A New Twist on the Fair Housing Act

— by Bradford Bullock —



The allegation is simple enough – by increasing certain minimum standards in its zoning and subdivision ordinances, a municipality allegedly causes the price of new, single-family, detached homes, built to the revised standards, to increase. Because these new, and as yet unbuilt, single-family, detached homes would allegedly be more expensive than homes built to the old standards, and because minorities (a protected class under the Fair Housing Act of 1968, or FHA)[1] tend to have lower median incomes than whites, the ordinances have a significant disparate impact on minorities' ability to purchase homes built under the amended ordinances, and thus, violate the FHA.

From a developer's perspective, the beauty of this theory is easy to see – the home building industry has long complained that excessive regulations drive up the cost of housing for working-class families. Indeed, even the Department of Housing and Urban Development (HUD) agrees that excessive regulations act as a barrier to affordable housing.[2] Assuming a plaintiff can demonstrate a minority income disparity[3] in a given geographic region, a party could, fairly easily, establish a prima facie disparate impact if all it has to show is that a regulation will make housing more expensive, and that minorities (or another protected class) have lower median incomes than whites.

From a municipality's perspective, the danger of the theory is clear – even modest regulatory changes can, potentially, have a significant disparate impact on a protected class if there is a large enough income gap in a particular region. And even absent a large gap, a sudden increase in regulation – for example, when a city annexes territory and subjects previously unincorporated land to zoning and subdivision regulation – could appear to have a "significant" impact on housing availability in the eyes of a federal judge, if the FHA's reach is, indeed, so broad. Perhaps more importantly, if this theory gains traction, it is not unreasonable to think that the threat of expensive federal litigation could affect a legislative body's decision-making process when it comes to imposing or amending land use regulations.

This is precisely the situation in which the fifth fastest-growing city in Texas finds itself. As of yet, it is unclear whether this theory will prevail at trial, but unfortunately for Kyle, Texas, the theory has survived the City's Rule 12(b)(6) motion to dismiss and motion for summary judgment.[4]

Background

Although a booming housing market and explosive population growth may be fading into wistful memories now, it was not so long ago that many bedroom communities faced the benefits and associated challenges that such growth brought. Kyle, Texas, a suburb of Austin, was just such a place. Between 1990 and 2000, Kyle more than doubled in size – growing from approximately 2,200 people to over 5,000. And that was just the beginning – by 2007, Kyle's population had ballooned to a whopping 25,000[5] and continues to grow. It does not take a municipal planning expert to understand that that sort of growth can strain infrastructure beyond the breaking point.

As early as 2001, Kyle was running out of water and was being fined for over-pumping its water rights. It was also facing potential regulatory action for an inadequate wastewater treatment capacity. Still, practically every week saw a new subdivision plat being filed with the City, each with dozens, or hundreds, of new homes that the City had to accept.[6] Perhaps not surprisingly, Kyle's zoning and subdivision ordinances were largely holdovers from its time as a much smaller town and were ill-equipped to address this sudden influx of large-scale housing development.

Kyle decided that it had to act. It started by imposing a development moratorium, which, under Texas law, is only available for very limited purposes (e.g., obtaining additional water rights or wastewater treatment capacity) and for a strictly limited duration.[7] Kyle also undertook a comprehensive review of its zoning and subdivision ordinances, including holding multiple public hearings in which it sought input from residents, community leaders, and home-builders.

Finally, in November of 2003, Kyle passed its amended zoning and subdivision ordinances.[8] While comprehensive, the new measures had four important characteristics that served as the basis for the FHA claim raised against the City: (1) the density of future single-family homes was decreased by increasing the minimum lot size from 5,000 to 6,000 square feet; (2) the minimum square footage for a single-family detached home was increased from 1,000 to 1,200 square feet; (3) new single-family homes were required to have a two-car garage and (4) to have four-sides masonry (including fiber-cement siding).

