUESTION: Doesn't it take a special use permit to give a planned unit development under the Town of Penfield?

MRS. LOGAN-BALDWIN: Well, there is an especially cumbersome process, you might say.

QUESTION: You can surely answer that yes or no,

can't you? Does it or does it not?

MRS. LOGAN-BALDWIN: Yes, I make that for special use.

QUESTION: Then what you are complaining about is that the board refused to grant the special use permit?

MRS. LOGAN-BALDWIN: Well, they have not processed completely these planned unit development applications. Our allegation is that they have either delayed them inordinately or so modified them to transform them into exclusive housing so that essentially those efforts have failed.

QUESTION: On the thesis that you advance here, I suppose that if there were an area in the 20 miles or 30 miles out of the large city which was laid out for minimum 10-acre lots, 10-acre tracts for people who wanted to have a lot of space and perhaps ponies for their children and what not, that would be vulnerable to the constitutional attack you made as soon as the low-income housing began to press up against that.

MRS. LOGAN-BALDWIN: Well, your Honor, again, I don't think that case reaches this. We have here only a question --

QUESTION: Is there a difference in principle from what you are advocating here?

MRS. LOGAN-BALDWIN: No. Again, what we are talking about here are affirmative acts of the Town of Penfield to exclude minorities. Now, we have to, of course, have our day

in court on those allegations.

QUESTION: Well, of course, if 20,000 square feet can be made out as exclusionary, then 10 acres very clearly would be more exclusionary, would it not?

MRS. LOGAN-BALDWIN: Well, yes, but, again, what we are talking about are particular individuals who make a claim that the affirmative acts of the town have a particular effect and pattern and each case would have to be examined on its own. But we are saying here that this is racially motivated and it's the same as the town hanging a sign outside of the Town of Penfield that minorities are not wanted here. It has that same effect.

I would like to direct my --

QUESTION: If the sign said minorities with less than \$21,000 are not wanted.

MRS. LOGAN-BALDWIN: Well, again, your Honor --

QUESTION: Are you on the racial point or the money point?

MRS. LOGAN-BALDWIN: Well, your Honor, we are on the racial point. We obviously have to at the time of trial introduce the evidence which substantiates that. But in the record the conclusions are that the enforcement of this ordinance has been with that intent in mind.

If I could, I would like to reserve the remaining time for --

QUESTION: Has a white person built anything out there for less than \$21,000?

MRS. LOGAN-BALDWIN: No.

QUESTION: Nobody has.

MRS. LOGAN-BALDWIN: It is a totally exclusionary. In fact the Town of Penfield has --

QUESTION: Are there any Negroes out there at all?

MRS. LOGAN-BALDWIN: At all?

QUESTION: You said there were some out there.

MRS. LOGAN-BALDWIN: There are 60 according to the Census, 60 out of 23,000.

QUESTION: Are they living in homes?

MRS. LOGAN-BALDWIN: The record doesn't show where there are 60 and who that 60 ..

QUESTION: May I ask a question?

MRS. LOGAN-BALDWIN: Yes, your Honor.

QUESTION: At the time the complaint was filed, Mr. Ortiz worked in Penfield.

MRS. LOGAN-BALDWIN: That's right.

QUESTION: In May of that year he gave that job up for one reason or another.

MRS. LOGAN-BALDWIN: Yes.

QUESTION: Do any of the present plaintiffs work in Penfield?

MRS. LOGAN-BALDWIN: Mr. Ortiz was the only person

who worked in Penfield. There are members of plaintiff Metro-Act of Rochester who live and reside in the Town of Penfield, approximately 9 percent of the membership of Metro-Act of Rochester are residents of the Town of Penfield.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hartman.

ORAL ARGUMENT OF JAMES M. HARTMAN ON
BEHALF OF THE RESPONDENTS

MR. HARTMAN: Mr. Chief Justice, and may it please the Court: I must take issue with the argument just made in that there are instances in this record that would indicate what my adversary concludes. First of all, the relief sought here is very, very sweeping. It is to declare the ordinance of the Town of Penfield unconstitutional, to enjoin its enforcement, and to require a new ordinance to be passed.

