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BY: MICHELLE D'ANDREA
Deputy City Attorney for Development Services, Plano, Texas

The Fair Housing Act and Multifamily Development: When Suburbs Get Dense

Congress adopted the Fair Housing Act ("FHA" or "Act") over 50 years ago, in 1968, shortly after the assassination of Martin Luther King Jr., to prohibit discrimination in housing, including the practice of redlining[1]. Originally, the Act covered race, color, religion and national origin. Sex was added in 1974.[2] And, in 1988, disability and familial status were added.[3]

The term "redlining" comes from the practice of withholding mortgages from minority communities. Before the Act, banks, realtors and even federal agencies used maps drafted by the Home Owners' Loan Corporation that described communities on the basis of perceived desirability and risk. According to the maps, the best neighborhoods were colored green, blue communities were still desirable, yellow were definitely declining, and the hazardous were lined in red.

The redlined communities were generally those in older urban areas and those with racial minorities. Lenders would not provide loans, so the areas fell into decline. Today 74% of Home Owners' Loan Corporation-redlined communities remain low-to-moderate income, according to a 2018 National Community Reinvestment Coalition study.[4]

After slowly increasing for about 35 years following enactment of the Act, the black homeownership rate reached nearly 50 percent in 2004, but went down significantly after 2007. In early 2019, 43 percent of black households owned their homes, essentially equal to the 42 percent recorded by the 1970 Census.[5]

Republicans and Democrats have drawn different conclusions from these numbers, with the GOP believing federal intervention is ineffective, and the Democrats saying that more intervention is needed.[6]

Recently the Trump Administration, through Secretary Carson at the Department of Housing and Urban Development ("HUD"), suspended the requirement of affirmatively furthering fair housing ("AFFH") and decided to rewrite the disparate impact rule. Both AFFH and the disparate impact rule have been used in previous administrations to further the goals of the Act.

GOP members of the House of Representatives said HUD policies should do more to push federal funding recipients to remove local zoning policies that can block the development of affordable, multi-family housing.[7] In a recent House hearing, Salim Furth of the Mercatus Center, the Republican minority's witness, defended HUD's decision to revisit the AFFH rule, but on the grounds that the 2015 rule lacked teeth. "It helped jurisdictions that wanted to be inclusive," said Furth.[8] "But if you look at communities that didn't want to be inclusive, it didn't force them to be so."[9] "Current land use regulations — one way to think about it — is that they reinforce redlining over time," Skylar Olsen, director of economic research at the Zillow Group, said in response to a question from ranking member Patrick T. McHenry, R-N.C.[10]

Meanwhile, suburban residents continue to fight multifamily housing projects. [11]

This article will discuss the impact of the Fair Housing Act on local land-use regulation, in particular regulatory limitations on multifamily housing, considering HUD guidance and caselaw. It will also provide practical tips for planning and zoning commissions and other decision-makers for complying with the Act when considering often-controversial developer requests for increased housing density in suburban areas.

In 2016, HUD and the U.S. Department of Justice released a Joint Statement with guidance about the relationship between the Act and local land-use law.[12] The Statement provides the following examples of land-use laws that control housing density in violation of the Act:

- Prohibiting or restricting the development of housing based on the belief that the residents will be members of a particular protected class, such as race, disability, or familial status, by, for example, placing a moratorium on the development of multifamily housing because of concerns that the residents will include members of a particular protected class.

- Imposing restrictions on housing because of alleged public safety concerns that are based on stereotypes about the residents' or anticipated residents' membership in a protected class, by, for example, requiring a proposed development to provide additional security measures based on a belief that persons of a particular protected class are more likely to engage in criminal activity.

The Act prohibits both intentional discrimination (with discriminatory intent) and discrimination lacking discriminatory intent but having a disparate impact on a protected group.[13] Disparate impact claims are based on a showing that the defendant's actions perpetuate segregation or disproportionality impact a minority group. Examples of violations of the Act due to disparate impact include:

- Adopting minimum floor space or lot size requirements that increase the size and cost of housing if such an increase has the effect of excluding persons from a locality or neighborhood because of their membership in a protected class, without a legally sufficient justification.
- Prohibiting low-income or multifamily housing may have a discriminatory effect on persons because of their membership in a protected class and, if so, would violate the Act absent a legally sufficient justification.[14]

Disparate-impact claims, which the US Supreme Court permits in FHA cases,[15] are analyzed in three steps. The first step requires the plaintiff to establish a prima facie case of disparate impact, which means showing at least three elements: (1) that the defendant used a policy in making housing-related decisions; (2) that a class of persons protected by the Act was harmed by this policy more than others; and (3) that this disparity was actually caused by the defendant's policy.[16]

A few cases in the last decade discuss the application of the FHA to local land-use regulations or development decisions regarding increased housing density. Reviewing the facts considered by the courts in their evaluations of these cases helps develop an understanding of how to prepare local decision-makers when they face unpopular requests for dense housing.

