



# Taking Sides In Fight Over NIMBYism


*BY BOB VOELKER, DENNIS ROOSSEN AND ERIN WOOD*

ST. BERNARD OFFICIALS CONTINUED TO VOICE THEIR POSITION THAT THE 288 APARTMENTS WOULD WEAKEN AN ALREADY UNSTABLE REAL ESTATE MARKET. PARISH PRESIDENT CRAIG TAFFARO SAID THE PARISH WILL CONTINUE TO APPEAL THE CASE WITH "FULL VIGOR."

— CRAIG TAFFARO JR., ST. BERNARD PARISH PRESIDENT

NEW ORLEANS TIMES-PICAYUNE

SEPT. 11, 2009

A close-up, profile view of a woman with short, wavy grey hair. She is looking out a window with light-colored blinds, and her expression is thoughtful or slightly concerned. The background is bright and out of focus, suggesting an outdoor setting.

Elected officials and advocacy groups are using clever and unique methods to oppose affordable housing development.

**I**n response to homeowner opposition to apartments, elected officials and government agencies frequently take steps to stymie a developer's efforts, including refusing to approve subdivisions or plats, requiring the developer to build or pay for excessive public improvements, stripping zoning away from the proposed site or passing building moratoria.

Forty years after the passage of the Fair Housing Act, vehement opposition still rises in response to efforts to provide affordable housing. Elected officials continue to take measures to placate the opposition.

However, recent court decisions and several other cases that were filed, but yet undecided, indicate that require cities that accept certain federal funds to "affirmatively further fair housing" can be an effective means to compel local officials to withdraw their opposition to affordable housing.

"INSTEAD OF ACQUIESCING IN, AND EVEN PANDERING TO THE EXAGGERATED FEARS AND RACE- AND CLASS-BASED PREJUDICE OF SOME OF ITS CITIZENS, THESE OFFICIALS COULD COURAGEOUSLY CHALLENGE THOSE ASSUMPTIONS, AND ACCURATELY PRESENT TO ITS CITIZENS THE ADVANTAGES THIS DEVELOPMENT COULD BRING TO THE PARISH."

— U.S. DISTRICT JUDGE GINGER BERRIGAN  
NEW ORLEANS TIMES-PICAYUNE  
SEPT. 11, 2009

## NYT: Low-Income Housing Battle Reveals Post-Katrina Tensions



Craig Taffaro Jr.

The parish of St. Bernard just east of New Orleans has agreed to allow housing for low-income families. However, the few hundred or so apartments had to be ordered by a federal judge. That is because members of the mostly white parish fought hard to prevent such housing, at one point even passing a law that made it illegal for homeowners to rent to anyone other than a blood relative. Parish officials say the law was intended to guarantee that neighborhoods would consist largely of owner-occupied homes. It was subsequently challenged and repealed.

Critics charge that this local battle over low-income housing reflects long-simmering class and racial tensions. Parish President Craig Taffaro Jr.

remarks, "I think people have adopted this issue as one that goes far beyond the reality of its impact. It tapped into the soul of our recovery" from Hurricane Katrina. Because the houses that were destroyed in the New Orleans metro area were disproportionately for low-income renters, market rents in the city are 35 percent higher than they were prior to the 2005 storm.

The demolition of the city's four major public housing communities two years ago and the approaching end to storm-related federal assistance have only exacerbated these problems. Such is the case in St. Bernard, one of the jurisdictions hit hardest by Katrina. Nearly every one of the 26,000 houses there was either severely damaged or destroyed, with 93 percent of them owned by whites. Many former residents sold their homes to investors, while thousands of people displaced from

elsewhere have moved in. Remaining members of the parish has not taken well to these changes. Last year, Provident Realty Advisors proposed developing four new apartment communities at a cost of \$60 million in the parish. Around 30 percent of the 288 apartments would be rented at market rates, with the remainder set aside for low-income renters.

Parish residents immediately issued grim forecasts of crime and blight, and parish officials declared a moratorium on building any apartment communities with five or more units. Parish officials insist they are not trying to keep out African-Americans. David Jarrell, an attorney for Sidney D. Torres III, has been one of the most vocal supporters of apartments in the parish. He says race was a factor. "It is what it is," he says. "Anybody that says otherwise is being disingenuous."

Source: NAA's Industry Insider and New York Times

**St. Bernard Parish, La.** The recent St. Bernard Parish case offers a unique reflection on the wrongful use of the planning and zoning process in response to proposed construction of mixed-income apartments, including a moratorium on multifamily development and refusal of the Parish to subdivide the land tracts.

In February 2008, the predominantly white parish adjacent to the predominantly African-American 9th Ward was found to have violated the Fair Housing Act by enacting a post-Katrina ordinance restricting rentals of single-family homes to "blood relatives" of the owner. The court issued a consent order in this blood relative case, requiring the parish to repeal the ordinance, and enjoined the parish from further Fair Housing Act violations for three years.

