



Duane Desiderio
Staff Vice President
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May 22, 2008

Hon. Stan Carroll, Mayor
Hon. Howard Vipperman, Mayor Pro Tem
Hon. Layne Baraldi, Council Member
Hon. Brian Bergman, Council Member
Hon. Tela Millsap, Council Member
City of La Habra Heights
City Hall
1245 N. Hacienda Road
La Habra Heights, CA 90631

Re: *Fair Housing Act & Takings Implications of Lot Development Standards*

Dear Honorable Mayor and Council Members:

We understand that that the City of La Habra Heights, California, has imposed severe restrictions regarding development standards for building design. In particular, the City has established maximum cumulative footprint requirements allowing a 4000 sq. ft. two-story structure on one acre, or a 7500 sq. ft. single-story structure on one acre. See Municipal Code, § 7.18.40(A), Exh. 7-21. Furthermore, the maximum hardscape surface areas allowed by the City greatly impinge on residential development. See Municipal Code, § 7.17.40(B), Exh. 7-13. These land use regulatory measures seriously impact the ability of our members to provide affordable housing within your jurisdiction.

The National Association of Home Builders (NAHB) strongly urges you to consider the implications of these requirements under the federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("FHA"). I am enclosing a white paper prepared by the NAHB Legal Services Department that discusses the implications of the FHA on local land use processes.

As the paper explains, the FHA ensures that certain protected classes, such as minority groups, are not the victims of housing discrimination. While the FHA clearly applies when regulators act with intent to discriminate, the case law also holds that FHA violations arise where local land use actions, regulations, and ordinances have an *impact* or *effect* that discriminates against minorities. In other words, municipalities need to be aware that their residential construction requirements—such as those in the La Habra Heights Municipal Code—can have an adverse impact on minority groups by pricing them out of the housing market through regulatory barriers that significantly increase home prices. In such circumstances, when protected classes are

deprived fair opportunities to housing, the FHA may be violated—regardless of whether the municipality acted with racial animus or an otherwise discriminatory purpose. Moreover, where a litigant prevails in a FHA suit, the statute expressly allows the award of damages and attorneys' fees from the government defendant. In particular, let me draw your attention to the paper's conclusion:

While the Fair Housing Act protects against overt forms of discrimination, the federal courts are also willing to entertain actions where the discrimination is more insidious and subtle. In particular, Fair Housing Act claims have been sustained where the impact of an ordinance, as it is put into effect, draws racial classifications and deprives protected classes equal and fair access to housing. As regulatory costs continue to increase—and as minorities find themselves increasingly unable to buy a house—the Fair Housing Act will weigh heavily on the shoulders of local land use decision makers who fail to consider the unintended, but nonetheless discriminatory, effects of their actions.

Additionally, the City's maximum allowances for hardscape surface areas raise significant concerns under the Takings Clause of the Fifth Amendment to the U.S. Constitution. For example, as we read the City's code requirements for 1 acre lots, the maximum footprint area including a home and appurtenances (such as porches, garages, and barns) for a 2-story structure is approximately 4,000 square feet and only about 8,000 square feet of hardscape area is allowed.¹ This overly restrictive land use policy, in our opinion, implicates issues of constitutional magnitude and will likely result in severe economic hardship on property owners.

Under the Fifth Amendment, localities must pay aggrieved landowners just compensation when regulatory land use actions result in a taking of property. The proper role of the Takings Clause is to "[bar] government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005). Under standards announced by the U.S. Supreme Court, a taking through land use regulation occurs—and thereby triggers the obligation of government to pay just compensation to affected landowners—based on the economic impact of the regulation, the character of the government's action, and the extent to which the regulation interferes with the property owner's investment-backed expectations. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Moreover, a land use regulatory body must pay just compensation when conditions on development lack both an "essential nexus" to the government's objective, and where conditions are not "roughly proportional" to the projected impact of the proposed development. *Nollan v. Cal. Coastal, Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Under these constitutional principles, several recent court decisions have found that municipalities in California have committed takings arising from their regulatory actions restricting property uses. *See MHC Fin., Ltd. v. City of San*

¹ Based on the chart provided at Exh. 7-13 on p. 7-59 of the Municipal Code, a 2-story structure on a 1-acre lot allows maximum hardscape coverage of approximately 4,000 square feet (that is, maximum graded area of approximately 8,000 square feet minus 4,000 square feet.) As for a single story structure on a 1-acre lot, maximum allowed hardscape is approximately 8,000 square feet (that is, maximum graded area of approximately 12,000 square feet minus 4,000 square feet.)

Rafael, 2008 WL 440282 (N.D. Cal. Jan. 29, 2008); *Yamigawa v. City of Half Moon Bay*, 2007 WL 831804 (N.D. Cal. 2007). In the City of Half Moon Bay case, a verdict was rendered requiring the City to pay almost \$40 million in damages as a result of a takings verdict.