After Hurricane Katrina, a suburb of New Orleans placed a moratorium on multi-family housing --resulting in a challenge from a developer under the FHA. St. Bernard Parish in the Greater New Orleans area was undergoing substantial reconstruction. The Parish was also operating under a consent order with a civil rights organization to resolve previous civil rights violations. While the City of New Orleans worked on updated zoning, they adopted a twelve-month moratorium on multifamily construction. That moratorium prevented a developer from constructing mixed-income housing. Following is a portion of some of the expert testimony:

> First, the moratorium has a disparate impact on African–Americans by reducing the amount of available housing structures with 5 or more units. 17.61 % of African–American households in the New Orleans metropolitan area live in structures with 5 or more units, compared to only 9.54% of Caucasian households. African–American households are 85% more likely to live in structures with more than 5 units than Caucasian households.
>
> Second, African–Americans are disproportionately affected because the moratorium reduces the supply of rental properties. Over 90% of structures with more than 5 units are rental structures. 51.7% of African–American households in the New Orleans metropolitan area live in rental units, compared to just over 25% of Caucasian households. African–American households are twice as likely as Caucasians to live in rental housing…[17]

Considering the information from the 2018 National Community Reinvestment Coalition study and the old redlining practices, this same type of data may also apply to your city or town. It may not be difficult for a plaintiff to show that decisions against multifamily housing have a disparate impact on minorities in your community. You may even have studies prepared on behalf of your city that analyze this type of information.

After considering disparate impact, the court also looked for discriminatory intent by the Parish, using the formula established by the Fifth Circuit. In particular, they reviewed: (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporaneous statements by members of the decision-making body.[18]

This editorial appeared on the front-page of *The St. Bernard Voice*, the official newspaper of St. Bernard Parish:

> Should St. Bernard residents be concerned? Ours was a crime free community of homeown-

Continued on page 38

Federal *cont'd from page 29*

> ers with a deep appreciation for shared values ... Is that now threatened?
> The local newspaper had three entries in its legal notices this past week. All three relate to the use of private and public money to construct a total of 216 apartments in three selected sites in the parish ...
> ... The fact that each development mentions that it will provide "supportive services in a community facility including ... after school programs on a voluntary basis, adult basic education, and personal finance" may provide some insights into the background of the intended occupants ...
> Less we forget, Village Square started out as a middle class housing development that catered to teachers, other professionals, and their families. It was a wonderful place to live ... when first opened.
> After a number of years, ownership changed, maintenance diminished, and the quality of renter fell to a much lower social/economic class. Result: Village Square became what can only be described as a ghetto with drugs, crime, vandalism, and violence.
> That is generally the case with high density housing. It was just because such problems persist in that type of environment that HUD demolished the concentrated lifestyles of the "New Orleans Projects." Is St. Bernard about to buck the trend and construct them here in St. Bernard? What guarantees have the residents of St. Bernard that their tax money is not going to be used to create the kind of blight New Orleans recently destroyed?
> But the fact remains that residents know little about what is going on, [and] are not impressed when they hear the term "mixed income development" mentioned in the project description ..."

The references to "ghetto," "crime," "blight," and "shared values," according to the court, were nothing more than "camouflaged racial expressions."[19]

The court found the publication of the editorial, and the outcry from citizens about the development project after the editorial, led to the adoption of the moratorium. This suburb's moratorium on multifamily housing had a disparate effect on African Americans in violation of the FHA.[20]

Let's look at one more case. In Yuma, Arizona, a community close to the Mexican border, the City denied a zoning application requesting a change to allow 6000 square foot lots, down from 8000 square foot lots.[21] The developer's reputation was for building Hispanic neighborhoods, based on its development of several affordable housing projects in Yuma in which the majority of the homes were sold to Hispanics.[22]

According to the developer, the City's refusal to rezone land to permit higher-density development stemmed from disparate treatment of Hispanics and created disparate impact in violation of the Fair Housing Act.