The Claim

Less than two years later, the National Association for the Advancement of Colored People (NAACP), the National Association of Home Builders, and the Home Builders' Association of Greater Austin brought suit against Kyle. They alleged that the City made housing unavailable under the FHA because the new minimum standards for single-family detached homes increased the price of those homes, and minorities in the greater Austin area had lower median incomes than whites. Importantly, the plaintiffs did not allege (nor was there any evidence to suggest) that the City had actually denied a project featuring affordable housing, and they did not allege or offer any evidence that the affordable housing stock in Kyle had actually been reduced as a result of the amended ordinances.[9]

Rather, the plaintiffs' claim boiled down to a simple equation: If a home

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built to the minimum specifications under the previous ordinances cost "x," (notwithstanding that the plaintiff's expert would admit, at trial, that there was little demand for 1,000 square-foot, all-wood homes with no garage in a suburban single-family home setting), then a new home built to the new minimum specifications would necessarily cost "x plus."[10] According to the plaintiffs, that "plus"– the marginal amount of extra cost allegedly attributable solely to the new requirements imposed by the amended ordinances – would mean fewer people would be able to qualify for a conventional mortgage to pay for the new, and allegedly more expensive, houses. And because, according to U.S. Census data, minorities are concentrated in higher numbers at the lower end of the income spectrum in the Austin Metropolitan Statistical Area (MSA), relatively more minorities than whites who sought to relocate to Kyle would "predictably" be excluded from purchasing such a home.[11]

The City argued that the plaintiffs failed to establish standing under the Article III minima[12] because there was no evidence that a project to build "minimum" single-family homes had been proposed by any developer, let alone been denied by the City.[13] The plaintiffs argued that, notwithstanding the evidence of a backlog of unbuilt lots not subject to the new ordinances, it was necessarily predictable that, as housing costs increased, more and more lower-income individuals would be unable to afford that housing. And because a disproportionate percentage of lower-income individuals were members of a protected class, they had met their prima facie burden of establishing a significant disparate impact.[14] Once a plaintiff met this prima facie burden, the onus shifted to the defendant, to produce evidence of a non-pretextual, legitimate governmental interest for its action or policy.[15] If the defendant met this burden, the plaintiff was then required to show that other policies, without a similarly undesirable effect, would also serve the defendant's legitimate interest.[16]

Although there is no one way to prove a disparate impact claim, most claimants do so with a statistical analysis that involves a comparison between two groups – those affected, and those unaffected – by a facially neutral policy.[17] A successful comparison will reveal that, although neutral, the policy in question imposes a significantly adverse or disproportionate impact on a protected group.[18] It must also involve the appropriate comparables – that is, including individuals in the data pool who might not desire or qualify for the housing in question would be improper.[19]

At trial, the City analogized the plaintiffs' evidence in this case to the situation in *Hallmark Developers, Inc. v. Fulton County*.[20] There, the court found that the plaintiff's statistical evidence was inherently speculative because, although the plaintiff's experts appropriately measured the proportional impact of an increase in the cost of housing due to the county's regulations, the experts necessarily had to speculate that the protected persons who owned homes or rented apartments in the price range proposed by the builder for its development would actually purchase or rent one of the homes in the proposed development.[21] In Kyle's case, the City argued that, because no project had even been denied, it was one step removed from *Hallmark* – if the court in *Hallmark* had to speculate about who would purchase a home in a development that was denied, how much more would a court have to speculate about who would purchase a home that had not even been proposed to be built?[22]

The Sunnyvale Problem

Sunnyvale is a small, suburban, north Texas town, and for those who litigate FHA cases, its history is well known.[23] Sunnyvale required one-acre zoning for all single-family residences, based on pretextual wastewater concerns. The community was 97% white, in stark contrast to the surrounding Dallas County, and it relegated a token amount of multi-family housing (which contained almost all of its scant minority population) to one small corner of the zoning map.[24] It also denied permits for additional multi-family housing based, in part, on "character of the community" concerns. All in all, Sunnyvale is a case study in how to intentionally violate the FHA.

The trial court ruled that the town violated the FHA by requiring one-acre zoning for all single-family residences. It noted that enjoining the operation of the zoning ordinance would not, "in and of itself, cause a single stick of housing of any kind to be built," but that such relief would "remove impediments and barriers that in the past have prevented the building of multi-family and lower cost single-family housing in Sunnyvale."[25] This language figured prominently in the plaintiffs' attack on Kyle's ordinances.

