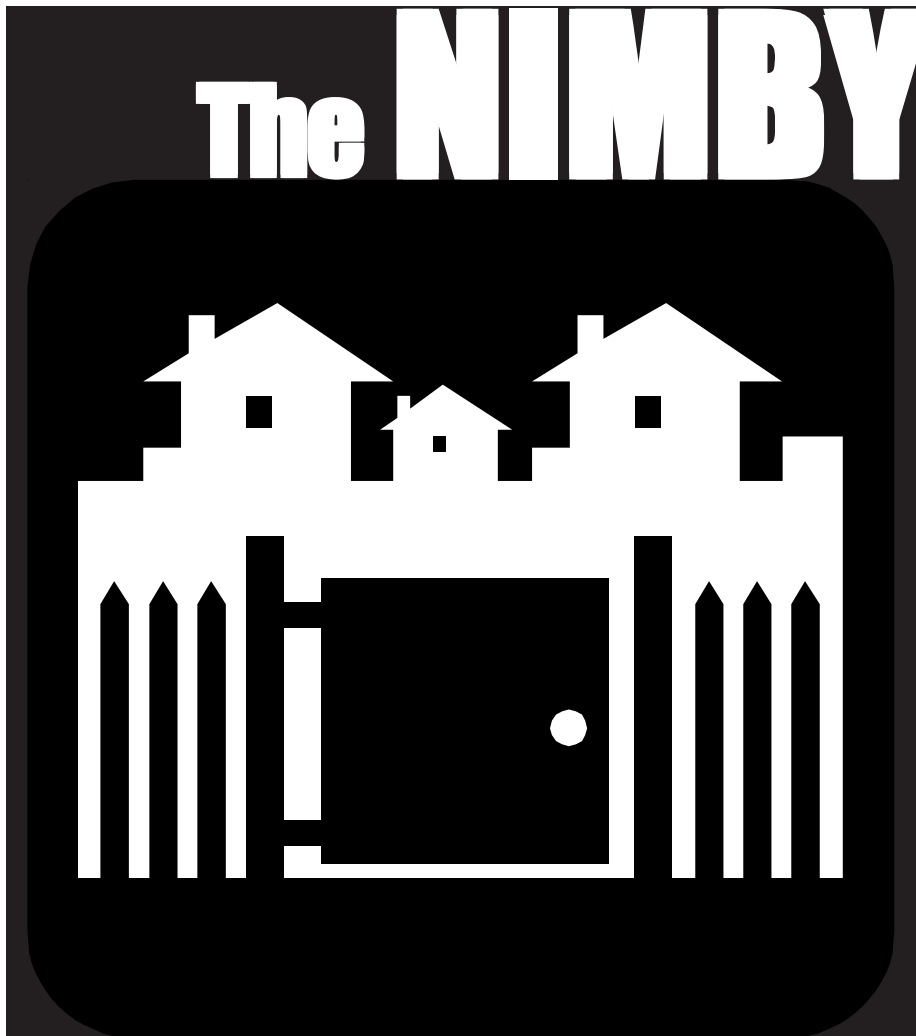


The NIMBY Report



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



***Buckeye* Goes to the Supreme Court**

Diane Citrino, Michael Allen and Kim Schaffer

On January 21, 2003, *City of Cuyahoga Falls v. Buckeye Community Hope Foundation* was heard before the United States Supreme Court. The case has been vigorously litigated since June 1996, and the housing has since been built, but the fight at the Supreme Court will determine whether the plaintiff in the case—an affordable housing developer and Fair Housing organization—will be able to have a trial in federal court to argue that the three years of delay in their project approval violated the U. S. Constitution and the Fair Housing Act.

“Those people”

In 1995, the Buckeye Community Hope Foundation located land in Cuyahoga Falls, Ohio—a town in which 99% of the residents are white—with the intent of building 72 homes for low and moderate income families on Pleasant Meadows Boulevard. Before purchasing the land, Buckeye received assurances from Cuyahoga Falls Mayor Don Robart that the group would have “no problem” building their proposed development.

Nothing could have been further from the truth.

City officials immediately began alerting constituents that “those people” with their “boom boxes” and families with children would be moving to Cuyahoga Falls, despite the fact that the Fair Housing Act prohibits discrimination on the basis of both race and familial status. Comments about “Pleasant Ghetto” and questions such as “Will your kids shut up at sunset?” were rampant in this community that had long been nicknamed “Caucasian Falls.”

Mirroring their constituents, city officials started placing roadblocks in the way of Buckeye’s development. These impediments included strange and unprecedented requirements, including one demand that an 11-foot high barrier be erected prior to any construction to protect the condominiums next door from the new development. City officials also openly urged delay in approving the site plan in the hope they could exploit the time-sensitive funding requirements

that Buckeye faced and thereby kill Pleasant Meadows. Some officials openly searched for a pretext to stop development. One Councilman claimed he had “looked under every rock” to try to find some legal shred to stop Pleasant Meadows, but was forced to concede that Buckeye had done everything right and that the site plan should be approved.

The city’s Planning Commission unanimously agreed that the site plan for Pleasant Meadows conformed to the Cuyahoga Falls zoning code, but local officials remained undeterred. Resorting to a tactic later condemned by the Ohio Supreme Court, city officials and residents placed a referendum on the ballot that asked voters to vote on the same question already decided by the Planning Commission: Whether the site plan (which most of the public had never seen) complied with the city’s zoning code (which most of the public had never read). Given the intensity of public opposition to affordable housing, it was clear voters would overwhelmingly reject Buckeye’s project. The final vote was 3-1 against the development.

To state and federal court

Buckeye, a non-profit developer with statewide involvement, initially sued in state court to stop the referendum, arguing that Ohio’s referendum process was limited to legislative questions and could not be applied to routine administrative decisions under existing land use ordinances. It also sued in federal court, claiming that the city had discriminated on the basis of race and familial status. While the federal court did not stop the referendum altogether, it did withhold certification of the results until the litigation was concluded. The matter went all the way up to the Ohio Supreme Court, which eventually held that the city had violated the state constitution. That decision, in late 1998, permitted the development to go forward.

The case in federal court is about whether the three years of delay that brought Buckeye to the brink of bankruptcy violated the United States Constitution and the Fair Housing Act. The lawsuit sought to have the city stop its discriminatory practices and to pay Buckeye for financial losses caused by the delay. The underlying claim before the U.S. Sixth Circuit Court was that the city allowed opponents of the complex to use the referendum process to kill it and that this action had a disproportionate impact on people of color and families with children. Buckeye claimed that the city essentially adopted the discriminatory views of citizens and denied

equal housing opportunity. The city has described the case as one in which it acted neutrally and allowed the citizens to determine land use issues. It says that the referendum and the city's refusal to issue the permits based upon that outcome are just legitimate expressions of political opinion, which are protected by the First Amendment and therefore cannot constitute violations of the Fair Housing Act.

When the Sixth Circuit Court of Appeals found plenty of evidence of discrimination to allow Buckeye to proceed with its trial, the city of Cuyahoga Falls asked the U.S. Supreme Court to take the case. Perhaps ominously, they did. In January, attorneys had one half hour of argument to persuade the Supreme Court that Buckeye deserves a trial.

Future impact

If they had simply allowed the lower court decisions to stand, the Supreme Court would have in effect given its blessing to Buckeye's right to sue for the delay. Instead, the Court agreed to hear the case on three issues: Intent to discriminate, disparate impact (of the

city's actions on protected classes), and substantive due process (for the city acting arbitrarily and capriciously in not abiding by its site plans). Attorneys for Buckeye planned to focus their arguments on the City's intent to discriminate, for which they planned to document the number of blatantly discriminatory remarks made and actions taken by city officials.

No matter which way *Buckeye* is decided, advocates will work to continue making the connection between civil rights and affordable housing.

The decision should be announced by June 2003.

Diane Citrino is Senior Attorney at Housing Advocates, a Cleveland-based fair housing organization. **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. **Kim Schaffer** is Communications Director at the National Low Income Housing Coalition.

Oldsmar: Using Civil Rights Laws to Build Affordable Housing

Kelli M. Evans

In the wake of the assassination of Dr. Martin Luther King, Jr., President Johnson signed into law the Civil Rights Act of 1968 (42 U.S.C. § 3601 *et seq.*). This landmark civil rights law, which included the Fair Housing Act, was enacted during a time when the nation was starkly divided. As the Kerner Commission recognized, black and white Americans were living separate and increasingly unequal lives. This separation and inequality had a profound impact on all aspects of American life.

In addition to determining where individuals worked, worshipped, and attended school, the lack of equal opportunities dictated whether and where African Americans were allowed to rent and purchase homes. Pervasive housing discrimination against African Americans and other racial minorities resulted in the perpetuation of residential segregation across the nation. Congress enacted the Fair Housing Act in order to end discriminatory housing practices and to promote integration.

The experiences in Oldsmar, Florida, are instructive in how the Fair Housing Act can be used to ensure that affordable housing development is not thwarted by NIMBYism.

The Fair Housing Act and NIMBYism

The Fair Housing Act makes it illegal to discriminate in virtually any aspect of a housing transaction based on race, religion, color, national origin, sex, disability, or familial status. The law provides for compensatory damages, unlimited punitive damages, injunctive relief, and attorney fees. It authorizes plaintiffs to sue municipal governments, government officials in their official *and* individual capacities, community associations, and residents for violations of the law.

Unfortunately, nearly 35 years after the passage of the Act, housing discrimination continues. Like many forms of contemporary discrimination, racial discrimination in housing is rarely as blatant as it was in the past. Today, most individuals seeking to deny housing opportunities to minorities disguise their discriminatory motives. Instead of posting signs that say, “Whites Only,” they erect racially “neutral” barriers

knowing that such barriers will have the same effect: the exclusion of racial minorities and often families with children from entire communities.

