

HOUSING BOND REPORT

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A Developer's Approach to Organized Opposition

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One of the most difficult aspects of developing affordable housing today is finding acceptable sites. A number of factors influence the limited supply of affordable housing land — a resurgence of market rate apartment development; the growth of the suburbs where zoning has been skewed away from denser multifamily development in favor of the single family, suburban lifestyle; and neighborhood opposition to apartments in general and affordable housing in particular, often referred to as “not in my backyard” or NIMBY.

Utilizing the Fair Housing Act to Counteract NIMBY

In the Fair Housing Act (FHA), Congress set out to reverse the trend toward residential racial segregation. The Supreme Court has observed that in the FHA “Congress has made a strong national commitment to promote integrated housing.” (*Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977))

The FHA provides that is unlawful “(a) to refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin or (b) to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the FHA].”

Furthermore, the FHA provides that any law of a state, a political subdivision or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this definition shall to that extent be invalid. In preempting discriminatory state laws, Congress recognized that housing, like all real estate development, is closely regulated by state and local rules and regulations. In its ruling in *Mitchum v. Foster*, the Supreme Court observed that “Congress clearly conceived

that it was altering the relationship between the states and the nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights.” (*Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L. Ed. 2d 705 (1972))

A developer may establish a violation under the FHA by showing either: that the local government's actions were motivated by an intent to discriminate (“discriminatory intent” or “disparate treatment”); or that the local government's otherwise neutral action has an unnecessarily discriminatory effect (“disparate impact”). Discriminatory effect may be proven by showing either adverse impact on a particular minority group or harm to the community generally by the perpetuation of segregation.

In the absence of direct evidence of discriminatory purpose, courts may consider the following:

1. discriminatory impact;
2. the historical background of the challenged decision;
3. the specific sequence of events leading up to the decision, including contemporary statements by members of the decision-making body;
4. any procedural and substantive departures from the norm; and
5. the legislative or administrative history of the decision.

The disparate impact analysis of fair housing cases arose because it is easy to conceal discriminatory motivations. Conduct that has the foreseeable consequence of perpetuating segregation can be as harmful as intentional discriminatory conduct in frustrating integrated housing.

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Covert bigoted behavior is much less pervasive than in the 1960s and 1970s. Hidden racial prejudice is no longer the principal underlying factor in actions that have a discriminatory impact. Most of the opponents of affordable housing today are engaged in a form of "economic egalitarianism" or "economic protectionism" — or loosely phrased "I pulled myself up by my bootstraps and I'll be darned if I'll let anyone else have a free ride into my community" or, perhaps more subtly, "I don't want those lower income kids (of whatever color) going to school with my kids." These opponents of affordable housing will vehemently deny that they are bigoted or racist — and clearly their intent and philosophy contain no racial prejudice. However, if we institutionalize this economic theory of suburban lifestyle and allow it to affect decisions on the siting of affordable housing, the result, or in fair housing language, the "impact" is that lower income people, who disproportionately tend to be minorities, are to a large degree shut out of the community.

In essence, this protectionist viewpoint creates an "economic moat" around a city. The city lowers the drawbridge in the morning to allow the lower wage workers to enter to service the community — school teachers, firefighters, retail and restaurant employees, etc., because these functions are important to an economically thriving city. But at night the drawbridge goes up and these workers are shunted off to an adjoining city that is more open to affordable housing. Daily cross-migration of workers occurs (professionals from the suburbs to the inner-city, and inner-city blue collar workers to jobs in the suburbs in the morning, and the reverse in the evening), with resulting traffic congestion and pollution. These living/working arrangements also create issues of fairness in terms of taxes and social services between adjoining cities. Stated more succinctly, economic egalitarianism/protectionism has direct consequences not only on residents of affordable housing, but also on the cities that accept or reject them and, ultimately, on the entire metropolitan region.