Analogizing Kyle's across-the-board increase in home and lot size for single-family, detached homes to Sunnyvale's one-acre zoning, the plaintiffs argued that ordinances can have the predictive effect of creating barriers and relegating minorities to "low income" pockets in the community, in much the same way that Sunnyvale relegated all of its multi-family housing to one tiny corner of the zoning map. In turn, the City argued that what the plaintiffs really sought was to have the trial court establish, for the first time, the right to an "increased housing choice[] and supply," an argument that was rejected in *Hallmark*.[26] The City also argued that it was uniquely qualified to determine whether or not 1,200 square-foot homes should be the community minimum, because the decision to re-draw the line there was a legislative, not a judicial, function.[27] Because the trial court declined to grant the City's halftime motion for a directed verdict, the burden shifted to the City to establish a legitimate governmental purpose for its zoning and subdivision amendments.

Legitimate Governmental Purpose

The mere showing of a disparate impact (even a significant one) does not constitute a violation of the FHA. Rather, it simply allows a trial to go forward, with the governmental body then being required to proffer a non-pretextual, legitimate governmental purpose for its action.[28] To meet its burden, the City not only proffered evidence of its explosive growth and the burden that this placed on its infrastructure, but, also, relied on traditional zoning jurisprudence: *Village of Euclid, Ohio v. Ambler Realty Co.*, and its progeny.[29] Like virtually every zoning

and subdivision ordinance passed since 1926, the stated governmental purposes in enacting Kyle's ordinances included: the conservation of existing and future neighborhoods; protection of property values; the conservation of natural resources; prevention of overcrowding; lessening the congestion of streets; and the provision of adequate infrastructure, among others.[30]

Kyle also showed that, unlike the "all-white enclave" of Sunnyvale, its zoning and subdivision ordinances did not provide for only a token amount of affordable housing but, rather, allowed for a whole range of housing options, including high-density apartments, mobile homes, and planned unit developments (PUDs). Further, the FHA did not require a city to provide particular housing opportunities to individuals; it mandates only that protected individuals be given meaningful access to housing in a non-discriminatory manner.[31] Thus, when Kyle amended its ordinances, it simply made a legislative policy decision that was outside the judiciary's scope of review – or so the City argued. And because the City's amended ordinances allowed for a whole range of housing opportunities (including those the plaintiffs conceded were typically more "affordable" than single-family detached homes), low-income minorities still had meaningful access to housing opportunities under Kyle's ordinances.

Conclusion

Unfortunately, the question of whether plaintiffs' theory "has legs" remains unanswered at this time. Both sides rested and closed almost a year ago, and the trial court took everything under advisement. But, as any municipal lawyer can see, the danger to municipalities of an adverse ruling is clear: if the plaintiffs' theory is accepted, then any time a local government draws a regulatory line that is marginally higher than the one before, a plaintiff can almost always make out a prima facie disparate impact case under the FHA because minorities, unfortunately, tend to have lower median incomes than whites, on a nationwide basis.

It was Kyle's position at trial, and remains its position today, that this would be an unprecedented expansion of the FHA and seriously undermine the local police power and land use authority. Moreover, regardless of whether the City prevails in this case – on some technical evidentiary point, perhaps[32] – a broad ruling recognizing the applicability of this kind of facial attack on zoning ordinances would be a significant victory to those that routinely oppose municipal regulatory authority.

In the meantime, cities across Texas and across the Nation will continue to grow, and will continue to face additional pressures on their ability to provide adequate infrastructure for their inhabitants. If every marginal increase in the cost of housing imposed by a land use regulation is subject to FHA review, then cities' jobs may be much harder.