Like the discrimination of past decades, these more subtle discriminatory practices are rooted in stereotyping. Developers of safe, quality, affordable housing that benefits people of color and families with children increasingly face opposition grounded in racial and ethnic stereotyping. For example, opponents of affordable housing, without any basis, frequently cite crime and “immoral conduct” to explain why they do not want affordable housing communities in their neighborhoods. When lawmakers adopt or cater to this type of NIMBYism, they are guilty of violating both the letter and spirit of the Fair Housing Act.

Developers all too often fight NIMBYism using land use and zoning laws, many times not realizing the powerful remedies that the Fair Housing Act can bring to the fight. What happened in Oldsmar demonstrates just how effective a tool the Act can be in battling NIMBYism.

Oldsmar: A case study

Oldsmar is a suburban city located just outside of Tampa in northern Pinellas County. The city has a population of approximately 12,000 residents. Oldsmar is an overwhelmingly white city with a significantly smaller minority population than the county or state in which it is located. More than 90% of the city’s population is white. African Americans make up only 3% of Oldsmar’s population and Hispanics less than 7%.

The Wilson Company, an award-winning developer of affordable housing, selected Oldsmar as the location for the Westminster affordable housing community based upon the city and county’s demonstrated need for affordable housing. Oldsmar has a significant number of industrial, manufacturing and retail businesses that depend on lower-wage workers. Many of these workers had to commute by bus from other cities because they could not afford to live in Oldsmar.

The Westminster community was an ideal way to help fulfill the city’s need for safe, quality, affordable housing. Plans called for Westminster to include 270 homes, all housing only those individuals and families with incomes less than or equal to 60% of the county’s median income. Oldsmar’s teachers, office workers, and salespeople could qualify to live in the new community. Based upon Wilson’s experience in other counties and the demographics of the area, it was clear



that Westminster would be an integrated apartment community, attracting a significantly higher proportion of African Americans, Hispanics, and families with children than generally reside in Oldsmar.

The Wilson Company identified a site for the Westminster community that was already zoned for multi-family development. Like the company's other affordable housing communities, Westminster would have state-of-the-art amenities and designer landscaping as well as valuable programs, such as after-school tutoring and a homeownership opportunity program. Through the home ownership program, residents would be able to apply 5% of their rent payments toward the purchase of a home.

Before The Wilson Company could submit its site plan for Westminster, however, community opposition surfaced, spearheaded by a small group of residents calling itself the Oldsmar Community

Alliance (OCA). It was clear from the beginning that the OCA's opposition was based not on legitimate concerns, but was motivated by discriminatory stereotypes and beliefs about the racial and ethnic minorities and families with children likely to reside in the new community. For example, many opponents voiced uninformed opinions about the perceived threat to Oldsmar's safety that Westminster and its residents posed. Knowing nothing about the likely future residents, opponents also alleged that Westminster's residents would have different "values" from the residents of the neighboring single-family subdivisions. One opponent flatly stated that she did not want individuals with low incomes near her neighborhood.

An election issue

At the same time that The Wilson Company began to seek approval of the Westminster site plan, a hotly contested race for three of five city council seats was taking place. The Westminster affordable housing community became a central issue in the race. The OCA vowed to defeat candidates who did not promise to block Westminster. Without reviewing or analyzing the Westminster site plan, three candidates promised to block the affordable housing community at any cost. The OCA endorsed these candidates and turned out voters in record numbers to elect the candidates who

had pledged their opposition to affordable housing. These candidates, including the new Mayor of Oldsmar, were elected because they shared or agreed to support the OCA's stereotyped and discriminatory views of Westminster and its likely residents.

Opponents of Westminster deluged the City Council with letters, phone calls, and petitions. In addition to claiming that the new community would increase crime, opponents alleged that it would result in school overcrowding, excessive traffic, and a decrease in property values. The Wilson Company responded to each of the objections and attempted to debunk the assumptions about affordable housing communities and their residents.

“After receiving a copy of the fair housing lawsuit, city officials had a change of heart. They voted to approve the community, and Westminster is now well under construction.”

In addition to providing hard evidence that the community would not cause the problems alleged by opponents, The Wilson Company conducted briefings in which it provided information and photographs about the

company's other affordable housing communities. The company also provided presentations by former neighborhood opponents of affordable housing and invited Oldsmar residents to tour a Wilson Company affordable housing community located in a neighboring city a few minutes away. The OCA, however, boycotted the informational briefings, refused the tour, filed several frivolous lawsuits, and continued to exert extreme pressure on Oldsmar lawmakers to block Westminster.

In an effort to fulfill their campaign promises, officials adopted the opponents' objections and devised one illegitimate tactic after another to halt the development. The city's leaders reversed initial approvals, engaged in delay tactics, imposed extraordinary administrative hurdles, and filed a series of baseless lawsuits. At one point, Oldsmar even sued itself, asking a court to declare its earlier approvals invalid.

As it did with the neighborhood opponents, The Wilson Company countered each objection raised by Oldsmar officials with facts and creative proposals designed to alleviate each concern. The company also worked closely with land use lawyers to ensure that it met all local land use and zoning requirements, foreclosing any possibility that Westminster could be blocked on a technicality.



After months of contentious hearings, a city council member acknowledged publicly in a local newspaper that the reason neighborhood opponents and some lawmakers opposed Westminster was racial bias. The lawmaker explained that opponents were guilty of prejudging people based on unfounded stereotypes. Even after this explosive revelation, three of the five city council members continued to oppose Westminster.

A happy ending

In danger of losing its state bond funding for Westminster, The Wilson Company prepared in 2001 to sue Oldsmar and neighborhood opponents in federal court for violations of the Fair Housing Act. In the 50-page lawsuit, The Wilson Company detailed the city's and the residents' orchestrated campaign to block housing designed to benefit groups protected under the law. The lawsuit also included claims under Florida's fair housing law, which specifically bans discrimination based on the source of financing of a development.

The Wilson Company's fair housing suit named the three obstructionist city council members in both their

official and *individual* capacities. Individuals sued in their individual capacities are personally responsible for paying damages awarded. The lawsuit sought compensatory and punitive damages, totaling over \$13 million dollars, resulting from The Wilson Company's loss of state bond financing and the violation of its right to develop racially integrated affordable housing for individuals and families with children free from discrimination based on race, national origin, and familial status.

After receiving a copy of the fair housing lawsuit, the city officials had a change of heart. They realized that they faced the distinct danger of bankrupting the city by being on the losing side of a multi-million dollar judgment. As a result, they voted in early 2002 to approve the affordable housing community. Westminster is now well under construction, and its first residents have already moved in. Already, much reconciliation has occurred. Westminster is seen as a resource and its residents as active citizens in the community.

The Developer's View: To Sue or Not to Sue?

“As an affordable housing developer, we cannot build affordable communities without multiple government permits as well as financial assistance in terms of local government construction subsidies or contributions.

Our company's philosophy has always been to acquiesce to local government requests, compromising whenever possible and generally providing more concessions than legally required as a regular part of doing business. We value our reputation as a good corporate citizen for many reasons, not the least of which is that we know once you have fought with a local government it limits the chances of successfully doing business with that

local government in the future. Loathe as we were to bring legal pressure against the City of Oldsmar, we concluded we could not keep walking away from NIMBYism thwarting our affordable housing communities. We had more than a few such experiences with other local governments in Florida and determined it was time to act. There is only so much developable land suitable for affordable housing. At some point developers need to stand up for our rights and the rights of the low income families we serve.”

-Debra Koehler, Senior Vice President,
The Wilson Company, Tampa, Florida.

Florida's Fair Housing Act Amendment

A recent amendment to the Florida Fair Housing Act essentially made low income persons a protected class with regard to land use and permitting:

760.26, Florida Statutes

Prohibited discrimination in land use decisions and in permitting of development.

It is unlawful to discriminate in land use decisions or in the permitting of development based on race, color, national origin, sex, disability, familial status, religion, or, except as otherwise provided by law, the source of financing of a development or proposed development. History.—s. 16, ch. 2000-353.

What are the lessons to be learned from Oldsmar? First, NIMBYism based on stereotypes is at heart a civil rights issue. Second, the Fair Housing Act is a powerful tool for combating NIMBYism because it can force defendants to approve developments and require them to pay millions of dollars in damages resulting from their unlawful conduct. Finally, the Fair Housing Act can make the difference between safe, quality, racially integrated housing and the perpetuation of affordable housing shortages and racial segregation.

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1418 W Street: Using Civil Rights Laws to Preserve Affordable Housing

Reed Colfax

One morning in early March 2000, the residents of 1418 W Street N.W., a 24-unit apartment building in Washington, D.C., awoke to see a notice posted on their front door by the District of Columbia government. The notice stated that their building had been deemed uninhabitable and would be closed in two weeks. The notice on 1418 W Street was one of five posted on multifamily apartment buildings that day as part of a crackdown on 35 “hot properties” that the city had determined contained excessive housing code violations. The vast majority of the hot properties and all five condemned properties were within walking distance of a newly opened Metro subway station in the heart of a rapidly gentrifying neighborhood. The neighborhood, Columbia Heights, houses the majority of the District’s Latino and Vietnamese populations and the targeted buildings were mostly occupied by low income Latino and Vietnamese tenants.

This was not the first time Latinos in the Columbia Heights neighborhoods faced the threat of being dislocated from their homes. Discriminatory code enforcement against Latinos has a long history in the District. In the wake of the 1991 Mount Pleasant riots, the United States Commission on Civil Rights held hearings on the riots’ underlying causes. They heard testimony by the Latino Civil Rights Task Force that the eviction of tenants in response to housing code violations had a disproportionate impact on the Latino community in the Columbia Heights area.

Despite the history and the clear implications of their actions, the District continued the cycle of slum clearance and urban renewal that displaced African American residents and destroyed vibrant communities in Georgetown and in southwest D.C. neighborhoods from the 1940s through the 1960s. The condemnation of buildings in largely Latino neighborhoods similarly mirrored urban renewal projects around the country that have resulted in increased residential segregation.

