

Affirmatively Furthering Fair Housing Through Land Use Laws

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In a momentous decision, the Supreme Court, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* 576 U.S. ___, No. 13-1371 (June 25, 2015), held that policies and practices that have the effect of discrimination, even if not intentional, violate the civil right to housing opportunity guaranteed by the Federal Fair Housing Act. The Court affirmed what is commonly known as the “disparate impact” theory of liability. On the heels of that Supreme Court decision, HUD adopted its final rule on affirmatively furthering fair housing. The combination of the Supreme Court decision and adoption of the final rule to implement a long standing, but rarely enforced, Fair Housing civil rights law should be viewed as a clarion call for local governments to make meaningful progress in creating housing choice in areas of opportunity.

Fair Housing Act violations are most commonly thought of in the context of refusing to rent or to sell property to a person or a family based on the color of their skin. Too often overlooked is that the most egregious cause of segregation in the housing market is the result of land use planning and permitting laws. A prime example, is when local governments permit large swaths of land to be developed through master plans that create mini towns or villages without creating housing opportunity for low income households; some have their own community schools and all the infrastructure associated with a municipality, but no requirement that affordable housing be part of the mix. This exclusionary land use can easily be seen to have a disparate impact on protected classes as it makes unavailable the areas of high opportunity (newer schools, better infrastructure, parks, and services) that come with the new development.

It is a compelling time for Florida jurisdictions to adopt inclusionary housing policies to promote housing choice in areas of opportunity. Inclusionary housing policies come in many forms in the land development code, from eliminating minimum square foot regulations, allowing accessory dwelling units in all residentially zoned areas, and accommodating tiny homes and co-housing by permitting pocket neighborhoods, to a requirement that affordable homes are included when land is rezoned for redevelopment or new market rate housing.

There are a variety of ways for government to make meaningful progress in affirmatively furthering fair housing. Using housing funds to supplement and not supplant general revenue dollars for improving community infrastructure in low income and high poverty areas, bringing existing affordable housing into good repair, and improving the overall health and safety in the parts of town that have suffered from disinvestment are important actions for affirmatively furthering fair housing. While not diminishing the importance of improving existing impoverished areas of the community, this article addresses the value of providing housing opportunities for low wealth individuals throughout the entire community, and particularly in areas of high opportunity.

Mixed Income And Mixed Use Developments.

New Urbanism uses Traditional Neighborhood Design (TND) to produce developments often rising to the level of small unincorporated towns. New Urbanism ostensibly offers a continuum of housing choices. Examples in Florida include Baldwin

Baldwin Park, Orlando, FL (former Navy Base)



When there is no inclusionary requirement, we find that new urbanism developments typically fail to include homes for low income populations.

Park in Orlando, City Place in West Palm Beach, Southwood in Tallahassee, and of course, the nationally acclaimed and first New Urbanism Community in Florida, Seaside, in the Florida Panhandle. There are approximately 60 New Urbanism communities throughout Florida. These large developments, which often feel like a small town complete with supermarkets, restaurants, town centers, and schools, have virtually no housing options for low income individuals.

HOPE VI developments were required by federal law to use TND, and were required by law to include low income families in these mixed income developments. Florida developers have embraced New Urbanism or TND because it creates desirable and profitable development. Local land use planning laws have permitted these developments most commonly under the local Planned Unit Development laws or pursuant to Development of Regional Impact (DRI) state planning law. But, by and large, those TND communities that were not HOPE VI developments, failed to include any legal requirement for affordability.

Was it local government's intent to close off housing choice in these desirable communities? Under the disparate impact theory of liability affirmed by the Supreme Court in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, discriminatory intent is not required. Local government may have believed that housing choice would be available because of the variety of housing types and tenures included in the developer's plan to provide a continuum of housing prices. For example, the attached rental housing would provide a type and tenure that low wealth families could afford. But that has not been the experience on the ground. With the exception of the falling prices from the housing recession of 2007-2012, the

desirability of the TND communities increased the prices of even the attached rental housing beyond the reach for Florida's lower-income households.

