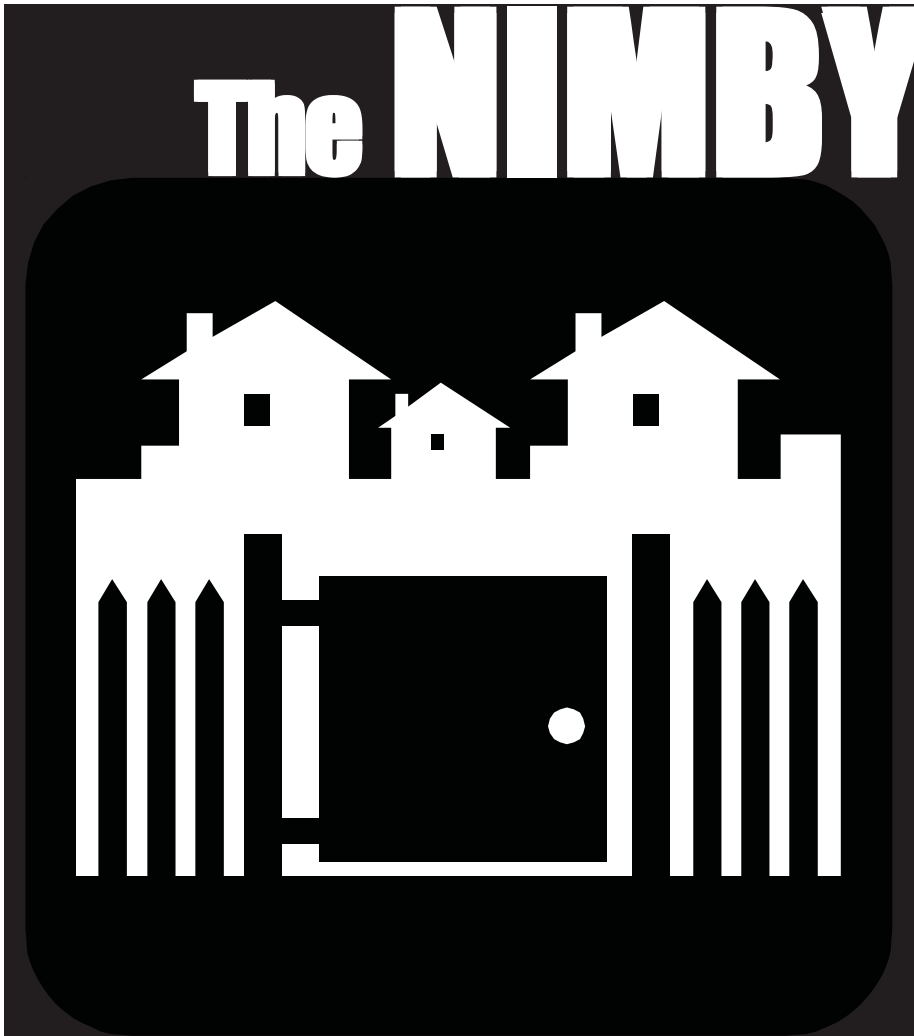


The NIMBY Report



Using Civil Rights Laws to Advance Affordable Housing

Fall 2002

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From the Editor

Jaimie Ross

Zoning and land use decisions in general (comprehensive planning, conditional use permits, etc.) are the domain of local government. Whether land zoned for residential use is to be exclusively for single family homes or can be used for multifamily homes, and whether transitional housing facilities or group homes are considered residential uses or commercial uses are two examples of decisions made at the local level that have a fundamental impact on affordable housing. Land use decisions are further devolved to private landowners, who regularly impose restrictions on large tracts of land as they develop deed-restricted communities with minimum lot sizes prescribing the development of mini-mansion subdivisions.

Local zoning and land use decisions have historically resulted in racially and economically segregated communities. These decisions continue to be made in an increasingly political environment fueled by NIMBYism (Not In My BackYard syndrome) and NIMTOOism (Not In My Term Of Office syndrome). The NIMBYs are local residents determined to maintain or create homogeneous neighborhoods who will vehemently oppose the development of affordable housing. The NIMTOOs are the local elected officials who may or may not agree with the NIMBYs, but are loath to vote in favor of an affordable housing development if the price is future re-election.