The residents of 1418 W Street, however, did not simply accede to the District’s attempts to gentrify their

neighborhood and close their building. Instead, utilizing fair housing principles, the tenants, along with tenants of other threatened buildings, launched a defense of their homes and ultimately preserved their—and many other D.C. residents’—affordable housing.

Soon after organizing and incorporating as tenant associations, the 1418 W Street tenants and tenants of three other buildings threatened with closure filed a Fair Housing Act lawsuit against the District for discriminatory enforcement of its housing code. The crux of the lawsuit was that the District’s action had a disparate impact on Latinos and Vietnamese neighborhoods at a time when the District had at its disposal less drastic and less discriminatory measures to accomplish any legitimate public safety goals. The proportion of Hispanics in the five buildings noticed for closure in March 2000 was significantly higher than the proportion of Hispanics in the general population of the District of Columbia. Of the approximately 138 occupied units that received building closure notices, approximately 81 were occupied by Hispanic households. Accordingly, approximately 59% of households that would have been evicted from their homes by the closures were Hispanic. The current Hispanic population in the District of Columbia is approximately 7.9%. The Vietnamese population in the District of Columbia is considerably smaller.

The disparate impact of the District’s housing code enforcement is further revealed by an examination of the neighborhoods affected. The five buildings that received closure notices are located in census tracts with an average Hispanic population of 34%. The total population of the census tracts where buildings on the “Hot Properties List” are located is 21% Hispanic, nearly three times their proportion in the general population in Washington, D.C. Further, the census tract with the majority of targeted buildings has the highest concentration of Hispanics of any tract in the District.

When the public reacted negatively to its announcement of building closures, the District announced that the aggressive enforcement actions were taken to assist tenants in addressing substandard living conditions. However, the District did not take similar action against equivalent or worse substandard apartment buildings in other parts of the District of Columbia with lower populations of Latino and Vietnamese tenants. Nor did the District avail itself of less severe measures available under District law to bring the buildings up to code

without creating such significant harm for the Latino and Vietnamese tenants. For example, the District began criminal prosecutions of a few property owners for housing code violations only after announcing the building closures and receiving a negative reaction in the form of tenant protests and unfavorable publicity. Other measures available to the District to improve housing code violations, such as the use of District funds specifically allocated for making urgent repairs in rental properties and the assessment of special taxes and liens against landlords who fail to make required repairs, were also not utilized. Further, despite taking actions that would have led to the displacement of the tenants at the targeted buildings, the District did not notify the tenants about relocation assistance or any relocation plan. The District's actions were simply not consistent with its professed goal of assisting the tenants.

Indeed, the District's actions in targeting these buildings for housing code enforcement had the opposite result than that they claimed to be pursuing. The code enforcement led to additional deterioration of the situation for tenants already living in poor conditions presided over by exploitative landlords. The property owners reacted to the District's enforcement by abandoning the properties and the maintenance and repairs needed altogether, or by conducting repairs in a slipshod and dangerous manner designed to serve as retaliation. Several of the property owners even threatened tenants or committed acts of violence against tenants. Even once it became clear that the District's lopsided enforcement had negatively affected the tenants much more significantly than the landlords, the District failed to take actions to redress the situation. The criminal prosecutions initiated against the property owners stalled quickly and have only begun to move forward in the last six months. Inspections conducted on the repairs were inadequate, and the District did not utilize other means of ensuring that the building conditions were improved.

With substantial pressure from the lawsuit and the public mounting, the District began negotiating with the tenants of 1418 W Street. The tenants offered a win-win solution: that the District drop its charges

against the landlords in exchange for the owners relinquishing the building to the tenants and providing them with sufficient funds to ensure rehabilitation. The idea was attractive to the District as the tenants would be responsible owners that would ensure compliance with the housing code. Preserving the building as affordable housing would answer the critics that were saying the city was merely functioning as a tool for the big developers who wanted the poor and minority tenants cleared from the rapidly gentrifying area. The idea was attractive to the landlords because they would avoid criminal prosecution (at substantial but not excessive cost). In addition, landlords were afforded a

“The tenants offered a win-win solution: that the District drop its charges against the landlords in exchange for the owners relinquishing the building to the tenants and providing them with sufficient funds to ensure rehabilitation.”

way to join the “good guys” by “donating” the building and money to the community. The biggest winners, of course, were the tenants, having gone from imminent closure of their building to home ownership in a few months.

Ultimately, the strategy worked for 1418 W Street.

In August 2000, 1418 W Street was transferred to the tenants' association for \$1 and the landlords contributed \$300,000 toward the rehabilitation of the building. This success became a rallying point in other efforts to fight the gentrification process in the District's Latino neighborhoods. With this win, the residents of 1418 W Street demonstrated that they were not simply subject to the whims of landlords, the city, or even powerful economic forces and that with use of fair housing principles, they could preserve their affordable housing.

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Using Civil Rights Laws to Provide Supportive Housing and Prevent Homelessness

Susan White Haag

Over the course of the last year, the Bush Administration as well as a number of state and local governments have committed to ending long-term homelessness in ten years. Programs that provide transitional or permanent housing combined with supportive services are a critical component of achieving this goal. Yet providers who seek to meet these needs often confront NIMBY opposition from local government in the form of zoning laws, building codes or permit requirements that may exclude such facilities from particular areas, limit their numbers or concentrations, or impose operating requirements that make it too costly to function.

At the same time, local governments are enacting ordinances that essentially criminalize homelessness by prohibiting activities like sleeping, eating, storing personal belongings, or carrying on other life-sustaining activities in public places, even though the lack of low income housing or shelter space leaves no alternative. After being arrested for these activities, people experiencing homelessness have a criminal record to add to the other barriers they face to obtaining housing. The convergence of criminalization of homelessness with NIMBY opposition to the siting of housing and supportive service solutions can result in homeless people having truly no place to go.

Knowledge of a facility's legal right to locate in a community, and the rights of its potential residents, can be used to educate the public, negotiate with neighbors, or file a lawsuit.¹ While people who are homeless, like people who are poor, are not a protected class under current law, homeless people and programs that serve them may be protected by civil rights laws that protect people from discrimination on the basis of other characteristics, such as race, physical or mental disability or familial status.² In addition, facilities operated by religious organizations that serve homeless people may be protected under the First Amendment. And to the extent a jurisdiction provides no alternatives for homeless people who are excluded from public spaces, due process, equal protection, and eighth amendment issues may arise.

The Fair Housing Act

The Fair Housing Act protects people from discrimination in housing based on their race, color, religion, sex, familial status, national origin, and/or disability, and applies whether or not the housing is federally funded.³ While the status of being homeless itself does not qualify for protection under the Act, homeless people may fall within one of the other protected classes. In particular, many homeless people who are disabled, or who may be perceived to be disabled because of being homeless, may be protected on that basis. Disability is defined by the Act to cover (i) a person with a physical or mental impairment that substantially limits one or more of his or her major life activities, such as feeding or dressing oneself, walking or working; (ii) a person who is perceived to be disabled and is discriminated against based on that perception; and (iii) people who are recovering from alcohol or substance abuse (although people currently using illegal drugs are not protected by the Act). 42 U.S.C. § 3602(h).

The Act protects people in the protected classes as well as organizations that provide them with housing and promote their interests, and may apply even if not all of the potential residents of a facility are members of the protected class.⁴ Thus, for example, the Act was used successfully to challenge certain special use permit requirements imposed on a shelter operated in two adjacent, formerly single-family residences in a commercially-zoned district in the city of Caldwell, Idaho, even though the facility served a variety of people, including adult women with minor children, some families with fathers, and a few single men, and only 75% of the residents were mentally or physically disabled. The court ruled that the township had failed to make a reasonable accommodation for people with disabilities in a number of the special use permit requirements that it imposed, and remedied the violation by raising the number of allowable residents, lowering the minimum number of required parking spaces, and eliminating the requirements for new sidewalks and landscaping. See *Turning Point, Inc. v. City of Caldwell*, Civ. No. 94-0169-S (D. Id. Dec. 28, 1994), *aff'd in part and remanded in part on other grounds*, 74 F.3d 941 (9th Cir. 1996).

Further, whether a particular facility is covered by the protections of the Fair Housing Act depends on whether it is a "dwelling" within the meaning of the Act. The one court case that considered whether a shelter was a dwelling within the meaning of the Act found the fact



that the otherwise homeless women that the shelter served had no other place to which they could return supported the conclusion that the women “reside at the Shelter while participating in the Shelter’s program.” *Woods v. Foster*, 884 F. Supp. 1169, 1174 (N.D. Ill. 1995). Thus, instead of relying on the temporary or permanent nature of their stay, the court was willing to look at whether during their stay, the facility was home. On this reasoning, the Fair Housing Act also has been applied to a group home for recovering drug addicts and alcoholics and hospice facilities for AIDS patients. HUD regulations also specifically identify “sleeping accommodations in shelters intended for occupancy as a residence for homeless persons” as accommodations covered by the statute. 24 C.F.R. § 100.21.

It is less likely that a day shelter, which provides no sleeping accommodations, would be covered by the Fair Housing Act – although a day shelter arguably might be covered if, for example, it is the place where regular clients return day after day, receive mail and messages, and is the only home to which they expect to return.

HUD funding certifications

In order for a state or local government to receive or continue to receive funds under certain HUD-administered programs, the governmental entity must include “certifications” in its annual submission to HUD. These certifications also may be used as a basis for challenging exclusionary practices.⁵

For example, a recipient of HUD funding must certify that it will affirmatively further fair housing, which means that it will identify impediments to fair housing choice in the jurisdiction based on race, color, gender, national origin, familial status, religion or disability, take appropriate actions to overcome the effects of any identified impediments, and maintain records reflecting its analysis and actions. Exclusionary zoning practices might be challenged as an impediment to fair housing choice. If the funding recipient has not identified the impediments, has not formulated a plan to overcome discriminatory situations, or is itself violating the Fair

Housing Act, an advocacy organization could challenge this certification by sending a letter with supporting documentation to HUD and requesting that the recipient be instructed to comply. HUD’s failure to enforce fair housing certifications might violate HUD’s own statutory obligation to affirmatively further the policies of the Fair Housing Act. See 42 U.S.C. § 3608(e)(5).