Yuma's general plan supported 6,000 square foot lots.[23] The City's Analysis of Impediments indicated the Hispanic population in Yuma was concentrated in the northern, western and central parts of the City and that substantially all of the available low to moderate income housing was in those areas, and that more than 75% of the households in that area were Hispanic.[24] By contrast, whites were concentrated in the northwest and southeast parts of Yuma where they comprised more than 75% of the population. The property the developer wanted to construct upon was on the western boundary of the white majority area in the Southeast portion of Yuma.[25]

The Ninth Circuit court held that: 1) the developer's allegations that Yuma's decision was driven by animus was plausibly alleged; and 2) the existence of similarly-priced and similarly modeled housing available elsewhere in Yuma did not necessarily preclude the disparate impact claim. "We reject the district court's view that other similarly-priced and similarly-modelled housing available elsewhere necessarily precluded a finding that there was a disparate impact."[26]

One primary factor in the court's finding was that the city council denied the developer's request despite the advice of its own experts to the contrary.[27] Another was the context of racially-charged opposition by Yuma residents.[28] Also cited against Yuma was the fact that the City had approved all requests for rezoning in the last three years except for this one.[29]

A Few Practical Tips:

1. Take language seriously and make findings. Your general plan, special area plans, and other adopted documents and policies determine how to analyze a request for a zoning change.
   a. Talk to your planning staff about making reports specific to help the decision-makers make appropriate findings. Make sure the reports produced by staff quote policy language that both supports and opposes the staff recommendations, to help the decision-makers understand the proper criteria for evaluating decisions, not just the sentiment of the public.
   b. Remind your planning staff that documents prepared by other

departments, including those prepared for affordable housing or demographic purposes will be considered by those bringing Fair Housing claims against your city.

c. Train the decision-makers to prepare for hearings on applications for zoning amendments by carefully highlighting language in staff's report that supports or does not support a particular application, so that they are prepared when they make their decision to cite specific language.

d. Remind the decision-makers that they are bound to their adopted plans, at least until they take legislative action to amend those plans.

2. Create appropriate distance between public comments and considerations of the commissioners.

a. Teach your decision-makers about disparate impact and give examples.

b. Talk to the chair about monitoring residents' comments and responding when necessary to create a clear record.[30]

c. Be aware of the need to distance decision-makers from press and social media while on the record in proceedings.

Notes

1. 42 U.S.C.A. § 3601-19 (West). (President Lyndon Johnson signed the Civil Rights Act of 1968 on April 11, 1968. Title VIII of the Civil Rights Act is also known as the Fair Housing Act.)
2. PL 93–383 (S 3066), PL 93–383, August 22, 1974, 88 Stat 633. (At this time the Act established the requirement that communities receiving Community Block Grants affirmatively further fair housing.)
3. PL 100–430 (HR 1158), PL 100–430, September 13, 1988, 102 Stat 1619. (The act added handicap and familial status to the classes protected under Title VIII of the Fair Housing Act, via the Fair Housing Amendments Act.)
4. Bruce Mitchell, Phd. and Juan Franco, *HOLC "redlining" maps: The persistent structure of segregation and economic inequality* (NCRC 2018).
5. Troy McMullen, *The 'heartbreaking' decrease in black homeownership. Racism and rollbacks in government policies are taking their toll*, The Washington Post, Feb. 28, 2019.
6. House panel shifts to fair housing issues, including redlining, bias, 2019 WL 1450294.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Steve Brown, *If DFW suburbs won't allow apartments, where will hundreds of thousands of new residents live?* Dallas Morning News, May 2018; Rachel M. Cohen, *When a Suburb tries to densify, forget Minnesota Nice*, Citylab, June 21,2018; Jon Kamp, *Boston Doesn't Have Enough Housing. Can it get the Suburbs to Help*? Wall Street Journal, Dec. 8, 2018.
12. Joint Statement of the Department of Housing and Urban Development and the Department of Justice, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, Nov. 10, 2016.
13. §3604(a) Fair Housing Act; Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015).
14. Joint Statement at Question 4.
15. *Texas Dept. of Housing*, 135 S. Ct. 2507 at 2525.
16. Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 424 (4th Cir. 2018), cert. denied sub nom. Waples Mobile Home Park Ltd. P'ship v. de Reyes, No. 18-1217, 2019 WL 1280527 (U.S. May 13, 2019). (This case has a robust notation in footnote 4 about the origins of the three-part analysis.)
17. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par., 641 F. Supp. 2d 563, 567–68 (E.D. La. 2009).
18. *Id.* at 568–69.
19. *Id.* at 571.
20. *Id.* at 578.
21. Ave. 6E Investments, LLC v. City of Yuma, Ariz., 818 F.3d 493, 500 (9th Cir. 2016).
22. *Id.* at 498.
23. *Id.* at 498–99. (The City's General Plan designates the Property for use as "Low Density Residential." This designation encompasses two permissible zoning designations: "R– *499 1–6" zoning, which allows development of a residential subdivision of houses placed on 6,000 square foot lots, and "R–1–8" zoning, which requires the use of at least 8,000 square foot lots.)
24. *Id.* at 498.
25. *Id.*
26. *Id.* at 497.
27. *Id.* at 504.
28. *Id.* (The presence of community animus can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views.)
29. *Id.* at 507. (Drawing all reasonable inferences in Developers' favor, the City's singling out of their zoning request for denial supports Developers' contention that the City had a discriminatory intent.)
30. Joint Statement at Question 5. ML