More often than not, the zoning and land use decisions resulting from NIMBYism and NIMTOOism violate federal and state civil rights laws. This edition of *The NIMBY Report* is dedicated to a discussion of the intersection between NIMBYism and civil rights and of the use of civil rights laws to further the development of affordable housing.

Michael Allen of the Bazelon Center for Mental Health Law begins our discussion with comprehensive coverage of the correlation between the Federal Fair Housing Act and exclusionary local land use regulations. Mr. Allen's article includes a rundown of zoning and land use cases in which local governments suffered sizable damages awards or settlements for fair housing violations. It is followed by an article co-authored by Diane Citrino, Michael Allen and Kim Schaffer on the *Buckeye* case, currently pending before the U.S. Supreme Court.

Next, civil rights attorney Kelli Evans recounts the successful use of federal and state fair housing laws against a city in Florida for its failure to permit an affordable housing development. Another case study follows from Reed Colfax of the Washington Lawyers Committee for Civil Rights. Mr. Colfax's case involves a successful attack on the discriminatory use of local code enforcement to demolish affordable housing.

Susan White Haag of the National Law Center on Homelessness and Poverty illustrates the use of civil rights laws to protect the interests of people who are homeless. Caught between exclusionary or NIMBY land use regulations that prevent them from obtaining shelter and laws that criminalize the failure to have a home, the homeless are doubly victimized.

Kevin Walsh of the Fair Share Housing Center in New Jersey reviews the implementation of *Mount Laurel* and recent legal challenges to this landmark series of cases. *Mount Laurel* is the seminal New Jersey Supreme Court case holding exclusionary local land use laws to violate the state constitutional requirement that zoning powers be used to advance the general welfare. The *Mount Laurel* doctrine requires "fair share" housing among local jurisdictions. Edward Goetz of the Urban and Regional Planning Program at the Humphrey Institute of Public Affairs at the University of Minnesota provides a thoughtful perspective of what the federal government could do to better promote inclusionary land use practices.

Finally, Tim Iglesias, law school professor and former editor of *The NIMBY Report*, leaves us with a balanced and practical approach to using civil rights laws to our advantage without having to litigate.

It is our hope that the collective expertise of these authors will assist affordable housing advocates and civil rights advocates to together further the development of affordable housing. And in so doing, they will advance the march of civil rights.

Jaimie Ross is the Affordable Housing Director at 1000 Friends of Florida, a statewide public interest law firm specializing in growth management. Ms. Ross serves on the board of the National Low Income Housing Coalition and is president of the Florida Housing Coalition. She recently authored *Creating Inclusive Communities in Florida: a Guidebook for Local Elected Officials and Staff on Avoiding and Overcoming the NIMBY Syndrome*.

The Fair Housing Act: An Essential Civil Rights Law in the Affordable Housing Toolbox

Michael Allen

Over the past 18 years, I have traveled back and forth between two worlds. One is populated with affordable housing developers and advocates who focus on site control, financing and land use issues; let's call them "housers." The other contains poverty and civil rights lawyers and theorists who are busy fighting housing and zoning discrimination and, according to a recent report,¹ winning close to \$200 million in damages under the Fair Housing Act; we'll call them "rightsers."

Although housers and rightsers would seem to be fighting for the same cause, all too often they speak a completely different language and act like ships passing in the night. No wonder lay people do not often see the connection between enforcement of the Fair Housing Act and the creation of new affordable units. This article explores the common threads between the two, and suggests that advocates in both worlds should think constructively about how to marry their respective efforts.

Multifamily housing and local zoning power

As much as we would like to think of affordable housing as a continuum of housing choice that includes home ownership, for most low income families that option is unrealistic. For the most part, the fight about "affordable housing" is over whether a locality will permit the construction of multifamily rental units and, these days, whether they will do so in the face of community opposition from neighbors, slow-growth advocates, school systems and others. That opposition is frequently expressed in a local government's zoning and land use ordinances and in the process the locality uses to make exceptions to standard zoning rules.

Since the 1920's, when states began to cede zoning and land use powers to localities, most cities, counties and towns have constructed zones in which certain land uses are preferred and others are disfavored. So-called R-1 zones frequently have the largest geographic share of land and, often, only single family homes are permitted there "by right;" that is, without the need for special zoning approval. It may be theoretically possible to develop multifamily housing in an R-1 zone, but the local

zoning authority (or, some might say, opposing neighbors) retains the power to veto such housing by refusing to grant a "conditional use" or "special use" permit.