Similarly, state and local governments that seek CDBG funds must certify that the grant will be conducted and administered in conformity with Title VI of the Civil Rights Act of 1964 (see discussion below) and the Fair Housing Act and implementing regulations.

Other statutory protections

A number of other civil rights laws may be available to challenge attempts to exclude homeless people, or programs or facilities that serve them, from a community, if the program or facility is federally funded.

Section 109 of Title I of the Housing and Community

Development Act of 1974 prohibits discrimination based on race, color, national origin, sex, religion, age or handicap in connection with programs funded under HUD’s Community Development Block Grant program. 42 U.S.C. § 5309.

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color or national origin in any program or activity that receives federal funds. A recipient of funds might violate the Act by denying homeless people access to counseling, treatment or shelter based on race, color or national origin; steering homeless people to shelters based on their race or the race of the surrounding neighborhood; limiting where programs needed by homeless people operate based on the race or national origin of the people who would utilize the services; or canceling programs based on the race or national origin of the majority of the participants.

Title II of the Americans with Disabilities Act prohibits discrimination on the basis of disability by State or local

“While people who are homeless, like people who are poor, are not a protected class under current law, homeless people and programs that serve them may be protected by civil rights laws that protect people from discrimination on the basis of other characteristics.”

governments in employment, governmental programs, services and activities, public or private transportation, telecommunications, public accommodations, and commercial facilities. 42 U.S.C. §§ 12131-12134. In some jurisdictions the ADA has been used successfully to challenge exclusionary zoning practices as an “activity” of a public entity, and Department of Justice regulations appear to support this view. Some courts have disagreed, however, holding that the ADA does not apply to zoning practices.

Constitutional protections

Services or facilities for homeless or poor people that are operated by churches or other religious organizations may be protected from zoning ordinances or other types of governmental interference under the free exercise clause of the first amendment

of the U.S. Constitution, as well as The Religious Land Use and Institutionalized Persons Act of 2000. For example, providing sleeping space for homeless people may be viewed as an integral part of a religious organization’s religious mission and therefore protected under the free exercise clause.⁶ In *Fifth Avenue Presbyterian Church v. City of New York*, the City of New York was enjoined from dispersing homeless people from sleeping on stairway landings outside the Church’s main sanctuary on Fifth Avenue and 55th Street in New York City, based on the court’s conclusion that the Church had demonstrated a likelihood of success in establishing that providing outdoor sleeping space for the homeless effectuated a sincerely held religious belief and that the City had not asserted a compelling interest that would suffice to overcome the Church’s free exercise right, or shown that it had adopted the least restrictive means of accomplishing its goal.

In addition to enacting zoning ordinances that impede development of facilities that would serve very low-income or homeless people, a growing number of jurisdictions are adopting or enforcing laws that prohibit activities such as sleeping, sitting, or storing personal belongings in public spaces.⁸ In localities where there is insufficient shelter or transitional bed space to provide any alternative, these practices essentially criminalize homelessness, and may provide the basis for

constitutional challenges. These practices also could provide the opportunity to work with local jurisdictions on developing constructive alternatives to criminalization.

In the late 1980’s, for example, the City of Miami arrested thousands of people for misdemeanors such as sleeping in public, being in a public park after hours, obstructing the sidewalk, for loitering and prowling, and for trespassing on public property. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559-60 (S.D. Fla. 1992). A class action brought against the city on behalf of homeless people living in the city alleged

violations of constitutional rights in connection with the arrests and seizures of their property. While the case eventually was appealed and the parties directed to settle, the district court ruled that the City’s policy of arresting homeless people for performing inoffensive

conduct in public when they had no place to go was cruel and unusual in violation of the eighth amendment, was overbroad to the extent that it reached innocent acts in violation of the due process clause of the fourteenth amendment, and infringed on the fundamental right to travel in violation of the equal protection clause of the fourteenth amendment. See *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

Importantly, the court found evidence of the lack of any available shelter space or housing alternative to be legally significant to the constitutional challenges:

Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless. This effect is no different from the vagrancy ordinances which courts struck because they punished ‘innocent victims of misfortune’ and made a crime of being ‘unemployed, without funds, and in a public place.’ . . . Therefore, just as application of

“Aggressive use of civil rights laws by advocates, and governmental support for civil rights initiatives, is critical to the success of plans to end long-term homelessness.”



the vagrancy ordinances to the displaced poor constitutes cruel and unusual punishment, . . . arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual.

The case ultimately settled for \$1.5 million, which was awarded to approved class members and attorneys, and resulted in creation of a written “no beds/no arrest” police protocol governing interactions with homeless people, meaning that if no beds are available, police may not enforce the ordinances against homeless people.

Strategies

While litigation is an important tool in combating exclusionary practices, it is a costly and lengthy process. In some instances, informal strategies that nonetheless rely upon the force of the civil rights laws may also be effective. Thus, for example, an advocate might enlist the assistance of a representative from HUD’s Fair Housing and Equal Opportunity office, or the local or State agency that contracts with HUD to enforce fair housing laws in the locality, or someone from the Housing and Civil Enforcement Section the Justice Department’s Civil Rights Division, to make a telephone call to a local official, or attend a meeting of the local zoning board. This strategy has been sufficient in some instances to focus the attention of local decision-makers and defuse exclusionary efforts.

Conclusion

The types of supportive housing that form the basis of current plans to end long-term homelessness are often exactly the types of programs that suffer the worst NIMBY opposition. Aggressive use of civil rights laws by advocates, and governmental support for civil rights initiatives, including enforcement, is critical to the success of these plans.

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Endnotes

¹ For further information on these issues, see National Law Center on Homelessness and Poverty, “Access Delayed, Access Denied: Local Opposition to Housing and Services for Homeless People Across the United States” (1997) and “Using the HUD Conplan Process and Federal Civil Rights Laws on Behalf of Homeless People: A Handbook” (1996). See also American Bar Association Steering Committee on the Unmet Legal Needs of Children and Commission on Homelessness and Poverty, “NIMBY: A Primer for Lawyers and Advocates” (1999).

² Similarly, a right to housing under the U.S. Constitution has not yet been recognized, although such a right is a common precept in international law.

³ See 42 U.S.C. §§ 3601-3631. This article uses the term disability rather than the statutory term “handicap.”

⁴ The statute makes it unlawful “to coerce, intimidate, threaten or interfere with any person . . . on account of his having aided or encouraged any other person in the exercise or enjoyment” of the fair housing rights protected by the statute. See 42 U.S.C. § 3617.

⁵ See 24 C.F.R. §§ 91.225 (local governments), 91.325 (state governments). These HUD-administered programs include, for example, the Community Development Block Grant program, the Emergency Shelter Grant program, the HOME Investment Partnerships program, or the Housing Opportunities for Persons with AIDS program.

⁶ 293 F.2d 570 (2d Cir. 2002).

⁷ See The Becket Fund for Religious Liberty, amicus curiae brief, *Fifth Avenue Presbyterian Church v. City of New York*

⁸ For further background on criminalization trends, legal issues raised and potential solutions, see National Coalition for the Homeless and the National Law Center on Homelessness and Poverty, “Illegal to Be Homeless: The Criminalization of Homelessness in the United States” (2002) and M. Foscarinis, “Down-ward Spiral: Homelessness and its Criminalization,” 14 Yale Law & Policy Review 1 (1996).

***Mount Laurel* Then and Now: Using the State Constitution to Further Affordable Housing**

Kevin Walsh

The *Mount Laurel* doctrine, which pursuant to the New Jersey state constitution requires all New Jersey municipalities to zone for their “fair share” of affordable housing, was created by the New Jersey Supreme Court in 1975 as a way to stem the tide of increasing racial and economic segregation in this most suburban of states¹. Recent decisions indicate that the Court is interested in strengthening the doctrine and in forcing the state to shoulder a greater financial burden.

Unfortunately, *Mount Laurel* advocacy that seeks to effect social change has always been controversial because many people oppose the doctrine’s inclusionary goals. Since 1975, the doctrine has been decried by a New Jersey governor as “communistic,” manipulated by suburban politicians, often ignored by municipalities, and overall neutralized by a state bureaucracy determined to remove the aspects of the doctrine that are likely to effect social change. Some New Jerseyans have blamed the doctrine for sprawl and sought to pass constitutional amendments that would remove the Supreme Court from the affordable housing business. The same people have cited it as an example of judicial activism, of judges making law instead of deciding controversies before them. Civil rights activists view the doctrine as sensible public policy, as the beginning of a remedy for decades of government-sanctioned segregation, and as a source of hope in one of the costliest housing markets in the nation. For-profit housing developers support the doctrine because it provides them with the opportunity to build at higher densities, but they have demonstrated no interest in doing anything beyond what is required of them, such as seeking state funding to make it possible for the urban poor to live in suburbia.

In short, the *Mount Laurel* doctrine is many things to many people—most of whom, it seems, are not very happy with it. Presently, suburban mayors and some state officials (both the current governor and his cabinet member in charge of housing funds are former suburban mayors who resisted providing their “fair share”) are seeking to neutralize the doctrine further, claiming that it robs municipalities of their “home rule” powers and

burdens their municipal budgets unfairly. At the same time, civil rights activists, unhappy with the doctrine for different reasons, are working to return it to its radical roots.