Once the affordable housing developer has made this showing of discriminatory impact, the burden of proof shifts to the governmental agency, which has a very difficult hurdle to overcome — it must prove that its actions further a legitimate *bona fide* governmental interest and that no alternative would serve that interest with less discriminatory effect.

Actions that the courts have focused on to finding disparate treatment or discriminatory impact include:

- ♦ a mayor telling the city director of construction to take every legal step to stop the development; he spoke to a group of 700 citizens who were concerned about the development; imposing rules not imposed on other residences.
- ♦ changing the zoning of a multifamily parcel, or having no multifamily zoned land outside of the poor, minority areas of town.

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- ♦ refusal to issue a building permit claiming overcrowding of the local schools, recreational facilities and local fire fighting and sewer capabilities.
- ♦ refusing to run a sewer line to an affordable housing development outside the city limits, when the city had done so before for single-family residential subdivisions outside the city limits.
- ♦ taking an opinion poll prior to making an affordable housing decision.
- ♦ selective enforcement of platting and building code review process.
- ♦ having different rules for elderly projects versus family projects.
- ♦ giving city councilmen approval rights over affordable housing.
- ♦ public or homeowner notification requirements and public forums allowing homeowners input into the process.

Case Studies

Two Texas affordable housing case studies from the author's own experience illustrate how quickly opposition to a tax credit development can mount.

In 1994, a developer filed a low-income housing tax credit (LIHTC) application for affordable housing in a North Dallas suburb. Before the tax credit application was filed, the developer was informed that market rate developers had been spurned over the years in their attempts to build in that suburb. The planning and zoning commission denied the plan five times over six months, during which time the city council undertook an emergency review of its master zoning plan, focusing on apartment zoned land first, and changed the zoning on most of the remaining multifamily sites in the city. A fair housing lawsuit was filed against the city. After a year of litigation discovery and \$125,000 in legal fees, a creative settlement agreement was achieved with the city and its insurance company that allowed retail and commercial development on the former apartment site and zoning and development fee waivers for 600 apartment units in the city.

Also, in 1994, an application was filed for a tax credit development in a suburb north of Dallas. Extensive discussions were held with the neighboring homeowners. Although the homeowners appeared to be pacified, at the city hearings the homeowners opposed the development and asked the city council to strictly enforce the city's building standards, including requiring the developer to rebuild both sides of 6/10ths of a mile of city road in concrete (adding approximately \$750,000 to the development budget). The city's parking ordinance also adversely affected affordable housing — one parking garage per unit and an additional parking space for every bedroom, or approximately 3.7 parking spaces per unit. The city would not issue the building permits unless the developer contractually agreed to build the road, which stopped the bond closing. A fair housing lawsuit was

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filed that included an inverse condemnation claim — that requiring the construction of the road amounted to a taking of property for public purposes. A settlement was reached with the city with the developer agreeing to build the road in asphalt and not in concrete and the city agreeing to waive 80 garages.

Conclusion

When facing NIMBY opposition from homeowners and city action to pacify their concerns, the best strategy is — to borrow an analogy from football — “a good offense is the best defense.” Many of the articles on dealing with NIMBYism recommend educating the homeowners and politicians on the societal benefits of affordable housing, and countering their objections, point-by-point: multifamily generates fewer children than single-family, so impact on schools is minimized; apartments have fewer cars per residence than single-family, so that traffic is not increased; and the city needs a place for its school teachers, firefighters, policemen; etc. Certainly, all of these statements are true and helpful up front. However, no amount of logic will persuade emotional and irrational homeowners. Faced with a rising tide of voter opposition, politicians typically will seek to pacify their fellow citizens. When the momentum starts to run against the development, and one or more of the politicians starts to take up the homeowners' cause, the likelihood of turning the situation around with education on the benefits of affordable housing is slim at best, and once the first official action is taken, the developer needs to boldly discuss fair housing rights and obligations with the city attorney and the city's insurance company.

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