Second, we have these individual plaintiffs, the real plaintiffs who originally were in the case, people who are indeed members of minority groups and who are members who are poor, who are poor members of minority groups.

Not one of these individuals has made a single application for housing in Penfield. One of these persons, Mrs. Angela Reyes, alleges in supporting affidavits which were submitted on the motion to dismiss this complaint that she looked around for two years, that she saw a broker and that one broker was helpful. She has an income of \$931 a month, she

and her husband, and disposable income for housing of \$231 a month. That's the extent of her -- and that's the most that's alleged by any plaintiff.

QUESTION: Individual plaintiff.

MR. HARTMAN: Individual plaintiff, yes, your Honor, which I would like to treat first.

Then they allege in addition in the complaint that the zoning ordinance of the Town of Penfield discriminates against minorities because it hasn't waived, modified -- the administrators of that ordinance haven't waived, modified, amended, granted building permits or variances of any kind to relieve this situation. But there is not a single application for such a permit except by one of the association members who is not a plaintiff and who is not a party, doesn't seek to be a party.

Now, we are talking about a very broad constitutional effect that this Court should rule allowing these plaintiffs to have standing, because we are talking about the fourteenth amendment. We ought to talk in terms of what specifically did these plaintiffs do to create a fact context which would indicate to the Court that the fourteenth amendment has indeed been violated. Without these facts what can we work with? What relief will we give? Will the relief -- first of all, the adjudication may be unnecessary because on an application for some kind of relief from the zoning ordinance, it might

very well be granted. If it's denied, at least some controversy confrontation with the town or its administrative agencies would have taken place to give a factual context within which to make a constitutional determination of its import.

Now, right now none of these affidavits indicate that any plaintiff wants to live in Penfield. One says I might want to live there, that's Ortiz' affidavit. Reyes doesn't mention wanting to live in Penfield, or that they will live in Penfield.

Have they been injured? Or is this allegation and their position totally speculative, because if relief were granted, which they seek, the abolition in effect of the Penfield zoning ordinance, would these individual plaintiffs receive themselves any substantial relief? And have they been injured? They have a personal stake in the outcome of this litigation, if they haven't alleged they tried to get into Penfield or that they even desire to get into Penfield? Isn't this kind of like O'Shea v. Littleton, where the relief they hadn't ripened into a position to be relieved by any judgment. And I think we have to look at this matter from the vantage point of the complaint and overlook the litigation that would take place to the outcome of that litigation and determine in order to determine standing whether that outcome would in effect affect these plaintiffs.

Now, I would like to go, if I may, to the associations

plaintiffs. And what I have said concerning the individual plaintiffs applies to the associational petitioners. One is a plaintiff, Metro-Act. One, there was a motion made to bring in, the Housing Council in the Monroe County Area. Now, that motion was denied because standing was denied for all the other petitioners. And the motion is sort of surrounded by some procedural vagary because it doesn't refer to rule 19 of the Federal Rules of Civil Procedure which indicate when a party should be joined as a plaintiff and/or as a defendant depending on the circumstances. In any event, the motion to bring them in is denied and they seek to be made a party plaintiff, and it is the Housing Council which refers to Penfield Better Homes who is not a party and doesn't seek to be a party.

Now, the Housing Council is basically an association of associations and public agencies. The Penfield Better Homes did, indeed, at one time apply for a project called Highland Circle in the Town of Penfield and sought variances or permits or actually I think an amendment to the zoning ordinance. It was denied. As a matter of fact it was denied in 1969, September of 1969, and then a rehearing was had in November of '69 and on January 12, 1970, there was a denial of any further public hearing, and these are in the appendix at pages 631, 381, and 883.

Now, for two years Penfield Better Homes did nothing.

They have done nothing yet. The Housing Council is moved to be brought into the case and uses Penfield Better Homes as an incident to give standing. But Housing Council has no complaint in this action. If Housing Council were allowed to remain standing as a party to this action, there are no allegations because they had not yet put in a complaint.