A doctrine is born

Before looking forward, a brief look back may be helpful. Although the *Mount Laurel* doctrine still commands newspaper headlines whenever it is mentioned at a public meeting or in court, the dispute that gave rise to it did not initially have the makings of a constitutional crisis. In the early 1970’s, as white urban dwellers continued their exodus to the newly created suburbs, the leaders of a community of black former sharecroppers in the Township of Mount Laurel approached the white Quakers with a simple request. They asked Mount Laurel to rezone a parcel of land to permit them to construct garden apartments that would be funded in part by the state. In response, the Mayor of Mount Laurel, in a statement that should make any top-ten list of later-regretted NIMBY-motivated statements said, “If you people can’t afford to live in our town, you’ll just have to leave.”²

With that smoking gun, and against a mountain of law that was against them, the plaintiffs, with two local NAACP Branches and a number of individual plaintiffs who were living in substandard housing among them, sued. (One noteworthy plaintiff, Ethel R. Lawrence, came to be known as the “Rosa Parks” of affordable housing.) They were represented by three lawyers with Camden Regional Legal Services, one of whom, Peter J. O’Connor, still represents the original *Mount Laurel* plaintiffs. The plaintiffs argued that by zoning the land as it did, Mount Laurel illegally forced people who are poor out of the township and prevented them from moving in. They contended that failing to provide for part of the region’s need for affordable housing amounted to racial and economic discrimination.

The plaintiffs lost at the trial court. On appeal to the Supreme Court, Mount Laurel’s lawyer first told the Court that the township was not discriminating against the plaintiffs because they were racial minorities, but because they were poor. Second, he argued that the township had violated no law because municipalities have an interest in maximizing the value of their tax base. That is, the municipality had nothing to gain, it contended, by providing affordable housing. At the time, Mount Laurel’s position was correct legally. NIMBY-motivated housing policies were the order of the day.

That changed, however, when the Court issued its

decision, *Mount Laurel I*, 67 N.J. 151 (1975). The Court held that Mount Laurel and the state violated the state constitution's requirement that zoning powers be used to advance the general welfare when it failed to provide opportunities for the poor while attempting to attract the wealthy:

While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.

The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.

Although the plaintiffs and their lawyers thought they had “won,” more municipal resistance throughout the state followed. In 1983, in view of *Mount Laurel I*'s willingness to rezone only land that was either in an industrial area or under water, the Court in *Mount Laurel II*, 92 N.J. 158 (1983), strengthened the doctrine. It held that a municipality that refused to provide a realistic opportunity for the development of its fair share of affordable housing is subject to a builder's remedy. That remedy permits developers who are willing to develop on-site affordable houses at a four-to-one market-rate to affordable-rate ratio to receive a density bonus—thus permitting more houses on the same amount of land. The Court sought to capture the for-profit developers' interest in making money to increase affordable housing opportunities for the poor.

Central to the Court's decision was the obvious fact that the ghettoized nature of New Jersey's urban areas was in large part the result of the concentration of the poor and the resulting desperation. The Court aspired to reverse that trend, contending that the “provision of lower income housing in the suburbs may help to relieve cities of what has become an overwhelming fiscal and social burden. It may also make jobs more accessible for the unemployed poor. De-concentration of the urban poor will presumably make cities more attractive for businesses and upper income residents to return to.”

“The Court held that Mount Laurel and the state violated the state constitution's requirement that zoning powers be used to advance the general welfare by failing to provide opportunities for the poor.”

Following the political firestorm caused by the *Mount Laurel II* decision, the legislature passed the New Jersey Fair Housing Act in 1985, which enabled municipalities to have their affordable housing plans approved by a new state agency, the

Council on Affordable Housing (COAH). COAH was intended to provide a constitutional means for the executive branch to administer the doctrine—essentially to have the governor take over where the Supreme Court left off. If municipalities do not receive protection from COAH, they may still be sued by developers and public interest plaintiffs.

With the passage of the state Fair Housing Act, advocates again claimed victory. Under COAH, more than 26,000 new affordable units, one-third of the state's need as calculated (likely too conservatively) by COAH, have been built or now are under construction. Almost \$100 million of development fees, which must be used to assist with the development of affordable housing, have been collected statewide. Sixty percent of New Jersey's 566 municipalities are now providing for their “fair share.”

Although COAH has provided for a more streamlined process, and although New Jersey has done more than most states to promote residential inclusion, the state and COAH have not kept the promise of the *Mount Laurel* doctrine. In 2002, New Jersey municipalities with COAH's blessing still maintain highly exclusionary zoning policies. They above all else pursue the ratables chase, in which to raise more in property taxes they try to keep school children out, and they zone their land in ways that perpetuate racial and economic segregation in massive proportions. Many suburban, predominantly white municipalities have

even paid urban municipalities, which have the most troubled and racially-segregated schools in the state, to accept up to half of their fair share obligation in the name of “revitalization” of urban areas while market-rate housing is built with little hesitation in the suburban areas. Compounding the lost opportunities is the fact that suburban municipalities are purchasing open space at a record pace, thus increasing the cost of land while decreasing its availability. Whereas some people have better housing, and thus better opportunities, because of the *Mount Laurel* doctrine, the vast majority of the intended beneficiaries of the Court’s recognition of a right to be free from exclusionary zoning are still victims of it.

Recent *Mount Laurel* developments

In view of the continued exclusion of most *Mount Laurel* beneficiaries from regional housing opportunities, the *Mount Laurel* doctrine is ripe for advocacy, and the state Supreme Court has signaled recently in two decisions that it is willing to hear what the advocates have to say.

In *Toll Bros. v. West Windsor*, 173 N.J. 502 (2002), the Court revisited the doctrine with the help of the original NAACP Branch *Mount Laurel* plaintiffs as friends of the court. *Toll Bros.* received a builder’s remedy because it proved West Windsor, a wealthy developing municipality, had not met its fair share obligation. The Court’s review of that decision, which it ultimately affirmed, provided public interest groups with the opportunity to argue that the doctrine is serving too few of the *Mount Laurel* beneficiaries and is not promoting regional mobility sufficiently. In a nutshell, the argument was that COAH’s version of the *Mount Laurel* doctrine is too exclusionary, and thus unconstitutional.

Advocates focused initially on the affordability range of the *Mount Laurel* opportunities that were being provided. COAH, in one of its more damaging departures from the *Mount Laurel* doctrine, primarily requires municipalities to provide opportunities for moderate income families, those with incomes from 50- to 80-percent of median income. That leaves behind about twenty percent of the population that is too poor to benefit from COAH’s interpretation of what the *Mount Laurel* doctrine requires. In Camden County, which is just outside Philadelphia and home to one of

the poorest cities in the nation, the median income is \$63,300. COAH’s regulations ensure that virtually no families earning below 40% of median income (approximately \$25,000) will have the opportunity to live in suburban *Mount Laurel* housing, a bitter irony in view of the Court’s stated purpose of providing opportunities for even the poor to leave urban ghettos.

COAH’s regulations rely substantially on the proposition that for-profit developers can subsidize their developments only so much. To require them to do more, the argument goes, would be counterproductive because

they would choose not to build developments that exact too great of an obligation. The proposed solution was to require municipalities and developers to seek funding from the state or other sources. Plaintiffs urged the Court to find that

constitutionally the obligation was to reach the full range of *Mount Laurel* beneficiaries — from the very poor to those with moderate incomes. Thus, for instance, a developer should be required to reach down to 40% of median income. The state then should use its funding (which incidentally is used primarily to construct housing in desperate urban neighborhoods with high rates of poverty, crime, and racial segregation) to reach farther.

To that argument the *Toll Bros.* Court responded with an invitation: Bring a case with a complete record and it will consider those arguments, which it noted optimistically are consistent with the New Jersey State Development and Redevelopment Plan’s recognition “that a comprehensive housing policy emphasizing the need to lower housing costs and increase opportunities for all income and ethnic groups is critical to the state’s economy.”

Two Justices went further. They would have required *Toll Bros.* and *West Windsor* on remand to address how they would reach below 40% of median income, presumably by using outside funding sources. That the Court did not disagree with that position, but merely decided to wait for a case in which plaintiffs’ concerns were raised below, is a good sign. It is also encouraging that the Justices who would have reached further cited the regional mobility goals of *Mount Laurel* to support their position.

“The next steps advocates take will involve increasing the range of affordability and requiring municipalities to construct actual houses instead of receiving credits of dubious utility.”

Another relevant revisiting of the Mount Laurel doctrine occurred in the Court's decision in *Fair Share Housing Center v. Cherry Hill*, 173 N.J. 393, 410 (2002). In that case, the developer of a former horseracing track in a wealthy suburban municipality sought to buy its way out of satisfying a likely several-hundred unit affordable housing obligation. In reversing the trial court decision, the Court recognized that land that is used for non-Mount Laurel purposes in a municipality not meeting its current fair share obligation may frustrate the satisfaction of the constitutional obligations imposed by *Mount Laurel* by removing land that should have had an affordable component from a municipality's affordable housing inventory. That is, a municipality's capacity to satisfy its constitutional obligations is what carries the day, not one developer's willingness to pay to build housing for the poor elsewhere.

In siding with the public interest plaintiffs in the *Cherry Hill* decision, the Court signaled the start of a trend away from another of COAH's neutralizing regulations. Although fair share obligations are based on actual need for homes by individual families, COAH trades in housing credits. That is, municipalities need not provide an opportunity for all of the houses, but only for the award of housing credits, which it seems are awarded to municipalities for the asking. Affordable rental homes for one family are deemed to be worth a home for two families. A payment of \$25,000 to a segregated urban area also is worth one housing credit, and municipalities can trade up to half of their obligation to such places. A municipality with an obligation of 100 units thus can get away with providing an opportunity for less than thirty actual homes. But those other seventy families still exist — and still need affordable housing. Whereas COAH conveniently forgets about those families, the *Cherry Hill* decision indicates that a more searching inquiry into the validity of such trickery is warranted and likely.