Many units of local government have some zones where multifamily housing can be built "by right," but these days such zones contain very few available parcels, and fewer still at a price that will allow the resulting housing to be truly affordable to poor people. While all people with low incomes suffer under such a regime, studies have repeatedly shown that the people who suffer the most are people of color, families with children, and people with disabilities. As a result of their exclusion from "desirable" communities, many areas are experiencing resegregation, with disfavored groups typically living in the urban core, and favored, relatively homogenous white communities in the suburbs. And, as one might predict, the more homogenous a suburban community, the more likely it is to resist multifamily rental housing, thereby perpetuating the lack of diversity.

Fair housing laws constrain local zoning authority, but enforcement is lacking

The Fair Housing Act of 1968 prohibited discrimination in the sale or rental of housing on the basis of race, color, religion, sex, or national origin. Twenty years later, Congress extended those protections to two additional categories—people with disabilities and families with children. Congress recognized that state and local governments had sometimes used their zoning power to discriminate against people with disabilities, children, and families—and made very clear that the Act was intended to prohibit discrimination in zoning and land use matters.

So, why the disconnect? In the face of this landmark federal law, how is it that local governments and neighborhood opponents have stymied the development of affordable housing for the very people who are supposed to be protected?

In part, it is because Congress did not intend the Act to preempt all local zoning authority. Rather, Congress simply intended to remedy discrimination that occurred as a result of the application of local zoning laws. Localities may continue to enact zoning regulations that create single-family districts, preserve the character of the neighborhood, prevent congestion, and mitigate the effects of automobile and other traffic. Further, local governments can enforce health and safety regulations and other nondiscriminatory laws designed to protect public safety. But if they do so with the intent to



discriminate, or if their decisions have a harsher (disparate) impact on people protected by the Act, such laws can be invalidated.

Therein lies another part of the problem: While the U.S. Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) are authorized to enforce the Fair Housing Act, they have limited resources to do so.² Victims of discrimination (including housing providers who are kept out because of discrimination against their prospective tenants) can also use private lawsuits to enforce the Act, but there are very few experienced lawyers available to represent them. As a consequence, although one might be able to prove that exclusionary zoning practices are illegal, it is often difficult to stop them.

Finally, one of the thorniest problems underlying NIMBYism is that much of it is expressed in the form of peaceful assembly and petitioning government officials—classic First Amendment-protected behavior, even if it does end up deterring the development of affordable housing. This issue came to the fore in 1993, when a

neighborhood group in Berkeley, California, organized to oppose the conversion of a transient motel to permanent housing for formerly homeless people. The group circulated flyers, drafted petitions, met with local elected officials, and even filed a lawsuit to stop the issuance of the necessary use permit. Upon the filing of a complaint, HUD conducted a thorough investigation of the neighbors' activities. While HUD ultimately decided not to prosecute the complaint, the neighbors protested that the agency's inquiry was invasive and violated their First Amendment right of expression and right to petition the government. Subsequently, HUD adopted new guidelines for the investigation of complaints involving expressive activity (www.fairhousing.com/hud_resources/hudguid4.htm) and has taken a much more cautious approach to these issues. From a practical perspective, HUD and the courts will be very wary about claims of discrimination that are based solely on expressed opposition to housing for people in the protected classes. Generally, some overt act that amounts to harassment, interference or intimidation will be required before opponents lose their First

“ Affordable housing advocates and fair housing advocates must think constructively about how to marry our respective efforts. Our worlds will collide as the U.S. Supreme Court decides *Buckeye*, and we must find a way to work together, no matter how the court comes down.

Amendment defense for NIMBY activities.

Systemic change under the Fair Housing Act has been difficult

While group home sponsors have had great success invoking the disability protections of the Fair Housing Act to strike down restrictive zoning rules, the tacit or active support of local government and the involvement of federal funding to support discriminatory housing practices has made systemic litigation to combat NIMBYism on the basis of race and national origin much more difficult to sustain.