Now, is Housing Council derivatively in a better position to pursue these rights than is Penfield Better Homes who had lawyers, made the application, was turned down and was turned down on three grounds -- erosion problems, traffic problems, and that the project was inconsonant with the surrounding neighborhood, which is a general and classical way that variances and rezonings are turned down in towns that are inconsonant with the neighborhood. If they didn't bring the action, are we to assume that that was done on racially discriminatory grounds? If Penfield Better Homes for two and a half years and today has not instituted any kind of action or proceeding in either the State courts in the State of New York or in Federal court alleging anything, no less racially discriminatory conduct or a racially discriminatory effect of the zoning ordinance of the Town of Penfield, is Housing Council derivatively to assert that through an affidavit of Mrs. McNabb who is not yet a party and has no complaint?

QUESTION: Is the record clear one way or another as

to whether one of the reasons that this organization was turned down was because it wanted to build houses on lots that were smaller than provided for in the zoning ordinance?

MR. HARTMAN: The decision is in the record, your Honor. Yes, sir. The decision is in the record and gives as its reason those three things I have related.

QUESTION: I know, but you still haven't answered my question, I gather.

MR. HARTMAN: I don't know that it's because they wanted to build housing of a greater density than would ordinarily be allowed. I think so.

QUESTION: What was the basis for saying that their project wouldn't be consonant with the surrounding neighborhood?

MR. HARTMAN: I think because it was for higher density multiple family housing in an area that was surrounded by residential single family housing.

QUESTION: Is that clear in the record?

MR. HARTMAN: It should be clear in the record, your Honor.

QUESTION: Now, if an organization applies for a variance to build other than single family dwellings on lots of a specified size, it is turned down, I suppose it would have had at that point, say, standing to litigate in the State court as to whether the zoning board decided correctly.

MR. HARTMAN: It has two methods you can use in the

New York State court. If the denial was done in an administrative manner by an administrative board, if you take a proceeding under article 78 of the Civil Practice Law and Rules, which is a review in the nature of certiorari mandamus, et cetera.

QUESTION: You would have a personal stake in it.

MR. HARTMAN: Oh, yes, they have --

QUESTION: Well, if he went across the street in the Federal court and said, "I've gotten hurt here by a zoning ordinance that's unconstitutional and I want it declared unconstitutional," would you say he didn't have standing?

MR. HARTMAN: He may not agree with his cause of action?

QUESTION: But how about standing?

MR. HARTMAN: He may have standing in the Federal court if he raises a Federal constitutional issue, certainly. If that partner makes himself a plaintiff in a Federal action and says because of this instance in this factual context when I confronted the Town of Penfield and sought relief, I allege that they denied it for racially discriminatory reasons, I think he would have standing.

QUESTION: Not racially discriminatory reasons, but because -- well, I wanted it because I wanted to build higher density housing than the zoning --

MR. HARTMAN: Then you would not have standing. If

it was just for higher density housing, you would not have standing.

QUESTION: He was denied his permit for that reason. And he goes and says the zoning ordinance is unconstitutional, to have denied me this is unconstitutional. Now, why doesn't he have standing?

MR. HARTMAN: Well, he would if he raised a valid constitutional question under the Federal Constitution, if he says he had been deprived of property. If he would allege he has been deprived of property, for instance, he can't develop this property --

QUESTION: I gather your argument anyway is he didn't do it.

MR. HARTMAN: He didn't do it.

QUESTION: This association of which Penfield was a member attempted to do it.

MR. HARTMAN: Right. That's correct, your Honor.

QUESTION: Aren't you confusing standing with valid defense of a constitutional claim in the answer to Mr. Justice White's question? In other words, you say he would have standing if he made a valid constitutional attack on the ordinance. The two are somewhat separate.

MR. HARTMAN: Yes, your Honor, they are separate. Now, I say he would have standing if his constitutional question were raised in a specific factual context which is

lacking here, not just because he raised a constitutional issue, no, no, no.

QUESTION: You are saying that if Penfield Homes had gone over to the Federal court right after they were denied and said this particular application is denied for this reason, they would have standing.

MR. HARTMAN: Yes, your Honor.