Next steps and conclusion

Although many civil rights activists rightly criticize how it is being enforced today, the *Mount Laurel* doctrine at its core remains a tool for social change, a basis for future advocacy, and a reminder to municipalities that want to sacrifice societal inclusion for a stronger tax base have to respond to a higher legal power, if not also another kind of higher power.

The two recent *Mount Laurel* decisions with public interest involvement indicates that the New Jersey

Supreme Court is still committed to the enforcing the constitutional right to be free from exclusionary zoning. The public interest face of *Mount Laurel* has been revitalized by the *Toll Bros.* and *Cherry Hill* decisions.

The next steps advocates take will involve increasing the range of affordability. That battle will be fought at first against the state, which unduly limits funding opportunities in suburbia. Developers who resist public interest plaintiffs' efforts while claiming to be interested in helping the poor also will become defendants. Requiring municipalities to construct actual houses instead of receiving credits of dubious utility is another worthy effort on the horizon. Beyond those implied invitations, public interest plaintiffs likely will work on resolving the tension between *Mount Laurel*'s economic remedy, which thus far has permitted transfers from wealthy suburban municipalities to poor, urban municipalities, and *Mount Laurel* inclusionary tenets. Likewise, there will be cases that require courts to reconcile those COAH's actions that have segregative effects with federal and state anti-discrimination laws.

Challenges to a state-sanctioned system of zoning that perpetuates racial and economic segregation will always be met with opposition. Some suburban mayors will continue to complain, the for-profit developers will continue to make money, and the civil rights activists will continue to advocate for a system of laws that does not force the poor to live exclusively in New Jersey's most troubled neighborhoods.

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Endnotes

¹ New Jersey was the first state to use any branch of government to impose an obligation to provide fair share housing, and it remains the only state to impose that obligation through the state constitution. Other states and localities have addressed fair share issues through regional equity agendas or through other legislative actions. Massachusetts; California; and Montgomery County, Maryland are places that have worked to address the issue.

²Quote taken from page 2 of "Our Town: Race, Housing and the Soul of Suburbia" by Kirp, Dwyer, and Rosenthal (Rutgers Univ. Press 1995).



Federal Policies to Disperse Subsidized Housing: Not a Satisfactory Remedy for Local Exclusionary Land Use Policies

Edward G. Goetz

The federal government has a yet-unrealized ability to counteract local policies that result in economic and racial polarization. Rigorous enforcement of fair housing laws is certainly at the top of the list. But, in addition, the federal government could use its transportation and infrastructure spending authority to encourage inclusionary patterns of development at the state and local levels. Federal dollars could be targeted to those areas that encourage inclusionary development and away from those areas that encourage exclusionary development. Federal civil rights protections certainly justify federal intervention in this way. Unfortunately, federal policy currently focuses on the creation of more integrated neighborhoods through the geographic dispersal of subsidized housing. For the reasons explained in this article, this is a federal policy that is unlikely to effect any real change in exclusionary residential patterns.

Voluntary and involuntary dispersal efforts

Several national policy efforts aim at dispersing subsidized households. The “mobility” approach attempts to enhance neighborhood options for very low-income households by providing housing vouchers to be used in “non-impacted” neighborhoods (areas having a small percentage of minorities and poverty). The prototypes for this type of voluntary approach are the Gautreaux program in Chicago, and the federal Moving to Opportunity (MTO) program, described below.

The second set of dispersal efforts is the remaking of existing subsidized projects in ways that reduce the concentration of very low-income households. The remaking of these micro-communities is achieved in several ways, the prototype being the national HOPE VI program. HOPE VI provides funds for the demolition or redevelopment of distressed public housing projects that reduce the density and concentration of public housing units on site. HUD’s efforts to “voucher out” subsidized projects across the

country also convert project-based assistance into tenant-based subsidies, and result in the involuntary dispersal of poor households. The development of ‘mixed-income’ housing in new developments as a means of avoiding future segregation of subsidized families, or in existing projects as a means of reducing current levels of segregation, is a central part of this second strategy.

Subsidized families who have been trapped in poor and sometimes dangerous neighborhoods (as is the case with some federally assisted housing) certainly deserve the opportunity to move to better neighborhoods while retaining their housing assistance. This, the MTO program does for them. Similarly, many of the nation’s worst (and most socially and economically dysfunctional) public housing projects have been rehabilitated and the environments made safer and more livable. This has been accomplished through HOPE VI. While these initiatives are able to achieve these important policy objectives, it is not likely that they will ever, by themselves or in combination, produce a significant level of housing desegregation in American urban areas.

Why voluntary dispersal efforts will not desegregate

Voluntary and involuntary dispersal efforts rely heavily on tenant-based housing assistance. Ultimately, the potential for tenant-based assistance to deconcentrate the poor and desegregate racial minorities rests upon a series of shaky propositions about the availability of an adequate number of units, their attractiveness to low-income families, and the willingness of property managers to accept such households. The difficulty in using this form of housing subsidy can be seen in recent experiences in housing markets across the country. For many years, the percent of families who receive vouchers who are able to find an acceptable unit and a willing landlord (this is called the “lease-up rate”) had been steadily increasing. In the past five years, however, lease-up rates have fallen nationally, with the biggest declines occurring in “tight” housing markets¹.

Special mobility programs achieve significantly lower lease-up rates than does the voucher program. The Gautreaux program, designed to move African-American families into Chicago area neighborhoods with few minorities, was able to achieve a lease-up rate in the low-twenty percent range. MTO achieved a 47 percent lease-up rate across its five program sites - an



improvement over Gautreaux, but still a failure rate in excess of one in two. In Minneapolis, more than 700 mobility certificates were made available to families to escape concentrated poverty in 1995. In more than five years of trying, the city was able to successfully launch only 60 families. Lease-up rates are low in some communities because the lack of a suitable stock of units hinders mobility programs. In suburban Baltimore, for example, only 15 percent of the dwellings have rents that meet program limits.

In addition to limitations inherent in the form of the subsidy, dispersal efforts are constrained by the difficulties faced by the poor in negotiating housing markets. The assumption that poor families *want* to move to outlying areas is also questionable. Mobility decisions of low-income families are strongly affected by the package of neighborhood amenities, including the range of services (including public transportation, medical care, and social services) that exists in neighborhoods. Many suburban, non-segregated neighborhoods simply do not have the features needed or desired by low-income families.

Many mobility participants also fear discrimination in the housing search and harassment in new communities. In Omaha, for example, families participating in a mobility program purposely waited four months (the statutory period for finding a home in a non-impacted area) so that they could use their housing voucher in an impacted neighborhood². While reluctance to participate in mobility programs is not universal, in some cities, housing authorities struggle to allocate all of the mobility certificates they have available. Even those who move out may turn around and return to impacted neighborhoods at a later date, a possibility that prompts many observers to suggest that long-term support is necessary for those who relocate in order to ensure that they remain desegregated.

Another reason that voluntary mobility programs will not likely result in a meaningful level of desegregation is their limited scope. The subset that volunteers for such programs is, on the whole, likely to be more motivated, and, perhaps, have broader life experiences

and abilities - in short, have greater levels of human capital than those who do not volunteer to leave. Beyond this problem of “self-selection,” there is often a formal screening process involved in operating mobility programs that ensures that those who participate are systematically different than the low-income families left behind. Finally, the low success rates for these programs further differentiate ultimate program participants from others. It is likely that those who are successful in leasing units are systematically different than those who are unable to do so.

“The greatest need for federal intervention is in the practices of the private housing market (through enforcement of Fair Housing laws) and in the exclusionary actions of local governments.”

Even if mobility programs were not limited by self-selection and screening, they would still have difficulty reaching scale. Mobility programs face the paradoxical situation that they must remain small to remain politically viable, but smallness ensures that they will never adequately address the problem of

segregated neighborhoods. It is clear that a significant expansion of mobility would be necessary to approach the scale needed to affect patterns of segregated neighborhoods in the U.S.

Why involuntary dispersal efforts will not desegregate

Dispersal that relies upon project-based assistance is just as likely to be limited but for different reasons. Most suburban communities have a built-up unmet demand for affordable housing. Suburban housing agencies typically have lengthy waiting lists and most prefer to serve families on their own waiting lists (through so-called “residency requirements”) before serving inner-city families. Thus, new housing opportunities that are developed in suburban areas are likely to be filled by suburbanites, not low-income black families from the central city. The nation’s largest program of regional fair share housing in New Jersey, for example, has produced thousands of affordable units in suburban areas. Most are occupied by white families who had previously lived in the suburbs³. In fact, the net rate of African-American dispersal in the fair share units in New Jersey is less than 1%.

Involuntary dispersal is even less effective in actually desegregating the poor than are voluntary programs. Because people who are displaced are given full choice

in relocating, many move into other parts of the neighborhood from which they have been displaced. The typical displaced family simply does not move very far away⁴. For example, in the years following the demolition of public housing in Chicago, 79 percent of families moved to census tracts that are 90 percent or more black, and 94 percent went to tracts in which the average income is \$15,000 or less⁵.

Beyond dispersal

Meaningful desegregation in American communities is going to require more than the dispersal of federally subsidized housing. Such housing accounts for a very small percentage of the nation's housing stock and, for the reasons described above, is not likely to become significantly dispersed in any case. The greatest need for federal intervention is in the practices of the private housing market (through enforcement of Fair Housing laws) and in the exclusionary actions of local governments. The federal government has been extremely reluctant to discourage local zoning practices that segregate lower-cost housing, or other regulatory actions that contribute to the economic and racial polarization of metropolitan areas. Yet, this is precisely what must be done to make a dent in segregation and to achieve significant change in residential patterns. The creative use of federal authority over infrastructure grants, transportation financing, and development funding must be used to create incentives for more inclusionary patterns of development. A narrow focus on dispersing the poor who live in assisted housing may be the most politically expedient strategy, but it is entirely insufficient to accomplish desegregation goals.

