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“Effects of Exclusionary Zoning: Sunnyvale, Texas Case Study”

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Many communities have zoning schemes for the regulation of land use. The constitutionality of this practice is well established. This paper deals with the issue of when the enforcement of zoning regulations constitutes an illegal exclusionary practice resulting in racial discrimination.

This paper analyzes a case pending appeal in which developers won their case barring enforcement of a community's zoning scheme. The paper traces the history of the case and the Federal District Court Judge's condemnation of the community for failing to permit the construction of high-density, low income housing.

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Many communities have zoning schemes for the regulation of land use. The constitutionality of this practice is well established. This paper deals with the issue of when the enforcement of zoning regulations constitutes an illegal exclusionary practice resulting in racial discrimination.

For Sunnyvale, Texas and other communities that fear the consequences of urban sprawl, this is not an academic question. The rural community is surrounded by suburban sprawl. This tiny community of 11,000 acres has a population not less than 2,3000 and a small, rural atmosphere. Located twelve miles east of Dallas, the community is a short drive from downtown. The economic potential for development given the community's proximity to a major city, would be a boon to developers. What has developed is a "bedroom community" with homes and large yards holding a median price of \$193,000.

Two developers filed a suit against the town. Ultimately, the federal district judge issued an order finding Sunnyvale zoning practices in violation of federal housing laws and ordered the community to cease the enforcement of its zoning laws while taking affirmative action to create low income housing. Some twelve years ago, in 1988, Mary Dews, a black woman, wanted to rent an apartment in Sunnyvale and found there were no apartments, especially federally-subsidized housing for low income residents, all in Sunnyvale due to zoning laws requiring the development of single family residences on not less than one acre lot sizes. Sunnyvale's zoning ordinance was the result of community resistance to large developments of densely populated neighborhoods, including multi-family apartments, as well as malls, shopping centers, and commercial development which would transform the rural community into a suburban sprawl like neighboring Mesquite and Garland.

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This paper analyzes the theory of the appeal in the context of other cases defining the boundaries of exclusionary zoning particularly the cases cited by the federal district court and the United States Supreme Court.

I. Law of Exclusionary Zoning

The Fair Housing Act (FHA) of 1968, as amended, expressly prohibits discrimination in the rental or sale of a dwelling on the basis of race, color, religion, sex, familial status, or national origin.¹ The act has been interpreted to prohibit municipalities from using their zoning powers in a discriminatory manner, i.e., a manner which excludes (has the effect of excluding?) housing for a group of the above classified parties.² The Federal courts, Fifth circuit,³ Second Circuit,⁴ Seventh Circuit,⁵ Eight Circuit,⁶ have established that a plaintiff under FHA may establish liability by showing intentional discrimination *or* (emphasis added) by showing that the defendant's conduct has had a discriminating effect.⁷ "Discriminatory effect" reworded by the Third Circuit is "conduct of the defendant which actually or predictably results in racial discrimination."⁸ FHA, aka Title VIII, is analogous to the Civil Rights Act of 1964, Title VII, in that un rebutted proof of discriminatory effect alone can justify a "federal equitable response."⁹ The leading opinion on "discriminatory effect" of zoning ordinances set forth in *Huntington* where such effect is proven by a showing of either (1) adverse impact on a particular minority group or (2) harm to the community generally by the perpetuation of segregation.¹⁰

The Town of Huntington in the early 1980's had enacted a zoning ordinance restricting private construction of multi-family housing to a narrow renewal area and refused a non-profit developer's request to rezone a parcel of land located outside the urban renewal area in order to develop a multi-family apartment complex. The town defended that its ordinance was designed to encourage private developers to build in the deteriorated, urban renewal area. The 1988 Second Circuit's opinion found that the zoning ordinance had a "segregative effect" and an adverse impact on African Americans.¹¹ The Town's zoning law had the effect of restricting multi-family housing

to a largely minority urban renewal area, i.e., integration was impeded by restricting low-income housing (multi-family?) needed by minorities to an area already 52% minority. Also, clustering or confining a significant majority of multi-family project's black tenants in a defined area is highly indicative of an FHA violation.¹²

Thus FHA "prima facie" cases are frequently made by observing the statistics of clustering which are the badges of discrimination, and, once such case is made, the defendant (often a town) must show its actions both furthered a legitimate, bona fide governmental interest and no alternative course of action could have been adopted with less adverse impact. Town of Huntington argued that setting aside a multi-family development area in the urban renewal area would encourage private developers to build in this set aside area and thus help revitalize it. The Second Circuit injected its judgment that less discriminating methods, such as tax benefits, could have been used to encourage private development, and these more direct incentives would have been more effective.¹³

In deciding whether zoning discriminatory intent exists under the Equal Protection Clause of the 14th Amendment, the *Arlington Heights* court set out a multi-fact test:

- (1) discriminatory impact,
- (2) historical background,
- (3) sequence of events leading to a decision,
- (4) unusual procedural or substantive departures,
- (5) legislative/administrative history of a city's decision.¹⁴

