LOCAL ZONING AUTHORITY AND THE FAIR HOUSING ACT: A BALANCING ACT

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I. OVERVIEW

As more and more people migrate to ever-expanding urban areas[1], the pressure on local governments to confront housing issues grows. Limitations on resources, including public water supply, transportation infrastructure, and public open space availability can all potentially impact housing availability. Housing affordability is another major issue confronting cities as they try to plan for this inevitable growth.

Central Texas, for example, continues to see significant growth.[2] According to U.S. Census Bureau estimates, Hays County experienced population growth of approximately 58.9% between 1996 and 2006.[3] These types of growth patterns, where small towns of approximately 5,000 can turn into growing urban areas of over 25,000 in a decade, place incredible strains on communities to accommodate growth while retaining some semblance of the town's character.

As cities are forced to confront critical issues such as whether or not the town's water system can supply enough water pressure to the hundreds of new homes that have been built in the last year, or whether the sewage treatment facility can handle the extra demands of thousands more toilets being flushed, cities must still be mindful of various federal and state laws that play an important role in the way in which they can address these issues. One of the most important of these laws is the Fair Housing Act of 1968, 42 U.S.C. § 3601, et seq.

The Fair Housing Act ("FHA") was enacted in 1968 as part of the Civil Rights Act of 1968 and signed into law by President Lyndon Johnson. In short, the law prohibits

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[1] The 2000 U.S. Census estimates that 79.2% of the population lives in "urban" areas, which are defined as population centers of 50,000 or more. http://www.fhwa.dot.gov/planning/census/cps2k.htm

[2] *Real Estate Market Overview 2007, Austin-Round Rock*, Real Estate Center at Texas A&M University, http://recenter.tamu.edu/mreports/AustinRRock.pdf

[3] *Id*.

any act that denies or makes housing unavailable on the basis of race, ethnicity, gender, familial status, etc. Cases interpreting the FHA have determined that Congress intended to create a broad, sweeping remedial statute in order to combat the effects of racial discrimination, meaning that this statute has one of the potentially broadest reaches of any federal law impacting local regulation of land use.[4]

This is largely because a local government can violate the FHA not only by engaging in intentional discrimination under the Act, but also by engaging in unintentional discrimination (i.e. disparate impact claims).[5] While this might seem counterintuitive, local governmental actions, including zoning laws, that have a significant discriminatory impact, regardless of the intent of the enacting body, can violate the FHA.[6] Because the reach of the FHA is so pervasive, local governments must be cognizant of the potential effect of even facially neutral acts.

This has been the backdrop under which local governments have operated for decades as they try to balance issues of availability and affordability and it was the premise under which Kyle, Texas fought a lengthy FHA claim late last decade. This presumption; that is, that the FHA recognizes disparate impact claims, is being challenged and the Supreme Court will finally have the opportunity to decide this issue in the case of *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*. But before we get to what could amount to a sea-change in the way FHA claims are handled by the courts, it is important to understand what remains the current status of the law and how we got to where we are today.

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[4] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).
[5] *Town of Huntington v. Huntington Branch NAACP*, 844 F.2d 26 (2nd Cir. 1988).
[6] *Id*.

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