Notes

1. 42 U.S.C. § 3601, *et seq.* (West 2009).
2. HUD, *Why Not in Our Community? Removing Barriers to Affordable Housing* (Feb. 2005) at http://www.huduser.org/publications/affhsg/whynotourComm.html.
3. U.S. Census data indicates a nationwide income disparity between whites and minorities, although there are pockets where the disparity is very small or non-existent.
4. NAACP, et al. v. City of Kyle, Texas, No. A05-CA-979LY (U.S. District Court, Western District of Texas, Austin Division). This case was tried to the bench before Judge Lee Yeakel in February of 2008, with fully briefed closing arguments taking place in April, 2008. As of February 27, 2009, the parties still await Judge Yeakel's decision.
5. City of Kyle, Tex., *Current Estimated Population in Kyle as of March, 2007*, at http://www.cityofkyle.com/economic/index.php.
6. In Texas, municipalities have no discretion to reject subdivision plats if the plats conform to the general plan of the municipality and its current and future streets, alleys, parks, playgrounds and public utility facilities. Tex. Loc. Gov't Code Ann. § 212.010 (Vernon 2007).
7. Tex. Loc. Gov't Code Ann. §§ 212.135 – 212.1351 (Vernon 2007).
8. City of Kyle, Tex., Zoning Ordinance No. 438 and Subdivision Ordinance No. 439 (Nov. 24, 2003).
9. In fact, the City offered uncontradicted evidence at trial that there was a backlog of 12,000 or more unbuilt lots that were not subject to the amended ordinances.
10. The plaintiffs did not allege that the City intentionally denied housing to a protected class when it passed the amended ordinances. Instead, their main claim was solely a "disparate impact" claim brought under the FHA. *See* Darste-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 903 (8th Cir. 2005) (in a disparate impact claim, a plaintiff must demonstrate that the objected-to action results in, or can be predicted to result in, a significant disparate impact upon protected classes, as compared to the relevant population).
11. *See Darste-Webbe*, 417 F.3d at 903.
12. The sole requirement for standing under the FHA is Article III minima; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). To establish Article III standing, a plaintiff must suffer an injury-in-fact, an invasion of a legally-protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of; third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003).
13. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 261 (1977) (FHA claim based on the denial of a project that would have provided low-income housing).
14. *See* Debolt v. Espy, 47 F.3d 777, 780 (6th Cir. 1995) (requiring a showing of a substantial probability that low-income minorities would actually or imminently be able to obtain affordable housing if the court afforded the relief requested).
15. *See* Darste-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d

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such as this one to those who live within the jurisdiction is to balkanize our civic dialogue." *Id.* at 199).

6. Kempner v. Town of Greenwich, No. 3-06-cv-1393 (JCH), 2007 U.S. Dist. LEXIS 53258, at *12-13 (D. Conn. July 23, 2007).

7. A First Amendment claim, of course, requires constitutionally protected speech. While recreation alone does not implicate free speech, *see, e.g.*, Daly v. Harris, 215 F. Supp. 2d 1098, 1108-09 (D. Haw. 2002) (lying on the beach, snorkeling, swimming, and other beach recreation were not "within the realm of First Amendment protection"), it is not difficult for a plaintiff to plead a cognizable free speech claim given the First Amendment's breadth. *See Leydon*, 257 Conn. at 328 n.13 (plaintiff sufficiently pled free speech claim by alleging he "intended to express himself by conversing with others on topics of social and political importance"); City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("freedom of speech means more than simply the right to talk and to write," and includes "speech that does not pertain directly to politics").

8. *See generally*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue").

9. *Id.* at 45.

10. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

11. *Perry Educ. Ass'n*, 460 U.S. at 45.

12. *Cornelius*, 473 U.S. at 802 (citing public meeting spaces and theaters as examples of designated public fora).

13. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal quotation marks omitted).

14. *Perry Educ. Ass'n*, 460 U.S. at 46.

15. Greer v. Spock, 424 U.S. 828 (1976).

16. Adderley v. Florida, 385 U.S. 39 (1966).

17. Int'l Soc'y for Krishna Consciousness, Inc. v. N. J. Sports & Exposition Auth., 691 F.2d 155, 161 (3d Cir. 1982).

18. Hobbs v. County of Westchester, No. 00Civ.8170(JSM)(LMS), 2002 U.S. Dist. LEXIS 24569, at *14 (S.D.N.Y. Dec. 23, 2002).

19. *Id.* at *14-15.

20. It is usually not difficult to satisfy either of the other two elements of the test applicable to speech restrictions in a public forum. The nature of residency policies makes them content-neutral, and in a municipality, there will almost always be ample alternative venues for speech available to a nonresident.

21. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (U.S. 1983) (a government was not required to "indefinitely maintain" a designated public forum for speech); Ark. Educ. Television Comm. v. Forbes, 523 U.S. 666, 678 (U.S. 1998) (the "objective characteristics of" traditional public fora "require the government to accommodate private speakers").

22. 2002 U.S. Dist. LEXIS 24569 (S.D.N.Y. Dec. 23, 2002).

23. *Id.* at *15-17.

24. *Id.* at *18-19.

25. 110 F. Supp. 2d 74 (D. Conn. 1999).

26. *Id.* at 79.

27. *Id.*

29. *See, e.g.,* Cox. v. New Hampshire, 312 U.S. 569, 577 (1941) (upholding parade permit fees designed to recoup the expense involved in holding the parade); Northeast Ohio Coalition for the Homeless v. City of Cleveland, 105 F.3d 1107, 1110 (6th Cir. 1997) (upholding a $50 fee for a peddler's license because it defrayed the "administrative costs incident to the implementation of an ordinance embodying compelling governmental interests").

29. *See, e.g.,* Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 389 (1978) (upholding substantially higher hunting license fees for out-of-state residents and noting that, "[t]he resident obviously assists in the production and maintenance of big-game populations through taxes").

30. *See, e.g.,* Leydon v. Town of Greenwich, 257 Conn. 318, 346 (Conn. 2001) ("Moreover, even if we assume that the town has a compelling interest in restricting nonresident access to the park—an assumption that finds no support in the record—the ordinance is not narrowly tailored to accomplish that end").

31. In *Kempner v. Town of Greenwich*, 562 F. Supp.2d 242 (D. Conn. 2008), the court did not ultimately reach the issue of whether higher beach access fees were consistent with the First Amendment, because the court found that the plaintiffs lacked standing.

32. *Cox*, 312 U.S. at 577.

33. Turley v. N.Y. City Police Dep't, 988 F. Supp. 667, 669 (S.D.N.Y. 1997) (First Amendment challenge to a permit requirement for street performers in New York City); Nat'l Awareness Found. v. Abrams, 50 F.3d 1159, 1163 (2d Cir. 1995) (upholding a fee designed to defray the administrative and enforcement costs of a fundraising licensing policy).

34. *Turley*, 988 F. Supp. at 669; *Nat'l Awareness Found.*, 50 F.3d at 1163; Int'l Soc'y for Krishna Consciousness, Inc. v. Evans, 440 F. Supp. 414, 422 (S.D. Ohio 1977) (upholding booth rental fee at state fair that was designed to defray operational expenses of the fair).

35. *Turley*, 988 F. Supp. at 669.

36. *Id.* at 669-70.

37. *Nat'l Awareness Found.*, 50 F.3d at 1165 (fee to defray the administrative and enforcement costs of a licensing policy upheld).

38. Vacco v. Quill, 521 U.S. 793, 799 (1997).

39. *See, e.g.,* City of Cleburne, Tex., v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

40. *Vacco,* 521 U.S. at 799.

41. County Bd. of Arlington County, Va. v. Richards, 434 U.S. 5, 7 (1977).

42. Broeckl v. Chicago Park Dist., 131 Ill. 2d 79, 89 (1989).

43. *Id.* at 797 ("if the mooring fees charged to both residents and nonresidents were the same, the residents of the park district would be paying a disproportionate share of the costs of maintaining the park district's services and facilities"). **M**

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898, 903 (8th Cir. 2005); *but see*, Huntington Branch, NAACP v. Town of Huntington.

16. *See* Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1254 (10th Cir. 1995); *but see*, Huntington Branch, NAACP, 844 F.2d at 936 (requirement to show