Inclusionary Zoning: a local land use remedy.

Inclusionary zoning ordinances require the private sector developer to include a small percentage (10- 20%) of affordable housing in the otherwise wholly market rate development. There are hundreds of inclusionary zoning ordinances operating in 20 states in the U.S. Some produce for-sale homes, others supply rental housing, and most do both. Most produce housing units available to low- and

moderate-income working families, or "workforce housing." Housing advocates nationwide perceive inclusionary zoning as a critical strategy with great promise for increasing the stock of affordable housing. The potential for inclusionary zoning is immense because local governments can propel the development of affordable housing without

substantial financing subsidies.

As its name suggests, inclusionary zoning is an antidote to "exclusionary zoning." Exclusionary zoning has been the common practice of separating land uses, prohibiting mixed income and mixed use developments, and promoting large lot and sprawl development that have the effect of excluding affordable housing and low-income populations, including persons of color. Exclusionary zoning sets the stage for private condominiums and gated communities that create socially, economically and racially homogenous enclaves. Exclusionary land use practices force low income people to live outside of high-opportunity areas marked by growing local job markets, lower-poverty and higher-performance public schools, and greater public investment in infrastructure, such as parks and other public amenities.



Inclusionary zoning is a form of “land value recapture” in which local government, acting in the best interests of the public, recaptures a portion of the increase in private property value caused by land use or zoning changes made by the government. Inclusionary housing is good public policy. Local land use authority is a powerful tool for ensuring adequate and well-located affordable housing, but far too few local government planners and elected officials are using it.

Land ownership within a jurisdiction includes a “public” dimension which is constituted by zoning policies. The housing produced in Florida’s communities (what kinds, how much, at what locations and at what price) is a result of a complicated set of interrelated systems. Exclusionary zoning has prevented low income members of the community from housing choice in areas of opportunity. Inclusionary zoning is a realistic, effective, and fair solution to both the lack of affordable housing and economic and racial segregation.

How Inclusionary Zoning Affirmatively Furthers Fair Housing.

An oft heard shorthand for the importance of where affordable housing is located is that “a child’s zip code should not determine his or her future success”. When children attend community schools and their communities are economically and racially homogenous, the result is segregation in the schools. In contrast, inclusionary zoning promotes economic and racial integration in public schools with substantial positive impact on all students. See newly released report on Success Stories of Socioeconomically Integrated Schools from The Century Foundation at www.tcf.org.

Inclusionary zoning is needed in all New Urbanist communities in Florida. The TND (traditional neighborhood design) that has been embraced throughout Florida, creating more than 60 New Urbanist communities throughout the state, has failed to meet the principle espoused by the Congress of New Urbanism that affordable housing should be included in New Urbanist communities. Without an inclusionary requirement, New Urbanist communities and large scale developments inspired by traditional neighborhood design remain unaffordable as the desirability

of these communities drive home prices and rents beyond what is affordable to the lower wage workforce.

The Effect of Inclusionary Zoning on Development in Florida.

An inclusionary zoning ordinance will typically apply to market rate developers of single family and multifamily housing, neither of whom are in the business of producing affordable housing. Typically, the push back from the market rate developer is couched in terms of the “unfairness” of having to provide affordable units. But in reality, the market rate developer is not being treated unfairly in economic terms, in fact, under Florida’s strong private property laws, it is likely that the market rate developer will not only be kept economically whole, but even able to profit more under the inclusionary ordinance than without it.

More likely, is that the discomfort with requiring a market rate developer to produce affordable housing is that the developer/builder is being told to produce a product outside of the developer/builder’s line of business or expertise. There are a number of ways for the market rate developer to comply with the inclusionary requirement to produce affordable units. If there are only a small number of affordable units to be provided, it may be a simple matter to include them within the market rate development, but that is not always the case. Partnering with a nonprofit, such as a community land trust to own and manage the long term affordability of the inclusionary housing units is a wise choice. A community land trust is a nonprofit that typically maintains ownership of the land beneath the affordable housing improvement, whether a homeownership or rental unit, and maintains the perpetual affordability of the home through the terms of a 99 year ground lease that permits the community land trust to restrict the sales price or the rent of the housing to ensure that the home is affordable for generations.