Against the burden of showing a community had a bona fide reason for excluding low income multi-family housing, the Town of Sunnyvale, Texas, became involved in a federal lawsuit filed in District Court for the Northern District of Texas on July 8, 1988, resulting in an opinion rendered by Chief Judge Jerry Buchmeyer on July 31, 2000, in favor of the Plaintiffs and Interveners: Mary Dews, Hammer-Smith Construction Co. Inc. and the Walker Project, Inc. The Final Judgment ordered that: The Town of Sunnyvale, Texas, cease implementing then present zoning and subdivision ordinances, policies and practices; and the Town shall change zoning as subdivision ordinances to remedy the past exclusionary practices by encouraging development of multi-family and other affordable housing within the Town.¹⁵ What facts supported such strong remedies?

Salient Facts

The Town of Sunnyvale (town) was born in 1953 as an incorporation of several rural communities and came to encompass about 11,000 acres of mostly undeveloped rural land. Even today, its 2,300 residents leave vast areas of pastures, ponds, trees, and flood plains undeveloped as residential property. No “downtown” with buildings and shops, per se, ever developed, nor did apartments, malls, and shopping centers. These trappings of urbania and suburbia took place in neighboring Mesquite (120,000 population) and Garland (200,000 population). It was the lack of apartments that sparked the flames of the federal lawsuit and judgment.

In 1988, Mary Dews, a black woman, living in Dallas County had tried to use a low income-housing voucher to rent an apartment in Sunnyvale only to find out there were none. The Town had passed a zoning ordinance in 1971 banning apartments and requiring a one-acre minimum home site. Mary Dews filed suit for violation of FHA as well as Civil Rights Acts 1866 and 1964 as amended. Though Ms. Dews died in 1991, a minority-owned construction company, Hammer-Smith, which wished to construct multi-family and low-income housing in Sunnyvale, joined the suit.

Judge Buchmeyer considered significant the facts that Sunnyvale was incorporated in 1953 as an apparent attempt to remove a large undeveloped area of Dallas Country from potential development of housing for black families. Further, despite a 1965 comprehensive Plan which changed the future outlook of the town from a rural area to a “complete city concept” with parks, schools, playgrounds, retail, etc, the Town never zoned any land for apartments even though the 1965 Plan designed 93 acres for apartment development. Only single-family dwelling districts 12,000-40,000 square feet minimums were allowed under a 1965 zoning ordinance.

By July 1971, the Town Council passed an ordinance expressly banning apartments. Minutes of these early 1970’s Town Council meetings reflect citizen’s concerns that low income apartment housing would be a “cancer in the community,” “trashy construction,” or similar descriptions with racial epithets attached.¹⁷

A 1987 zoning ordinance included a mention of an apartment district but one was never designated on the zoning map. The town had and continues to market itself publicly and proudly as low density, single-family residential community.¹⁸ Other

descriptions include “slow-paced”, “rural”, “unique and distinctively peaceful”; if you want apartments, condominiums, townhouses, etc. you may simply move to adjoining Mesquite, Garland, and Northeast Dallas.

As the 1970’s and 1980’s passed, further citizen and town meetings reflected widespread support for one acre home sites and no large type growth,” as supported in an updated 1986 Revision of the 1965 Comprehensive Plan. The 1986 planners proposed some acreage (202) for multi-family residential. For the record, low density was 6.67 persons per acre, medium density 15.55, and multi-family 30.75. An August 19, 1986 Town Council meeting considered the Plan, and they hired an expert planner who remarked quite bluntly that without a section of land reserved for multi-family, the town could be subject to a lawsuit for discriminatory, exclusionary zoning. One Town Council member remarked that it would be one matter to designate an area for multi-family housing, but another “whole ball game whether you actually allowed it to be built.” Once again, the expert stated that the designation in the plan of such high-density development could avoid a lawsuit by the “ACLU or the NCAA, the NAACP.”¹⁹

Town residents and elected officials stood fast – “NO apartments!” “We don’t want to be a planned disaster like Garland.” “We’ll hold off those Indians (developers) – we’d rather not see any apartments or cottages homes.”²⁰

The most plausible reason for one-acre low density planning for 90% of the town was for effective septic tank systems. Otherwise the town would continue to hold fast to its “no apartment” mantra on the belief that apartments bring theft, shifting population, more police protection, and more water and sewer and education requirements.

By 1988, the Dews suit was filed, and, in 1993 a new Comprehensive Plan for the town was adopted. One way the Town Council felt that apartments could be avoided was to zone a high density area for town homes (i.e., “owner occupied”) and place such on the edge of town or the edge of a flood plain or in an area without sewer service or in an area adjacent to industrial zoned land. The town eventually settled on a 1993 Comprehensive Plan and on September 13, 1993, adopted its current zoning ordinance. The plan and zoning ordinances vary slightly in required development densities which are very low compared to neighboring Mesquite. The zoning ordinances make no mention of apartments.