*The New York Times* reported on this battle over low-income

housing, calling it "one of the most bitter that anyone in the... parish can remember." (See "Low-Income Housing Battle Reveals Post-Katrina Tensions," above).

In mid-2008, a Dallas developer filed applications with the Louisiana Housing Finance Agency (LHFA) to secure low-income housing tax credits for four mixed-income apartment communities in the parish. Before LHFA awarded the credits, the parish passed a moratorium on multifamily development. The moratorium essentially halted development in the four apartment communities, resulting in the developer possibly missing construction deadlines and losing tax-credit financing and other federal community development money for the projects.

This ban was in direct response to the dramatic opposition the

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project faced from parish residents who argued that the parish had a sufficient number of affordable rentals and that adding more would hurt nearby home values by bringing criminal elements to the parish. The ban also asserted that the parish did not have sufficient infrastructure to support the developments.

In December 2008, the developer intervened in the blood relative case, claiming that the multifamily moratorium violated the Fair Housing Act and the consent order by disproportionately excluding minority families seeking to live in St. Bernard Parish. Using the “disparate impact” line of Fair Housing Act case law, they noted that the ban disproportionately excluded African-Americans.

In March 2009, the judge granted the request to enforce the consent order, requiring the parish to revoke the moratorium and holding the parish in contempt for violating the consent order. The judge stated that the housing ban was passed with the intent of—and had the effect of—discriminating against potential minority residents of St. Bernard, and ordered the parish to lift the moratorium. The parish then attempted to delay the subdivision’s construction process to stop the apartments, resulting in the judge again holding it in contempt and ordering the subdivisions approved.

The St. Bernard Parish case involved most of the potential ways in which a local government can attempt to stop apartment development, and prompted an in-depth analysis by the court of the impacts of delay tactics on expiring financing for the developments. The strong language used by the court when striking down these tactics by the Parish Council and Planning and Zoning Commission can be quoted when other cities attempt to use the planning and zoning process to halt apartment development.

**Westchester County, N.Y.** In order for a state, county or city to secure Community Development Block Grant (CDBG) funds from the federal government, the governmental entity must certify that it will “affirmatively further fair housing.” Additionally, U.S. Department of Housing and Urban Development Guidelines indicate that part of this certification is an analysis of impediments to providing fair housing and the steps necessary to overcome those impediments. Westchester County made these certifications to the U.S. Department of Housing and Urban Development (HUD) when applying for more than \$52 million in federal CDBG funding for housing and community development from 2000 to 2006.

The Anti-Discrimination Center of New York Inc. (ADC) filed suit against Westchester County under the federal False Claims Act, which allows recovery of federal funds obtained by making a knowingly false or fraudulent claim. ADC contended and the court found that Westchester County is racially segregated, and that the county knowingly submitted a false claim when it did not conduct the impediments analysis required to make the certification that it was affirmatively furthering fair housing.

The county’s primary defense was that it was actively promoting affordable housing, but the court quickly noted the distinction between affirmatively furthering fair housing and affordable housing activities. Although the county prepared impediments analyses, they were “devoted entirely to the lack of affordable housing in the county and related obstacles,” and the court noted that “a



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determination that affordable housing is the greatest impediment does not absolve the county from its requirement to analyze race-based impediments to fair housing.”

Fair housing is concerned with the location of affordable housing—for instance, whether or not the housing is congregated in “impacted areas” (high minority/high poverty areas)—and not just the supply of affordable housing. The court summarized that “as a matter of logic, providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation.”

After this decision, the parties entered into an agreed settlement in which the county agreed to repay \$30 million to the federal government and \$2 million in legal fees to ADC’s counsel. Further, the county agreed to spend \$30 million between 2009 and 2014 for affordable housing that affirmatively furthers fair housing, including not less than 750 units primarily in non-minority areas.

This case creates a clever new tool to combat “not in my backyard” (NIMBY) pressures and local government actions that use planning, zoning and other development processes to subvert affordable housing. If the local government is a “participating jurisdiction” (accepting CDBG funds from the federal government) and is covering to the least sign of homeowner opposition, these actions might impede production of affordable housing in non-minority areas. This can give rise to a developer claim that the local government is violating its federally man-

dated duty to affirmatively further fair housing, resulting in exposure to a federal False Claims Act action.

Homeowners and local elected officials may impose roadblocks intended to delay or halt apartment development. Developers can gain significant leverage to overcome this opposition by proving that the local jurisdiction’s actions, in bowing to NIMBY pressures in zoning and land use decisions that inhibit the development of apartments in non-minority areas, either have a discriminatory intent/impact or breach the governmental entity’s obligation to affirmatively further fair housing.

Informing local officials of these recent case-law developments may allow apartment developers and their attorneys to resolve development conflicts without going to court. Given recent developments in fair housing litigation, the best technique to sidestep confrontation with communities opposing apartment development is a frank discussion regarding fair housing rights, obligations and non-compliance legal repercussions with the city attorney and the city’s insurance company. ■■



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