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Endnotes

¹ Finkel, Meryl, and Larry Buron (2001) "Study on Section 8 voucher success rates: Volume I: Quantitative study of success rates in metropolitan areas." Washington, DC: Office of Policy Development and Research, U.S. Department of Housing and Urban Development.

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³ Wish, Naomi Bailin and Stephen Eisdorfer (1997) "The impact of Mount Laurel initiatives: An analysis of the characteristics of applicants and occupants." *Seton Hall Law Review* 27: 1268-1337.

⁴ Varady, David P., and Carole C. Walker (2000) "Vouchering out distressed subsidized developments: Does moving lead to improvements in housing and neighborhood conditions?" *Housing Policy Debate* 11 (1): 115-162.

⁵ Rumbler, Bill (1998) "Despite Section 8 vouchers, segregation perpetuates." *Chicago Sun Times* December 6.

Managing Local Opposition to Affordable Housing: A New Approach to NIMBY

Tim Iglesias

The MLO (Managing Local Opposition) approach is a proactive, collaborative, and comprehensive method for dealing with local opposition. It focuses on what the developer and its allies can achieve together by planning for potential opposition. It integrates (as appropriate) political and community organizing, legal strategies and public relations strategies. The MLO approach is described more completely in the article from which this excerpt is adapted, and is available in the Journal of Affordable Housing & Community Development Law, Volume 12, Fall 2002. Reprinted with permission.

Case study in Managing Local Opposition (MLO)

Center Point, Inc., an established community services agency with almost no development experience, received a house in the upper-income city of Larkspur in Marin County, California, after another mental health services nonprofit had gone bankrupt. The house had been previously used as a congregate living facility and had a history of poor relations with its neighbors. In addition, a private, for-profit alcohol rehabilitation center was nearby that was also a source of neighborhood conflict. Center Point proposed to establish and operate a transitional housing residence with supportive services for women and children at the site. There was confusion over whether Larkspur's zoning code would require a conditional use permit (CUP) for the use, both because of confusing language in Larkspur's code and because of the city attorney's apparent uncertainty on the issue. The Planning Commission decided that no CUP was required. During the period prior to the Planning Commission hearing, Center Point had been meeting with neighborhood representatives to listen to and respond to their concerns. After the Planning Commission decision, however, neighbors organized against the proposal. They hired an attorney who appealed the decision and wrote a memorandum arguing for the imposition of a CUP requirement. Center Point then approached the Community Acceptance Strategies Consortium¹ (CASC) for assistance.

CASC's attorney drafted a memorandum supporting the

Planning Commission's decision and countering the arguments advanced by the opponents' attorney. On the eve of the City Council meeting at which the appeal would be heard, the opponents met with Center Point and agreed to withdraw their appeal in exchange for reasonable assurances (all of which had previously been offered) by Center Point. The city not only approved the proposal, but also directed its city attorney to review the disputed code language and propose appropriate modifications.²

A pragmatic view

Land use decisions are often the result of a mix of law and politics.³ The MLO approach takes a pragmatic view, but emphasizes the need for the developer to clearly and deliberately consider the potential for using law, and to do so early in the predevelopment process.⁴ The information gathered and analyzed in the research and planning step will set up the strategic decisions that the developer should make regarding legal strategies.⁵

The first strategic issue that the developer should carefully consider is whether it is willing to employ *any* legal strategies. Many developers are skittish about framing their housing proposal as a legal or civil rights issue. There is a common reluctance among affordable housing developers to press or even raise legal issues with the local government for fear of upsetting the relationship in which the developer is often seeking both funding and land use approvals.⁶ At one end of the spectrum, experienced and successful developers of affordable single-family and multifamily housing typically shy away from any use of the law.⁷ At the other end of the spectrum, some developers—particularly those sponsoring housing for persons with disabilities—are keenly (and painfully) aware of the likely opposition that they will face, and may tend to interpret any local opposition as “discrimination” requiring a legal solution.⁸ (This comment is not meant in any way to minimize the facts of rampant discrimination, particularly against housing and services for persons with mental disabilities.⁹)

There are numerous other obstacles to developers taking advantage of their legal rights. Developers tend to accommodate most local governments' aversion to conflict. Some developers have numerous options for expending their predevelopment resources and rationally decide not to risk spending time and energy in a context where legal issues might arise.¹⁰ Of course, the money, time, and risk associated with exercising

legal options are additional barriers. Moreover, the appropriate legal resources, i.e., attorneys skilled in fair housing and other relevant laws, may be scarce where the developer operates.¹¹ Finally, many developers assume that “using the law” inevitably means engaging in protracted, contentious litigation. They are often unaware of alternative ways to assert their rights short of filing a lawsuit.¹²

If the developer is open to using legal strategies, the next strategic issue concerns the scope of legal strategies that the developer is willing to pursue. The primary divide is between developers willing to file or support the filing of an administrative complaint or a private lawsuit to defend their rights and those who will only entertain strategies short of litigation.¹³

Litigation is always a last resort, but the use of the law need not be. The CASC project successfully used laws in three ways to obtain local government approvals: educating decision makers, providing an “excuse” for well-meaning decision makers, and enforcement actions short of litigation.

“Litigation is always a last resort, but the use of the law need not be.”

Educating decision-makers

Ideally, the planning staff and city attorney will be aware of applicable laws, but sometimes they may need to be educated about them.¹⁴ Some laws are written clearly and have sufficient specificity of application that they are almost self-executing when the decision maker is made aware of them.¹⁵ If it is not apparent that city staff is aware of fair housing laws and other federal antidiscrimination laws that apply to land use policies and decisions,¹⁶ the developer should consider making inquiries of the planning staff to determine the city’s awareness of them. If the awareness is dim or lacking, setting up a meeting with the planner or a sympathetic appointed or elected official, or providing a memo summarizing the relevant law¹⁷ that could be passed on to the city attorney is advisable. If the information is relevant, clearly written, and unbiased, and it is delivered early and in a nonconfrontational manner, often the local government representative will appreciate the early notice and having some of the staff work done in a reusable fashion. The benefit to the developer of knowing that the local government

understands the legal context of the siting decision is twofold: first, the local government is less likely to take action that may violate the laws; and, second, if the local government begins to take such an action, the developer has an already-established reference point from which to question the action.

Providing an “excuse” for well-meaning decision-makers

Some decision makers want to do “the right thing” (i.e. approve the proposal), but feel threatened by expressed community opposition. If they can point to the city’s legal duties as a reason for voting to approve a development that some elements of the community oppose, this may provide them with sufficient political cover to vote for the proposal. Sometimes this occurs even if the law would not, strictly speaking, require the approval. On other occasions, this use of the law comes as a result of a city attorney briefing decision makers either by a memo or in executive session about the applicable laws. Such briefings can be prompted by a sympathetic public official or, more frequently, in response to the threat of a lawsuit.

Enforcement action short of litigation

If, after attempts at education and persuasion, a city appears likely to take an action that the developer believes may violate its rights,¹⁸ the developer should consider its enforcement options.¹⁹ When the potential violation of the developer’s rights is clear, a well-drafted demand letter is often enough to change the city’s course of action,²⁰ especially if the potential violation is identified and challenged *before* decision makers have taken a public position on the issue.²¹ Of course, any developer whose attorney drafts such a letter should be clear on whether or not it will bring an action to enforce its rights if the city refuses to yield to the demand letter.

A third strategic issue is how the developer integrates its legal strategies with its political and public relations strategies. When a developer asserts its legal rights, putting together a consistent message for each of the five critical audiences (local government, supporters, concerned neighbors, media, and the courts) is important.²² Of course, the attorney representing the developer ought to foster constructive relations with



the city and its attorney to keep the door open to settlement. If the legal conflict becomes the focus of media coverage, the developer will need to educate the media about the law.²³ It is not difficult for a developer to educate its supporters about the legal dimension of its approach.²⁴ However, communicating with concerned neighbors about the law is likely to be challenging. Protecting individual property rights and property values are traditional and broadly accepted objectives of the local government's exercise of land use power. Homeowners often assume that their own property rights somehow extend to "their community" or that they have some implicit right to decide who can live in their neighborhood.²⁵ Neighbors may be surprised, confused, angry about, and dismissive of the legal rights of developers and the housing rights of prospective residents.

Conclusion

Given the law's degraded status in contemporary American culture, certain laws (such as fair housing law) that command citizens' obedience to serve controversial social goals are unlikely to inspire conversion to, appreciation for, or even interest in those social goals.²⁶ There are few or no "teachable moments" in the typically adversarial public hearing. Appeals to the prospective tenants' housing rights may even provoke more friction and backlash among empowered and threatened homeowners.²⁷ Sometimes an explanation of the law that includes how its various applications benefit members of the opposing community group may help promote understanding.²⁸

The value of legal strategies should not be overstated.²⁹ Use of legal strategies is limited by additional factors. Often the laws do not reach important forms of conduct (e.g., when local officials engage in backroom arm twisting to pressure developers to agree to burdensome and possibly illegal conditions) or are not clear in their application. The developer's assertion of its rights may lead organized, well-resourced opponents to threaten their own lawsuit if the development is approved. Of course, if the developer elects to litigate, it may lose on the merits. Or, even if it wins, it may gain only a Pyrrhic victory because it has lost its funding or land during the dispute and the laws that it relied upon do not provide the desired remedies. Still, it is clearly in developers' interest to consider the legal strategies that it might employ to get its approvals.