QUESTION: Regardless of the merits of their constitutional claim.

MR. HARTMAN: That's right. They would have standing in that case. But in this record there is no instance of that. And I say can an association -- there are association cases been brought and sustained. An association can bring a case in certain circumstances. But are they in a better position than Penfield Better Homes -- and they are not seeking that litigation, they have joined in the general abstract speculative nature of the case before this court.

QUESTION: In this connection, now that we have all interrupted you, there is a fair amount of talk in some of the amicus briefs about title VIII of the '68 Act. Is there any allegation whatsoever in the complaint about title VIII?

MR. HARTMAN: Not to my reading of the complaint.

QUESTION: Was it considered by the court below?

MR. HARTMAN: Not to my knowledge, your Honor.

In addition to these organizational petitioners, the

Housing Council, the Metro-Act, too, is an association. Metro-Act talks of a proposal. That proposal is Exhibit Q, and that's to the affidavit of a Robert Warth in the record, a proposal that they presented to the Town of Penfield. Now, what happened, and it's in the record, is they came in with this -- now, the zoning ordinance of the Town of Penfield is 89 printed pages and it covers a multitude of issues which are properly the concern of local government. Metro-Act comes in and says, We made a proposal, four typewritten pages, which starts off with a threat of litigation if you don't listen to us. It alludes to no particular property, but it says houses ought to have a square -- land ought to be 7,000 square feet for some houses. It comes in again, the next thing is 40 percent of Penfield ought to be zoned for this and something for that.

Is that a proposal, when they did make proposals which are in the record in the city of Rochester which picked sites, which gave the kind of housing, which showed the kind of recreation, which went into the many, many details that are required when you talk about a proposal for legislation by a town.

Now, can Metro-Act, has it been injured? None of its members have been injured. If none of its members have been injured, how can Metro-Act come in and say it's been --

QUESTION: Who are Metro-Act's members?

MR. HARTMAN: Any -- well, Metro-Act has a lot of

people who are interested in housing. It has some poor members of minority groups. It has some people who are not poor members, it has some rich people.

QUESTION: But it's an organization of individuals?

MR. HARTMAN: Yes, your Honor.

QUESTION: Not of associations?

MR. HARTMAN: No, no. The Council is of associations.

Now, if the individual plaintiffs, if some of them are members of Metro-Act and they haven't described a specific injury, how can Metro-Act now derivatively have a better claim than any of these individuals?

QUESTION: Mr. Hartman, to back up a little bit, Mr. Ortiz has applied to the zoning board for permission to buy and develop his own home below \$21,000, and it had been denied. Do I understand you to say he would have a right of access?

MR. HARTMAN: No. I said if he applied -

QUESTION: You said this group had a right of access.

MR. HARTMAN: I said the group doesn't have a right of access.

QUESTION: Didn't you say that the group -- what's the name of it?

MR. HARTMAN: Penfield Homes.

QUESTION: Yes, yes.

MR. HARTMAN: I said that they would have standing --

QUESTION: Ortiz has standing.

MR. HARTMAN: If he made an application on a specific parcel to build a particular home and he was denied, he would have standing.

QUESTION: Why does he have to have a particular parcel?

MR. HARTMAN: Well, a particular application. He could be a tenant for an apartment. He doesn't really have to have an apartment.

QUESTION: You would deny him standing because he didn't first go to the zoning board.

MR. HARTMAN: That's right. Or any other board.

Let me add this: That even going beyond a specific interest in property or going beyond a specific parcel of property, I see no reason, if relief is sought from the Town of Penfield, that some step shouldn't have been taken to confront the town and say, We want some land zoned. Now, whether Metro-Act does it or Mr. Ortiz does it for one piece of land --

QUESTION: What you say is if he doesn't buy the land, he has no cause of action, and if he does buy the land, he might have a cause of action.

MR. HARTMAN: No, I say if he buys the land he has a cause of action after he has applied for relief.

QUESTION: He has to put up a whole lot of money for that.

MR. HARTMAN: But Metro-Act doesn't have to put up money for that, your Honor.