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that no alternative would serve the governmental interest with a less discriminatory effect).
17. *See* Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003).
18. *Id.*
19. *See* Mountan Side Mobile Estates P'ship, 56 F.3d at 1253.
20. 466 F.3d 1276, 1286 (11th Cir. 2006).
21. *Id.* at 1286-87.
22. As previously noted, the trial court declined the opportunity to indulge this argument, which was raised in the City's motion to dismiss, motion for summary judgment, and halftime motion for a directed verdict.
23. Dews v. Town of Sunnyvale, Tex., 109 F. Supp.2d 526 (N.D. Tex. 2000).
24. *Id.*
25. *Id.*
26. Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1288 (11th Cir. 2006).
27. *See* Doe v. City of Butler, 892 F.2d 315, 320 (3rd Cir. 1989) ("every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."); *see also*, Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996) ("the exercise of discretion, whether to require a minimum of 650 square feet for an apartment of four people, as opposed to a minimum of 500 square feet or 800 square feet, is a legislative, not a judicial function").
28. *See* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (Seventh Circuit expressly rejects the argument that, once a racially discriminatory effect is shown, a violation of the FHA has necessarily been established); *see also*, Oti Kaga, Inc. v. South Dakota Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003); *compare* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988).
29. 272 U.S. 365 (1926); *see also*, Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (Supreme Court recognized a city's police power to protect its citizens from "the premature and unnecessary conversion of open-space land to urban uses" and the "ill effects of urbanization").
30. City of Kyle, Tex., Ordinance No. 438 (2003).
31. *See* Elliott v. City of Athens, Ga., 960 F.2d 975, 982 (11th Cir. 1992).
32. The City also challenged the plaintiffs' experts with *Daubert* motions. ML

Helping Development

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endnote, "In making this finding, the Zoning Administrator shall consider the building's past and current vacancy rate, existing and previous uses, and real estate market information." *Id.* at 30.
12. Los Angeles, Ca., Adaptive Reuse Incentive Areas Specific Plan, Ordinance No. 175,038, § 6 (2003).
13. Metropolitan Government of Nashville and Davidson County, Tenn., Ordinance No. BL2004-492 (Feb. 02, 2005), available at http://www.nashville.gov/mc/ordinances/term_2003_2007/bl2004_492.htm, or go to www.nashville.gov and search "BL2004-492."
14. Metropolitan Government of Nashville and Davidson Country, Tenn., Code, ch. 17.36, Overlay Districts (2008). The Code is available using the Online Library at www.municode.com.
15. Metropolitan Government of Nashville and Davidson County, Tenn., Ordinance No. BL2004-492 (Feb. 02, 2005).
16. *Id.* at § 2.
17. *Id.* at § 11.
18. *See* ftp://ftp.nashville.gov/web/mpc/Adaptive_Reuse_Ordinance.pdf. ML

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Feb. 27, 2008) (Explanatory Note on Evidence Rule 502).
9. *Id.*
10. For emphasis, this means that the terms of the court order would be enforceable in a subsequent proceeding against non-parties.
11. 145 Cong. Rec. S1318 (daily ed. Feb. 27, 2008) (Explanatory Note on Evidence Rule 502). ML

Supreme Court

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a traditional Title VII lawsuit, while the plaintiffs were stepping into what were usually the employer's shoes and defending the validity and use of the tests. In the end, the court found that the desire to comply with Title VII was a legitimate non-discriminatory reason, and that the City had leeway to decline to certify the tests, even when the ultimate validity of the tests, had they been used, remained uncertain.

On appeal, a three-judge panel of the Second Circuit summarily affirmed, essentially endorsing the district court's decision. The plaintiffs moved for rehearing *en banc*, which the Second Circuit denied by a 7-6 vote, with several dissenting opinions. Among their concerns, the dissenters questioned whether the district court used the correct framework, which gave a large degree of deference to the City, or whether something more akin to strict scrutiny was the appropriate standard for the City's admittedly race-conscious conduct. And assuming that compliance with Title VII could provide the basis for a compelling governmental interest, the dissenters also questioned whether the City could legally abandon its test for race-conscious reasons without a more detailed analysis of the validity of the test. What, the dissenters asked, prevented municipalities from adopting stealth quota systems based upon the mere presence of adverse impact?

A Grant of *Cert.* and a Plea for Clarity

In January, the plaintiffs' petition for certiorari was granted. Final briefs are due on March 18, and the case may be argued and decided this Term. As demonstrated by *Ricci*, hiring and promotional testing, especially in police and fire departments, continues to produce results that are legally perplexing and politically challenging. Cities continue to face the threat of litigation from either white or minority applicants (and sometimes both) each time they make a decision to test and to use (or not use) test results. Whatever the final outcome, municipalities must hope that the Supreme Court gives guidance as