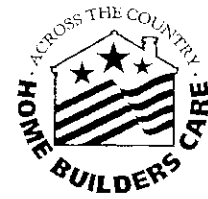
To conclude, NAHB strongly encourages the City of La Habra Heights to consider the effect of the Fair Housing Act and the Fifth Amendment Takings Clause in the context of its land use actions that interfere with residential development.

Sincerely,

A handwritten signature in black ink that reads "Duane J. Desiderio". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Duane Desiderio
Staff VP, Legal Affairs

c: Richard Lambros, CEO, BIA of Southern California



The Fair Housing Act & Local Land Use Regulations

“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. §3601.

Title VIII of the Civil Rights Act of 1968 and its amendments, known together as the federal Fair Housing Act, prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing related transactions, based on race, color, national origin, religion, sex, familial status, and disability. Thirty-five years ago, the most immediate problems to address were racial steering and blockbusting by the real estate industry; redlining of homeowners policies by insurance companies; and predatory lending by financial institutions. However, the legislative history of Title VIII indicates that its framers meant to put an end to *all* forms of housing discrimination.

The discriminatory tactics used today are more subtle, but, unfortunately, it is not uncommon for local land use planning to violate the Fair Housing Act. For instance, in an effort to restrict growth or to ensure that only large-scale, profitable dwellings are built, local governments utilize restrictive planning and zoning techniques that invariably constrict the supply of housing, thereby artificially inflating the overall housing costs within a county or region. Techniques frequently used to exclude certain types of residential development include: minimum lot and house square-footage requirements; enhanced frontage and setback requirements; overreaching exactions, including impact and other regulatory fees; mandatory garages for small-lot single family homes; and prohibitions on the construction of multifamily housing in residential zones. Whether or not an intent to discriminate against or prohibit a certain type of housing is apparent, the inevitable exclusionary effects of such land use controls has a pernicious effect on the local housing market.

To be clear, the Fair Housing Act is not a land use or zoning statute and it does not preempt local planning powers. However, our legislative system is constructed such that if state and local powers are exercised in a way that is inconsistent with a federal law, the federal law will control. Based on this principle, courts have held that the Fair Housing Act prohibits local governments from exercising land use planning and zoning powers in a discriminatory manner. The following sections examine the way that the Fair Housing Act is used to check discriminatory activities.

Discriminatory Effect

While a case might be made showing discriminatory intent of a local action under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, legislative motive in the enactment of land use regulations is rarely made explicit. As an alternative case, a violation of the Fair Housing Act often does not require discriminatory intent on the part of the municipality

– merely that the *impact* of the regulation is discriminatory. It is not required that the racially discriminatory purpose appear on the face of the regulation.

A discriminatory effect may be found from a regulation that was meant to produce legitimate nondiscriminatory, facially neutral conduct but failed to do so. As an example, a large-lot zoning requirement (minimum two-acre lots) imposed for the public purpose of preserving the rural character of the surrounding community, might very well violate the Fair Housing Act where the *impact or effect* of the restriction serves to exclude certain racial and ethnic groups from accessing that particular housing market.

The goal of a discriminatory impact case is to show that the government's action had a greater adverse impact on a protected group than on others. In determining whether discrimination has occurred, the courts consider the strength of the proof of discriminatory effect, any evidence of intent, the government's interest in the conduct being challenged, and whether the complainant seeks either to compel the government to provide housing for the protected class or to restrain the government from interfering with property owners trying to provide such housing. If the complainant makes a case, the burden shifts to the government to show that there is some legitimate, nondiscriminatory reason for the action *and* that no less discriminatory alternatives were available. It is the second part of this requirement that can pose difficulty for local land use planners. For example, while the planning or zoning authority might offer as justification for an exclusionary regulation the necessity to protect the health, safety, or welfare of the community, the public interest in affordable or moderately-priced housing could outweigh such an assertion. Essentially, the government's justification for effectively excluding low-and moderate-income persons from the subject jurisdiction is not the least discriminatory alternative that could be utilized.

Parties Involved in Litigation

Either private parties or the federal government may bring a cause of action under the Fair Housing Act. Specifically, the Fair Housing Act authorizes "an aggrieved person" to bring a cause of action for enforcement. An aggrieved person is defined by the Act to include "any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."