QUESTION: I am talking about Ortiz for the time being. Ortiz, according to you, would have to buy a piece of land.

MR. HARTMAN: That's correct. Well, if he needed the land. But I don't think he needs the land to make that application. I think he can go in without the land for some kind of relief. They mention in the complaint not only variances and permits, your Honor, they mention .. and changes in zone. Now, he doesn't have to have land --

QUESTION: He could do that without owning a piece of land?

MR. HARTMAN: I would say --

QUESTION: He could make the application.

MR. HARTMAN: I see no reason not to. And I tell you, if he's denied a hearing on the application, that might give him some kind of standing.

QUESTION: Mr. Hartman.

MR. HARTMAN: Yes, your Honor.

QUESTION: Would you describe briefly the procedure in Penfield for one who wants to build a house? First of all, he gets a building -- he applies for a building permit.

MR. HARTMAN: No, he applies -- he first has to submit a site plan if it's more than one house, or a subdivision

plan for the planning board.

QUESTION: A site plan and plans and specifications also?

MR. HARTMAN: Right. The building inspector has to make sure they comply with the building codes of the State or the town.

QUESTION: Right.

MR. HARTMAN: And he would get a building permit.

QUESTION: Let's assume he's turned down.

MR. HARTMAN: He has an action if he's turned down on an arbitrary or capricious basis.

QUESTION: No, let's assume he's turned down. May he appeal to the Board of Zoning Appeals?

MR. HARTMAN: From the determination of the enforcing officer, yes, the building inspector.

QUESTION: So the first step is to apply for a building permit, the second step is to go to the Board of Zoning Appeals

MR. HARTMAN: Right.

QUESTION: Suppose he loses there, may he go to the City Council?

MR. HARTMAN: No, he goes to court from there in my opinion.

QUESTION: To court from there. And may he go to court from there under New York law?

MR. HARTMAN: Yes. The Article 78 proceeding -- the zoning board has final jurisdiction over appeals from enforcing officers and also ad initio, if you will, jurisdiction to grant variances. If he's denied there, he goes right to court.

QUESTION: How broad is the jurisdiction to grant variances?

MR. HARTMAN: Oh, a great deal is discretionary. There are certain New York State cases which hold -- instances in which variances are proper and when they are not, and some of the things are that there is a unique problem that it will not do violence to the general character of the town and that kind of thing.

I must say that there is a lot of latitude in the language of the cases as well as the authority of the zoning board to rule on these things.

The last group of petitioners here -- oh, I'm sorry, I forgot one organizational group, which is the Home Builders, and they seek to intervene. They say that they, number one, have not been able to build low and middle income housing because of this racially discriminatory ordinance and that they have been injured. That's the extent of it. Not a single instance of a single home builder attempting to get a single permit or make an application for a single variance is in this record. And these people are in a position -- that's

their business, to buy land, to take options on land, to get into contracts for the purchase of land, and go in and get variances and get zoning relief because they do it all the time.

QUESTION: Does the ordinance permit an option or to make an application for a variance?

MR. HARTMAN: Yes, your Honor. Contract vendee, optionee, optionor. Usually, they are joined in by the owner and the potential purchase.

QUESTION: Didn't Mrs. Logan-Baldwin say there were some plaintiffs in this case or maybe applicants for intervention who in fact had options or owned land?

MR. HARTMAN: She said so. It's not in the record.

QUESTION: She did say that, didn't she?

MR. HARTMAN: Yes, but it's not in the record except for Penfield Better Homes.

Now, there are some parts that are indeed by this time under construction, but at the time of the complaint, the PUD ordinance of the Town of Penfield happens to say --

QUESTION: What ordinance?

MR. HARTMAN: P-U-D, planned unit development, I'm sorry. We use it every day. -- happens to say that the purpose of this is because we recognize the need for housing at all economic levels. Now, it's a new ordinance, a new field, but there are four PUD's, planned unit developments, under way at

some stage in Penfield.

Now, this Home Builders -- as I say, not a single instance in the record of a single application by those in the best position to test this ordinance. So can again the Association of Home Builders, derive or obtain derivatively a better right, can they assume an injury when no member has pleaded an injury? And I say again there's a broadside attack that they have been threatened about bringing a suit.