Another way for the market rate developer to meet the inclusionary requirement is to partner with an affordable housing developer—for example, a developer using low income housing tax credits or other affordable housing finance resources. Typically, the inclusionary housing ordinance will require that

*From HUD AFFH Guidebook

6.3.3 INCLUSIVE COMMUNITY DEVELOPMENT & POLICY

In addition to programmatic strategies to affirmatively further fair housing there are many policy levers that may be used to overcome historic patterns of segregation, transform R/ECAPs into areas of opportunity, reduce disproportionate housing needs, and eliminate disparities in access to opportunity. Inclusionary zoning, regional fair share policies, mixed income housing, and community-based settings for individuals with disabilities are some strategies that may produce fair housing outcomes. Today, over 400 cities, towns, and counties have implemented inclusionary zoning policies. When applied effectively, inclusionary zoning can successfully integrate affordable housing across jurisdictions and regions. For example, an inclusionary zoning ordinance may require that a percentage of new housing units be developed for low- and moderate-income families. Under one ordinance of this type, 12.5 to 15 percent of dwelling units, in developments of 50 or more units, must be “moderately priced,” and 40 percent of these units must be offered to the local public housing authority or nonprofit sponsors. By doing this, in exchange, developers are provided a density bonus, that is, they are allowed to develop more units than zoning laws would otherwise permit. In one county, inclusionary zoning has produced over 12,500 affordable housing units that are integrated with market-rate housing.

the inclusionary units be built on-site. In Florida much of our new market rate housing is built on large parcels, sprawling walled-in developments or the lovely New Urbanist communities that have the trappings of a small town. The market rate developer could conceivably meet its inclusionary requirement by providing land to the developer of a tax credit development that will be built to the aesthetics of the market rate community. This would be a private sector partnership facilitated by the public sector, creating a quadruple win. A win for the market rate developer; a win for the affordable housing developer; a win for the local government; and a win for the residents of the community.

Improving the Production of Affordable Housing.

All local jurisdictions in Florida are required to meet the entire current and anticipated housing needs of their communities Section 163.3177 (f), Florida Statutes. The Florida Legislature enacted a statutory goal that “[by] the year 2010, this state will ensure that decent and affordable housing is available for all of its residents” (Section 420.0003 (2), Florida Statutes). In 2016, we are still far from achieving this goal. The 2016 Florida Home Matters Report, published by the Florida Housing Coalition, finds that over 950,000 very low income households in Florida are severely cost burdened, spending more than half their income on housing.

Contemporary affordable housing is well-designed, professionally-managed and an asset to the community. Moreover, when affordable housing is located in opportunity-rich neighborhoods, it creates economic and cultural diversity that benefits the entire community. Educating elected officials and the public about the quality of present day affordable housing is key to overcoming neighborhood opposition to the inclusion of housing for lower income residents. Florida is a national leader in providing a dedicated revenue source for affordable housing through the Sadowski state and local housing trust funds to help in the financing of affordable housing. Florida is also a national leader in having a state Fair Housing Law which prohibits discrimination in land use decisions based on the financing of the development. See 760.26, Florida Statutes. Inclusionary zoning is a policy that successfully addresses both the production of affordable housing and the location of affordable housing. The Innovative Housing Institute, a national nonprofit, estimates that if inclusionary zoning had been enacted by all local governments in 118 higher-housing cost metro areas, a 15% set-aside would have resulted in 1.6 million affordable housing units being built by private, for-profit homebuilders between 1990 and 2006.

The life breathed into Affirmatively Furthering Fair Housing from the Supreme Court decision and adoption of the Affirmatively Furthering Fair Housing Rule means it is time for all of Florida’s local governments to take a fresh look at whether their land use codes can do a better job in making meaningful progress to affirmatively further fair housing. **HNN**



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