In order for a claimant, the aggrieved person, to have the courts hear a case on its merits, the person or organization may need to show that he or it has standing to sue. There are generally two limitations on standing, constitutional and prudential. Constitutional limitations on standing, dictating federal court jurisdiction, require that the claimant show (1) that he has personally suffered some actual or threatened injury as a result of the conduct of the local government; (2) that the injury can be fairly traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision from the court. Prudential limitations on standing, developed by the courts to ensure individual rights are decided, require (1) that the claimant's injury is distinct, and not a generalized grievance shared in substantially equal measure by all or a large class of citizens, and (2) that the claimant is asserting his own legal rights and interests and not the rights or interests of a third party. However, the U.S. Supreme Court has held that prudential limitations on standing are not necessary for actions brought under the Fair Housing Act. Like

any other individual or organizational plaintiff involved in Fair Housing Act litigation, it is incumbent upon a claimant challenging an exclusionary land use regulation to establish the threshold criteria of constitutional standing.

As an additional preliminary matter, a claimant has 2 years following the occurrence or termination of an alleged discriminatory housing practice to initiate civil litigation. The claimant is not required under the Act to file a fair housing complaint with the U.S. Department of Housing and Urban Development before filing his case in court. Court proceedings may be brought following an agency action, but pre-litigation agency review is not required. However, while an administrative action is pending in a discriminatory housing practice case, the 2-year clock is suspended. Finally, most courts do not require an exhaustion of remedies at the local level by applying for a variance or other administrative relief.

On the other side, any person or entity engaged in discriminatory housing practices might be found to be liable for a Fair Housing Act claim. Generally, a corporate officer is not personally liable for corporate wrongdoing unless the officer is personally involved in the wrongdoing. However, there have been exceptions to this rule in the context of civil rights litigation. Under the Fair Housing Act, courts have found both a corporation and its officers liable for the discriminatory acts of an employee, even when the officer neither directed nor authorized the discriminatory acts.

Remedies for Discrimination

Invalidation of a local ordinance that violates the Fair Housing Act is only the tip of the iceberg. The Fair Housing Act authorizes both injunctive relief and damages. Generally, in order for a claimant to secure an injunction while the case is ongoing, the claimant must show that (1) he has a strong likelihood of success on the merits of the case, (2) he has irreparable injury if the action goes unchecked, (3) the injunction would not cause substantial harm to others, and (4) the public interest is served by issuing the injunction. The courts look at all of these factors together to make a determination about enjoining the local government from continuing its potentially discriminatory activity. However, in a Fair Housing Act case, the second factor is less important because there is a presumption by the courts that there is an irreparable injury.

While the loss of civil rights is not easily translated into monetary terms, it is clear that compensation is available for victims of discrimination. In addition to damages for the loss of civil rights, courts have held that awards may be based on humiliation, psychological injury, and pain and suffering inferred from the circumstances of the case. For example, the 11th Circuit has awarded \$100,000 in compensatory damages for injuries that included loss of sleep, marital strain, and humiliation. (*Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985)).

The goal of punitive damages is to punish the violator for outrageous conduct and deter him, or others like him, from similar conduct in the future. Federal courts have held that punitive damages may be awarded in civil rights cases. In fact, the U.S. Supreme Court has held that punitive damages may be awarded when defendant's conduct is shown to involve reckless or callous indifference to the federally protected rights of others, not just in cases where the defendant's conduct is shown to be motivated by evil motive or intent. For example, a jury in

the 6th Circuit found that a property owner's refusal to sell or to negotiate for the sale of the eight lots was motivated by the fact that the renters were disabled and awarded \$125,000 in punitive damages. (*Preferred Properties, Inc. v. Indian River Estates, Inc.*, 276 F.3d 790 (6th Cir. 2002))

In addition to traditional damages, the U.S. Supreme Court has carved out a type of damage for fair housing organizations seeking to eradicate discrimination in housing. The groups may receive damages based on claims that organizational resources have been diverted or that the organization's mission has been frustrated by the discriminatory behavior and subsequent litigation.

Finally, the Fair Housing Act specifically authorizes the court, in its discretion, to allow a prevailing private party to recover reasonable attorney's fees and costs in a civil action.

Conclusion

While the Fair Housing Act protects against overt forms of discrimination, the federal courts are also willing to entertain actions where the discrimination is more insidious and subtle. In particular, Fair Housing Act claims have been sustained where the impact of an ordinance, as it is put into effect, draws racial classifications and deprives protected classes equal and fair access to housing. As regulatory costs continue to increase—and as minorities find themselves increasingly unable to buy a house—the Fair Housing Act will weigh heavily on the shoulders of local land use decision makers who fail to consider the unintended, but nonetheless discriminatory, effects of their actions.

Sources

42 U.S.C. §§ 3601-3619, 3631 (2003).

Douglas, Dash T., *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 Akron L. Rev. 613 (2001).

Kramer, Edward G., *Title VIII Fair Housing Litigation Comes of Age*, 1 Ass'n of Trial Lawyers of Am. Continuing Legal Educ. 333 (2001).

Mandelker, Daniel R., et. al., *Federal Land Use Law Limitations/Procedures/Remedies* § 3.01 et. seq. (West 2001).