There was a motion made here and 900 pages of material came in and not one specification on that and it apparently didn't dissuade them from trying to intervene in the suit, so I don't know where that statement comes in because there is just no way that I could state anything about it. There is nothing in the record to verify or support that if they brought this suit they would be in trouble in Penfield.

Now, the third group of petitioners are plaintiffs who sued in the nature of taxpayers, and I don't think that I ought to address myself to that at length. I think that simply
Erothingham v. Mellon and Reams v. Board of Education are preclusive on this kind of a taxpayer suit. Here you have taxpayers in the city of Rochester who attempt, and they assert that they have to pay higher taxes in Rochester because in Penfield there is not any tax abated housing. Therefore, Rochester bears a greater portion of tax abated housing and increases their real estate tax. Well, I just want to use the

word "remote." I don't think there is a specific out-of-pocket injury. They don't attack a spending law statute or ordinance nor one concerned with taxing, in addition to which they don't attack one in their own municipality. They attack it in an adjoining municipality, an ordinance which this Court has held is concerned, properly concerned with the interests it seeks to protect, that of land use, and typically the concern of local government. There has been no good faith showing of a pocketbook injury. There are some figures that taxes have gone up. Well, they have gone up all over. I don't mean only in the city of Rochester. How are you going to assert that's a result of Penfield's zoning ordinance I don't know.

As I said, this is a very -- a decision here giving standing in this case would have some very, very broad far-reaching and sweeping effects on the municipalities of 50 States. This is a typical zoning ordinance, pretty typical zoning ordinance and so found by the Court of Appeals for the Second Circuit. There is a failure of any of these plaintiffs or petitioners to show a personal stake in the outcome of the case. There is a failure to show a definitive injury. There is a failure to show a definitive factual context within which this Court can test a serious constitutional question. I think it misses the point so clearly made in Baker v. Carr that such a personal stake in the outcome of the controversy

as to assume that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional question is missing here.

QUESTION: Suppose I go to Penfield and I shop around for a house and I read the papers, look at the advertisements, talk to the dealers, and I just discover there isn't a house in town that I can afford because there is just not that kind of housing around. Now, it makes some difference -- and the reason I want to live in Penfield is to be close to work, it's close to a job and you save a lot of gasoline, and it has good schools there. You think there is no standing for him to attack the ordinance?

MR. HARTMAN: He may never win. Unless an allegation is made --

QUESTION: Well, I went to find some housing and I couldn't find any because there isn't any I can afford in town. That may be a terrible cause of action, but how about standing?

MR. HARTMAN: I don't think you have it. I think, however, you have standing --

QUESTION: If you did, some of these individuals would have.

MR. HARTMAN: I'm sorry, I didn't hear that.

QUESTION: If that would suffice for standing, then some of these individuals would have standing.

MR. HARTMAN: I don't know, I don't think they have gone that far.

QUESTION: They didn't even go to Penfield to look around for a house.

MR. HARTMAN: They didn't go that far, your Honor. I think if you said, I can't find housing in Penfield because I tried to buy this property and the owner told me I'm not going to sell it to you because I don't like United States Supreme Court Justices, I don't like your color or your race --

QUESTION: I know what would happen to that cause of action.

(Laughter.)

MR. HARTMAN: Thank you very much, your Honors.

QUESTION: May I ask a question? In the complaint one of the reliefs sought is to compel the defendant to enact a nonexclusionary zoning ordinance.

I am asking you, ma'am.

Are you serious about that, you want an injunction compelling the City Council to enact a law --

REBUTTAL ORAL ARGUMENT OF MRS. EMMELYN LOGAN-

BALDWIN ON BEHALF OF THE PETITIONERS

MRS. LOGAN-BALDWIN: Your Honor, I think again the question here is standing. The lower court -- it would be the province of the lower court to direct the appropriate relief. If the injunction is granted and the declaratory

judgment granted and the zoning ordinance is declared unconstitutional, there might not be any need for any further relief because the building could take place and the exclusionary barriers that exist would be eliminated.

