To: Dave Martin
From: L.F.P., Jr.

75-616 Village of Arlington Heights

This memorandum will comment on your draft opinion of 11/16, that I have found quite interesting. For the most part my comments are general rather than specific, as I would like for you to put portions of the opinion through a second draft. You can do this much better than I.

1. You will note some editorial changes, primarily on the first twenty pages. No "editing" at this stage is final, and editorial improvement by you -- and your colleague "editor" -- will of course be welcomed.

2. Part I looks fine, subject to the limited editing I have suggested.

3. Part II, dealing with standing, is excellent. Apart from quite minor editing, I see no need for change.

4. I would like for you to rewrite most of Part III, primarily with the view to condensing it to about half its present length. Try writing it with the conciseness and specificity of a Law Review note.
I now make some specific observations that may afford some guidance.

PP 22, 23. On these pages, you summarize the teaching of our prior cases, noting that circumstantial evidence may compel a finding of purpose, and that even a single action may be so invidious as to violate Equal Protection. It is important to distill and state the principles that may be deduced from prior cases. Perhaps this could be done more concisely.

I suggest greater reliance on Washington v. Davis, possibly quoting from it in the text or a note.

PP. 23-26. In these pages you were identifying relevant evidence or considerations. The points made included: (i) that "ultimate effect" is an "important starting point", but effect alone is rarely determinative. (P. 23); (ii) that the "sequence of events" leading to an official decision may shed light (PP. 23, 24); (iii) that the sequence of events may be viewed in a "broader sense", citing Mulkey (P. 24); (iv) that direct evidence in the form of contemporary statements by officials may be relevant (PP. 25, 26); (v) that direct testimony by
"decision makers" (legislators) may be helpful, but there are various negatives as well as constitutional constraints (26, 27).

I have no disagreement with any of the foregoing, although my impression is that the relevant considerations can be summarized quite concisely. Some also are almost too obvious to state, e.g., contemporary statements by officials.

Two pages (26, 27) are devoted to the possible relevancy and admissibility of testimony by the decision-makers. What you have written is excellent, and would be entirely suitable for a Law Review. I think the substance should be included in our opinion, but in condensed form and possibly relegated to a footnote.

The "awesome" paragraph on p. 28 can be omitted.

5. Subpart D of Part III decides the case.
The principles identified earlier in the opinion are applied to the facts.

At first reading, this part of the opinion seems a bit thin. After stating that the courts below made no finding of discriminatory purpose or intent, the draft simply states that we have reviewed the evidence, and find no basis for overturning the findings of the courts below. At this point, at least there should be a footnote
reference back to the discussion of the evidence in Part I. As an alternative, consider the possibility of amplifying that paragraph by summarizing in a few sentences the more pertinent evidentiary facts: this property had been zoned R-3 since 1959; it was virtually surrounded by single family homes; the owners of these homes had built or purchased them in reliance on the single family residence classification; the proposed rezoning would cause a diminishment of property values; the purpose of R-5 zoning was to serve as a buffer between single family development and commercial or manufacturing land use, a purpose that would not be served by rezoning the Lincoln Green tract to R-5.

Thus, not only was there no substantial evidence of discriminatory purpose or intent; there was rather strong affirmative evidence to the contrary.

I am not entirely sure that a summary (along the foregoing lines) is desirable in this final section. But it might be helpful to give it a try, and see how it looks.

6. Although I have not examined all of the footnotes critically, they seem generally to be in good shape. I do suggest that you ask yourself, with respect to each, whether (i) the note serves a clarifying or other useful purpose, and (ii) whether, in the case of
several of the longer notes, they could be condensed without impairing their usefulness. I shy away from too much dicta or free wheeling in notes.

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I am not on any crusade for shorter opinions and less fullsome footnotes. I do think the Court is fairly subject to some criticism (not all of it) on account of the length of our opinions and the multiplicity of the notes. What our critics sometimes overlook is that we are the Supreme Court; we have a responsibility to make law as well as decide particular controversies, and this requires careful analysis and appropriate elaboration. Such an opinion can and should be different from an essay or Law Review article.

I add these comments for the benefit of all of us, including particularly myself. Your draft is not fairly subject to this general criticism.

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Now, as to the next steps for this opinion: please write a fresh draft of Subpart A of Part III. You might also make such changes in Subpart B thereof as you think desirable.
Meanwhile, one of the secretaries can recopy the few pages in your first draft that I have edited substantially. This will give us a relatively clean copy of the first twenty pages.

It would be extremely helpful if you could give me the revised Part III by Saturday morning. I would then be able to get this back to you by Monday, with the hope that it could go to your "editor" early next week, and possibly to the printer for a Chambers draft before Thanksgiving.

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