A number of federal housing programs have required recipients, as a condition of receiving federal funding,

to certify that their programs are in compliance with the Fair Housing Act and its amendments, and that they have taken affirmative steps to further fair housing opportunities. Cities, counties and states receiving funds from Community Development Block Grant (CDBG), HOME, HOPWA or

McKinney programs are required to complete a periodic Analysis of Impediments (AI) to fair housing choice, and to outline how they will eliminate discriminatory barriers created by the public sector and actively work to overcome discrimination by private actors. Owners of assisted housing and recipients of federal Low Income Housing Tax Credits (LIHTC) also have to make certifications that they comply with the Act. Because of limited budgets and administrative confusion over enforcement responsibilities, HUD and allied federal agencies have done little to ensure that these certifications are truthful and complete.

Where do we go from here?

As a result of the imperfect enforcement of the Fair Housing Act, I believe that housers have forgotten what an important tool it can be to promote affordable and integrated housing. But as the number of developable parcels in established communities continues to shrink and the ability of opponents to derail affordable housing proposals continues to grow, I think it is time to reevaluate how the Fair Housing Act might help move



us all forward toward our shared goal.

Clearly, we have made progress since 1968 in reducing housing discrimination, but much remains to be done. Because land use discrimination has become more subtle, and clothed in the language of citizen participation, it is often difficult for individual victims to recognize that their rights have been violated. And in the newer areas of disability and familial status discrimination, fair housing advocates need greater support for education and outreach to explain individual rights and responsibilities.

There is clearly more that the federal government can do to eradicate discrimination and thereby support more affordable housing. HUD has traditionally limited its fair housing enforcement activities to investigating complaints of discrimination and has virtually ignored its obligation to monitor its own compliance and that of thousands of grantees and contractors with the “affirmatively furthering” obligations of the Act. So long as CDBG, HOME and the LIHTC programs—the major engines of affordable housing production in this country—allow discrimination, the Fair Housing Act has not been truly successful.³

DOJ has been increasingly active in fighting zoning and land use discrimination by local governments, and with good effect (see sidebar). The deterrent purpose of its work is clear: As more and more localities are made aware that they will have to pay damages and attorney fees for violating the Act, the frequency of discrimination is likely to decline. The next frontier for DOJ should be to provide even greater protection for developers who are worried that if they take action against local governments, these local governments could retaliate by withholding funding. DOJ has begun to be active in this area and invites contact with its Housing and Civil Enforcement Section by individuals or agencies who feel they may have experienced such retaliation.⁴

But there is also much that housers and rightsers need to do with one another. Among other things, our worlds will collide this winter as the U.S. Supreme Court considers the Fair Housing Act case of *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*. We must find a way to work together, no matter how the Court comes down (see *Buckeye Goes to the Supreme Court*, p. 8). Buckeye, which found a way for housers and rightsers to get on the same page, took on this issue because it wanted to send a message on behalf of all providers and tenants that local governments and

community opponents cannot deny housing opportunities. We can repay the favor by joining and supporting their efforts.

We can also get to know one another better by making presentations at each other’s conferences, writing collaboratively across the two constituencies, and being available to provide one another consultation and technical assistance as we tackle increasingly complex developments and litigation. Through existing national organizations, we can link our expertise and our shared passion about fair and affordable housing.

Although he meant it in a different context, Martin Luther King, Jr. aptly described our condition: “We may have come here in different ships, but we’re all in the same boat now.” It’s time we all picked up an oar and started to row in the same direction.

Michael Allen is a senior staff attorney and director of housing programs at the Judge David L. Bazelon Center for Mental Health Law in Washington, D.C., where he is involved in public policy and litigation on behalf of the housing needs of people with mental disabilities. He also serves as co-director of the Building Better Communities Network. He can be reached at 1101 15th Street, N.W., Suite 1212, Washington, D.C. 20005, 202-467-5730 x117, michaela@bazelon.org.

Endnotes

¹ Fair Housing Center of Metropolitan Detroit, *\$180 Million and Counting* (June 2002). Available from FHCMD. 313-963-1274.