QUESTION: There are some cities without any zoning laws at all.

MRS. LOGAN-BALDWIN: That could be true, your Honor.

QUESTION: Houston, Texas.

MRS. LOGAN-BALDWIN: I think again the focus and the question for this Court is standing, have these plaintiffs, these petitioners alleged injury in fact, and I think the real problem with the argument of the defendant respondents is that they are focusing as if there had been a full trial on the merits, as if we had aired all of the ramifications of the zoning ordinance. We have had no opportunity to do so.

All the low-income minority petitioners, as is confirmed in the record, have actively sought to live in the Town of Penfield. Mr. Ortiz, of course, didn't go to the zoning board of appeals because he never had an opportunity to have either a rental or purchase property in the Town of Penfield.

QUESTION: I understand Mr. Ortiz didn't try for anything at all.

MRS. LOGAN-BALDWIN: No, that's not correct. He indicates in his affidavit that he searched in Penfield for

housing. He finally had to move to Wayland, New York, and reside in Wayland.

QUESTION: What board of Penfield or any other place in the State did he apply for relief?

MRS. LOGAN-BALDWIN: He didn't go to the zoning board of appeals. He looked for housing.

QUESTION: Did he apply to any State board?

MRS. LOGAN-BALDWIN: Not any State board.

QUESTION: Or city board or any other official?

MRS. LOGAN-BALDWIN: No.

QUESTION: Is that true he didn't apply to any official of any kind?

MRS. LOGAN-BALDWIN: And no ordinary individual would have any relief to go to the zoning board of appeals to ask them to give him a particular house or anything like that. He as a person trying to find housing simply went to look and there none such there. The injury he suffered as a consequence is the extraordinary commuting to and from his job in Penfield, living in an environment which has poor schools, which has less community services and so forth. These are real injuries, I submit, the type of injuries that this Court --

QUESTION: Mrs. Logan-Baldwin, I think you had said on direct there are folks here who own or have options upon.

MRS. LOGAN-BALDWIN: There are in the record builders

applications.

QUESTION: That is among the plaintiffs in this suit or the applicants for intervention?

MRS. LOGAN-BALDWIN: They are members of organizations who are plaintiffs, your Honor, and I submit that --

QUESTION: Can you name particularly?

MRS. LOGAN-BALDWIN: The Penfield Better Homes is a member of the Housing Council which is a plaintiff and Rochester Home Builders have constructed 80 percent of the housing in the Town of Penfield over the last 15 years.

QUESTION: Does that one own or have options upon land in Penfield?

MRS. LOGAN-BALDWIN: Now, that the record does not clearly direct itself to, and there is a reason for it, your Honor. At the time of the defendants' motion, Rochester Home Builders had not yet moved to intervene. There was actually no written opposition on the part of the town to Home Builders' application to intervene, so there were no responding affidavits coming from the intervenor to particularize or to expand upon their general allegation that they have on numerous occasions applied for relief from the zoning ordinance. The town has on each occasion refused. That again --

QUESTION: How about any of the individual plaintiffs?

MRS. LOGAN-BALDWIN: The individual plaintiffs, again,

are represented through associational efforts.

QUESTION: But do some of the individuals, whether represented, whether parties or represented by other parties, are there such, according to this record, who actually own land or have options upon land?

MRS. LOGAN-BALDWIN: None of the low income minority plaintiffs own or have options, your Honor.

Thank you, your Honor, I believe my time --

QUESTION: Is Rochester Home Builders itself engaged in construction, or is it a trade association whose members engage in construction?

MRS. LOGAN-BALDWIN: It is primarily a trade association whose members engage in construction, but it has as its purpose, which is set forth in the record, to facilitate the construction of housing for the entire community, including low and moderate income housing.

QUESTION: You say it's primarily an association. Does it secondarily engage in construction itself?

MRS. LOGAN-BALDWIN: No, your Honor, not to my knowledge, and I don't think the record discloses that it has.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 1:47 p.m. the oral argument in the above-entitled matter was concluded.]

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