Hammer-Smith's Tale

Hammer-Smith Construction Co., Inc. (HS), an intervening plaintiff versus the Town of Sunnyvale specializes in construction of affordable housing. Mr. Hammer is African-American, and HS qualifies as a minority-owned business for relevant federal government considerations. In 1988, HS obtained an option to develop a Sunnyvale Ranch. HS wished to obtain a zoning change or variance to allow for development of 1,368 apartments (22 per acre), 407 townhouses/duplexes (8 per acre), and 1,376 single-family residences (6 per acre).

HS's variance request was tabled by the Zoning Board, and HS was asked to pay the Town \$22,000.00 for an impact study (in addition to earlier studies by a prior developer). The study would be necessary to provide information on the impact the proposed development would have on local taxes, schools, water and sewer systems, existing population, and traffic. HS, after several weeks, refused to pay for the study believing that the Town Council would not approve the variance even after a study was done. HS would not re-apply for a density variance and could not see how an economical development could be made without building 18 to 22 units per acre.

Court Findings/Arguments/Appeal²²

The Federal Court found injury caused by the Town through its zoning ordinances and Town Council's refusal to adjust for high-density areas. A higher proportion of minorities reside in apartments in Dallas County relative to the population mix; further, one acre zoning for residences raises the cost of a residence so that only "a token number of black households" exist in the town. Instead of sharing its obligation to provide fair housing, the town is compelling neighboring Garland and Mesquite to assume its obligation. Thus, Plaintiffs made out a prima facie case of discriminatory effect, according to the Court.

Could the Defendant, Sunnyvale, show a compelling, legitimate, bona fide governmental interest for the zoning practices or that there was no alternative course of action that would be less discriminatory? Not according to the Court's opinion despite presentation of health (septic tank) evidence.

The Town of Sunnyvale has appealed the Court's adverse ruling to the Fifth Circuit with oral arguments scheduled for summer, 2001, if a motion for new trial is denied.

A Different Perspective

Dallas area including Sunnyvale residents are alarmed that Judge Jerry Buchmeyer has a history and reputation for "cramming down" the throat of Dallas area residents his expansive interpretation of the Fair Housing Laws. He bought into every argument and statistic offered by the Plaintiffs in the Sunnyvale case, including using 1990 Census data when 2000 data is now becoming available. The Judge should take into account the new demographics of Sunnyvale reflecting increased non-white residents. He seemed to overlook the refusal by Hammer-Smith to conduct a relatively inexpensive \$22,000 community impact study as a "pretext." Wouldn't a \$20,000 study have been easier than hundreds of thousands of dollars of litigation?

The Fifth Circuit may not so readily see the Sunnyvale case as a "lay down" FHA case as some judges have in the past. Judge Jerry Buchmeyer sprinkled his opinion with hearsay about "racial" slurs overheard from City Council members without identifying the speakers, and seemed to read into town planning language that Sunnyvale should discourage premature development or "no development in a substandard manner" as discouraging African Americans. The Fifth Circuit could probably say, "get over it, Judge" when reading his opinion.

The Fifth Circuit might try to fashion a moderate remedy whereby the town can provide areas for low income housing rather than turn an oasis of pastoral living into suburban, congested areas like Mesquite and Garland. Two to three hundred non-white citizens, (100 apartment units), would reflect more reasonably the racial composition of Dallas and its surrounding rural area; however, the only public school is overcrowded and the streets, roads, water and sewer are not in place for such high density growth. Developers have in the past year constructed hundreds of apartments within blocks of Sunnyvale's western entrance. Unless one looks carefully for a city lines sign, there is no distinction between Mesquite and Sunnyvale.

Look for a Fifth Circuit with less invidious language and history than the Federal District Court to find appropriate remedy than to call Sunnyvale a “municipality hostile to minorities.”²³

¹ 42 U.S.C. §3601 et seq.

² *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1987) cert denied, 486 U.S. 1055 (1988).

³ *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 155 (5th Cir. 1996).

⁴ *United States v. Yonkers Board of Education*, 837 F.2d 1181, 1217 (2d Cir. 1987) cert. Denied, 486 U.S. 1055 (1988).

⁵ *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 448 F.2d 1283, 1287-90 (7th Cir. 1977).

⁶ *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), cert denied, 422 U.S. 1042 (1975).

⁷ *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-148 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Rizzo* at 937.

¹¹ *Rizzo* at 938.

¹² *United States v. Mitchell*, 580 F.2d 789, 791 (1978).

¹³ *Id.*

¹⁴ *Arlington Heights, supra*, at 271.

¹⁵ The recited Town of Sunnyvale facts, quotes and events came from the District Court case of *Dews* entered July 31, 2000 (CA 3:88 –CV- 1604-R).

¹⁷ *Id* at p. 23.

¹⁸ *Id* at p. 30.

¹⁹ *Ibid.*

²⁰ *Id* at p. 32.

²² *Id* at p. 58.

²³ *Id* at p. 81.