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Endnotes

¹ The Community Acceptance Strategies Consortium (CASC) is a consortium of eight county representatives and three regional experts (including an attorney specializing in affordable housing and land use law) in the San Francisco region that focuses its technical assistance and training work on proposed developments that would provide housing and services for homeless people threatened by local opposition. CASC's mission is to articulate a widely applicable approach, train developers to use it, and support the use of the approach by providing free technical assistance in the hopes that the development community would adopt new attitudes, learn new skills, and change its practices. CASC envisioned that once developers and advocates began to collaborate using an approach that provided a common analysis and language, they could collectively adjust their attitudes, identify and adopt better practices, and hone needed skills to manage this on-going problem. CASC staff and members of the regional group have trained more than 300 developers, advocates, and local government representatives in the region. More than 20 developments received their local government approvals using the MLO approach with technical assistance provided by CASC. It has used the approach successfully to help site (or relocate) a wide variety of types of affordable housing, including a homeless dining room, a homeless shelter for youth, multifamily apartments, and housing for persons with disabilities. Some developers have formally changed their predevelopment process to incorporate the MLO approach; many other project managers incorporate it into their work. For more information, contact the Non-Profit Housing Association of Northern California at 415-989-8160.

² This description is adapted from CASC & NPH, *supra* note 14, at 15.

³ See, e.g., Richard Babcock, *The Zoning Game: Municipal Practices and Policies* (1966); Richard Babcock, *The Zoning Game Revisited* (1985).

⁴ The use of Strategic Lawsuits Against Public Participation (SLAPP) are not recommended. These lawsuits and anti-SLAPP laws are beyond the scope of this article.

⁵ This section assumes that the developer has conducted the

planning process described, *supra* at notes 62 – 90 and accompanying text.. Such a developer is aware of its rights and the rights of its prospective residents and has assessed the likelihood of serious disregard for those rights by the local government. Many developers are unaware of these rights. A later section of this article (*see infra* notes 147–159 and accompanying text) addresses an attorney’s role in helping its client understand his or her rights, how to spot and document potential legal violations, and when to retain a land use lawyer for representation in getting the approval. Another section highlights potentially relevant laws (*see infra* notes 127 - 129 and accompanying text).

⁶ In the author’s experience, compared to for-profit developers, nonprofits rarely mention, much less assert, their property rights as owners of land.

⁷ See Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 Santa Clara L. Rev. 35, 50–53 (1993) (discussing reasons why developers do not bring lawsuits to enforce California’s fair share housing law).

⁸ Some authors do not make clear distinctions between local opposition that will generally be protected by the First Amendment and actions that are likely to be actionable as discrimination. See Jennifer Honig, *Advocating for Housing for People with Serious Psychiatric Disabilities*, 8 J. of Affordable Housing and Comm. Dev. L. 336, 348 (“[S]ome forms of discrimination may be easily detectable (such as neighbors protesting the siting of a group home in their community). . . .”). For a thoughtful reflection on this issue, see Michael Allen, *Making Room at the Inn: Civil Rights and Inclusive Siting Practices*, 8 J. of Affordable Housing and Comm. Dev. L. 115 (1999).

⁹ See, e.g., *U.S. Housing Discrimination Greatly Underreported*, Reuters News Service, Apr. 3, 2002 (While the National Fair Housing Advocacy Alliance compiled 24,000 complaints about housing discrimination in 2001, the U.S. Department of Housing and Urban Development “estimates 2 million people experience some form of [housing] discrimination based on race, disability, national origin or for other reasons. . . .”).

¹⁰ On the other hand, an established developer with substantial resources and a well-documented track record may be best placed to challenge an exclusive jurisdiction for the benefit of other affordable housing developers in the region.

¹¹ Typically, legal services attorneys, fair housing groups, and some private law firms are familiar with the relevant laws.

¹² See, e.g., options discussed *infra* at notes 125 - 130 and accompanying text.

¹³ The answers to these strategic issues will largely determine if and when the developer should retain a land use attorney.

¹⁴ Because it appeared that many planning directors and city attorneys in the San Francisco region were unfamiliar with important applicable laws, CASC conducted two training sessions for these groups. Because the training was conducted outside of the context of any particular siting issue, it provided a safe, open environment for participants to learn about legal and planning issues related to the siting of

affordable housing and to discuss their own questions and concerns. The trainers used the opportunity to prepare and distribute useful technical assistance materials to participants. Such training can pave the way for later assertions of legal rights without litigation.

¹⁵ For example, in California and some other states, “six and under laws” (e.g., California Health and Safety Code §§ 1267.8, 1566.3, and 1568.0831(2002)) require local governments to treat state-licensed congregate care homes that will house six or fewer residents as “single-family housing” for purposes of applying the local planning and zoning laws. In one case, upon being informed of this law and its clear application to a proposal, a council member in whose district the group home was proposed informed upset neighbors that the city could not require community notification or a public hearing of any kind on the proposal. Laws providing affordable housing with exemptions from certain state-mandated environmental review are another example of laws that are generally clear in their application. See, e.g., California Public Resources Code §§ 21080 et seq., (2002).

¹⁶ The federal Fair Housing Act (FHA) (42 U.S.C. §§ 3601 et seq., or “Title VIII”) makes it illegal for local governments and individuals to deny or “to otherwise make unavailable” housing to persons based on race, color, religion, sex, familial status, national origin, or mental or physical disability. The Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12210 et seq. (2002)) and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 1691 et seq. (2002)) also prohibit discrimination by local governments and others against persons with disabilities. In addition, the FHA, ADA, and Section 504 require local agencies to make “reasonable accommodations” for the needs of disabled people.

¹⁷ Many such summaries are available. For California’s laws, see *Laws Affecting Location and Approval*, *supra* note 14. See also *The NIMBY Report* (Winter 1999) and the special supplement to the federal Fair Housing Act. For information about laws protecting the rights of persons with disabilities, see Bazelon Center for Mental Health Law, *What “Fair Housing” Means for People With Disabilities* (1999), and Bazelon Center for Mental Health Law, *Digest of Cases and Other Resources on Fair Housing for People with Disabilities* (2000) (updates on these publications and other resources can be found at www.bazelon.org).

¹⁸ Common violations include requiring community notification for affordable housing developments that is not required of other similar housing developments, requiring additional land use approvals, attaching illegal conditions, and denying permits that should be approved.

¹⁹ While fair housing laws may in some circumstances be enforced against the neighborhood opponents themselves, this action implicates very complex and sensitive First Amendment concerns. This article only considers enforcement actions against potential local government violations.

²⁰ Following are three examples from CASC’s experience. Opponents to a proposed transitional supportive housing for persons with HIV/AIDS (New Hope Housing) were pressuring the city to impose an unwarranted CUP. An

attorney retained by CASC drafted a demand letter explaining the violation and the city withdrew the requirement.

In a similar case, after the Planning Commission had decided that a transitional residence with supportive services for women and children (Center Point, Inc.) did not require a CUP, opponents hired an attorney who appealed the decision and demanded that the city require a CUP. The political winds and a wavering city attorney seemed to lean toward requiring it. After CASC's attorney countered with a legal memorandum and demand letter, the city firmed up its position that a CUP would not be required.

In another case, the project manager for a special needs project serving persons with HIV/AIDS was alerted to likely opposition and potential legal issues. His plan was to document the public processes carefully and then assert the developer's legal rights only if needed. A citizen committee appointed by the county delivered a biased and procedurally defective recommendation to the county Board of Supervisors to deny the approval. Using his documentation and citing the law, the project manager himself drafted a letter to the Board of Supervisors detailing the events and his concerns (but not threatening litigation). The board refused to accept the citizen committee's recommendation and approved the development.

²¹ This puts a premium on early identification of potential legal violations, a skill that comes from the research and planning stage, *see supra* notes 61–90 and accompanying text.

²² Opponents tend to characterize a developer who asserts its rights as a “big bad bully developer forcing a project down the neighborhood's throat.” Sometimes elected officials will adopt or echo this theme. The developer will want to explain that it does not want to bring a lawsuit, but only wants to build housing and is open to resolving any legitimate issues of concern, but it is unwilling to sacrifice its own or its prospective residents' housing rights.

²³ This may be done by distributing an easy-to-understand handout and ensuring that the development's spokesperson (who should not necessarily be the attorney) is articulate on

this issue. If a local newspaper has been regularly covering the conflict, it may be appropriate to request an editorial board meeting or to offer substantial background information on the applicable law.

²⁴ In some cases supporters want to or are willing to play the role of “bad cop” in criticizing the local government so that the developer may retain its cordial relations with local officials. If the relationship between the developer and the supporting group is publicly known to be close, the city is likely to see through this tactic. However, in some situations it may create the potential for speaking with two (coordinated) voices, saving face for the city and making settlement easier for the city by being less vulnerable to the charge that it caved under advocates' pressure.

²⁵ One of the profound challenges of managing local opposition in the long run is for developers and housing advocates to appreciate how these expressions and expectations reveal not only parochial and selfish attitudes but also a laudable sense of community and civic-mindedness (e.g., leaders or community groups that have worked to improve their neighborhood and overcome obstacles). The challenge for affordable housing developers is to learn to harness the civic dimension of this sentiment to *support* the development of affordable housing to meet the community's needs.

²⁶ Law's educative function (or, more grandly, moral suasion) is more achievable outside of the context of a particular siting, but (paradoxically) it is difficult to engage an overstimulated populace about fair housing laws when nothing appears to be at stake.

²⁷ In one instance, after an affordable housing development was approved, in part because of the developer's appeal to the fair housing law, opponents later sought to pressure the city to sponsor state legislation to revise and weaken the law.

²⁸ For example, if the opponents are homeowners, one could discuss the application of the fair housing law to prevent discrimination by lenders in the lending context.

²⁹ *See Allen, supra* note 120.

About The NIMBY Report

NIMBY — “Not In My Back Yard” — has become the symbol for neighborhoods that exclude certain people because they are homeless, poor, or disabled, or because of their race or ethnicity.

The NIMBY Report supports inclusive communities by sharing news of the NIMBY syndrome and efforts to overcome it. It is published by the National Low Income Housing Coalition. Kim Schaffer is the staff editor.

A monthly edition, prepared in collaboration with the Building Better Communities Network, is distributed as a monthly supplement to NLIHC’s weekly newsletter, *Memo to Members*. Semi-annual issue reports such as this provide in-depth analysis on specific subjects.

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