² A recent study has found HUD’s enforcement record unsatisfactory. See National Council on Disability, *Reconstructing Fair Housing* (November 2001), www.ncd.gov/newsroom/publications/fairhousing_pdf.html. Assessments of DOJ’s record in these matters is decidedly more favorable. See John P. Relman, “Federal Fair Housing Enforcement at a Crossroads: The Clinton Legacy and the Challenges Ahead,” in *Rights at Risk: Equality in an Age of Terrorism* (Citizens’ Commission on Civil Rights, 2002), www.cccr.org/RightsAtRisk.htm.

³ In late 1998, HUD proposed conducting more systematic monitoring and strengthening requirements on grantees under these programs, but withdrew them in the face of local government opposition. These regulations, should they be adopted and fully implemented, will give advocates powerful tools to ensure greater housing opportunity for low- and moderate-income people.

⁴ Contact Joan Magagna, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, 202-514-4713.

Zoning and Land Use Discrimination Does Not Pay

It's a familiar scenario: A city or town demonstrably needs affordable housing. A sponsor comes forward to gain site control and secure financing. Once neighbors get wind of the news and express opposition, elected officials get cold feet and deny zoning or building permits that are necessary to move forward. The lost housing opportunities are most often felt by people of color and people with disabilities. Moreover, the loss of affordable units can also mean a lost opportunity for diversity in the communities affected.

More and more frequently, the Fair Housing Act is being used to send the message that discrimination in zoning and land use decisions is illegal. In addition to any injunctive relief that may be available (a court order to do something specific or refrain from doing it), the following cases have resulted in sizeable damages, awards or settlements against local governments. Under either the Fair Housing Act or the Americans with Disabilities Act, a court can also require the losing party to pay the attorney's fees incurred by the winner. Some states, such as California, have state statutes to the same effect.

Additional information about cases in which the U.S. Department of Justice (DOJ) has been the successful plaintiff is available at www.usdoj.gov/crt/housing/caselist.htm.

U.S. v. City of Elgin, Illinois: An August 2002 agreement between DOJ, U.S. Department of Housing and Urban Development (HUD), the City of Elgin, and the HOPE Fair Housing Center settled DOJ claims that Elgin had discriminated on the basis of national origin. The city paid \$500,000 to settle the claims.

U.S. v. City of Fairview Heights, Illinois: The federal court in southern Illinois approved a consent decree in September 2001 in this case in which the city had denied a permit to construct an apartment building based on concerns that more African-Americans would move to town. The consent decree required the city to pay \$275,000 in damages.

U.S. v. Chicago Heights, Illinois: DOJ alleged that the city's decision not to issue a permit to a mental health services provider to operate a residence for

persons with mental illness was based on the disability of the prospective residents. Rather than going to trial, the city agreed to a consent decree under which it was required to pay \$123,000 in damages.

U.S. v. City of Milwaukee, Wisconsin: The underlying lawsuit alleged that the city discriminated on the basis of national origin against Native Americans by denying a zoning variance to a proposed low-income senior citizen housing development sponsored in part by the Indian Council of the Elderly. In a June 2001 consent order resolving the dispute, the city agreed to provide more than \$650,000 toward the construction of the senior center, including \$340,000 in damages to the private plaintiffs and other aggrieved persons.

U.S. v. City of Jacksonville/Jacksonville Housing Authority, Florida: DOJ accused the city and its housing authority of engaging in intentional discrimination based on race in the siting of public housing in Duval County and of unlawful race discrimination when it passed a 1994 amendment to its zoning code which required a special permit for public housing that was not required for private housing. A November 2000 consent decree required the defendants to pay \$440,750 in damages, create 225 new units of public housing in neighborhoods that had none, and operate a Section 8 mobility housing counseling program

Jennifer House v. City of Owensboro, Kentucky: In this private lawsuit brought with the assistance of the Lexington Fair Housing Council, plaintiffs alleged that the city had violated the disability protections of the Fair Housing Act by refusing to issue a conditional use permit for construction of a sober living home for women. A 2001 out-of-court settlement resulted in \$125,000 in damages for the plaintiffs.

Walker v. City of Dallas and HUD: This case, brought by private litigants in Texas, alleged that the city and other defendants prevented the development of affordable housing in predominantly white suburban areas ringing the city of Dallas. Under the terms of a 1992 court-approved settlement agreement, 32 suburban cities were required to plan for and build affordable units, and defendants were ordered to pay \$2,142,420 in damages.

-Michael Allen

