A DEVELOPER'S APPROACH TO ORGANIZED OPPOSITION©

"Utilizing the Fair Housing Act to Counteract NIMBY"

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Evolution of Tax Credit Developments

From its inception in 1986 through the early 1990's, securing adequate financing was the most difficult component of developing affordable housing using low income housing tax credits. Interest rates were high, tax credit investors were paying only 27 cents to 40 cents on the dollar for tax credits, and tax-exempt bond deals were virtually non-existent. Tax credits were plentiful, and apartment zoned land was readily available since market rate apartment complexes were overbuilt and experiencing high vacancy after the free flow of money to these transactions in the early to mid-1980's.

Development of affordable housing has matured over the last 20 years. Today, financing is inexpensive (with low interest rates and 90 cents plus per dollar being paid for credits), but sites for affordable housing are increasingly hard to find. A number of factors influence the limited supply of affordable housing land -- a resurgence of market rate apartment development; the growth of the suburbs, where zoning has been skewed away from denser multifamily development in favor of the single family, suburban lifestyle; and neighborhood opposition to apartments in general and affordable housing in particular (so called "not in my backyard" or "NIMBY").

Background on the Fair Housing Act

Forty years ago, institutionalized racial segregation existed in education, housing and economic opportunity in America. Racial discrimination was inherent in philosophy and in practice, but society chose to overlook this disparate treatment. The race riots of the 1960's shone a spotlight on these inequities. "In response, Congress adopted broad remedial provisions to promote integration. One such statute, the Fair Housing Act, was enacted to provide, within constitutional limitations, for fair housing throughout the United States." [1]

The Fair Housing Act's passage in 1968 was the product of one of the most turbulent periods in urban America.[2] The history of the Fair Housing Act is contained in a report by the Kerner Commission.[3] The Commission, in its March 1, 1968 report, stated:

> This is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal . . . . Discrimination and segregation have long permeated much of American life; they now threaten the future of every American. This deepening racial division is not inevitable. The movement apart can be reversed.

The Commission assessed the future of urban America as follows:

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1 Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 928 (2d Cir. 1988), *aff'd*, 488 U.S. 15, 109 S. Ct. 276, 102 L.Ed.2d 180 (1988), *reh'g denied*, 488 U.S. 1023, 109 S.Ct. 824, 102 L.Ed.2d 813 (1989).

2 Letter from Fair Share Housing Center to New Jersey Housing and Mortgage Finance Agency dated November 20, 2002 re: Proposed 2002 Low Income Housing Tax Credit Qualified Application Plan.

3 The Kerner Commission was led by Chairman Otto Kerner, to study the 1960's urban riots.

Three choices are open to the nation:

> We can maintain present policies, continuing both the proportion of the nation's resources now allocated to programs for the unemployed and the disadvantaged, and the inadequate and failing effort to achieve an integrated society.
>
> We can adopt a policy of "enrichment" aimed at improving dramatically the quality of ghetto life while abandoning integration as a goal.
>
> We can pursue integration by combining ghetto "enrichment" with policies which will encourage Negro movement out of central city areas.

The first choice, continuance of present policies, has ominous consequences for our society. The share of the nation's resources now allocated to programs for the disadvantaged is insufficient to arrest the deterioration of life in central city ghettos. . ..

The second choice, ghetto enrichment coupled with abandonment of integration, is also unacceptable. It is another way of choosing a permanently divided country….

We believe that the only possible choice for America is the third—a policy which combines ghetto enrichment with programs designed to encourage integration of substantial numbers of Negroes into the society outside of the ghetto.

To reach this goal, the Kerner Commission set forth its recommendation:

> Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them.

In the Fair Housing Act, Congress set out to reverse the trend toward residential racial segregation identified in the Kerner Commission report. One of the foremost authorities on housing discrimination describes the Congressional mandate in the Fair Housing Act as follows:

> Difficult as housing integration may be to achieve, it is clear that this goal was important to the Congress … the new law was intended not only to expand housing choices for individual blacks, but also to foster racial integration for the benefit of all Americans. … Aware of the conclusion of the Commission on Civil Disorders that the nation was dividing into two racially separate societies and the problems associated with them—segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and blacks caused by the "lack of experience in actually living next" to each other.
>
> This legislative history makes clear that residential racial integration is a major goal of the Fair Housing Act, separate and apart of the goal of expanding minority housing opportunities.[4]

Integration is an important goal of the FHA. The US Supreme Court has observed that in the FHA "Congress has made a strong national commitment to promote integrated housing."[5]

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[4] Robert G. Schwemm, Housing Discrimination: Law and Litigation § 2.3(2001) (emphasis added). See also Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972) (quoting Senators Mondale and Javitts in discussion of broad role of Title VIII in redressing urban racial segregation); id. at 209, 211-12 (discussing broad construction of Title VIII necessary to effect policy Congress considered to be of "highest priority").

[5]

The Act was intended to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."[6] Congress clearly intended that broad application of the anti-discrimination provisions would ultimately result in residential integration.[7]

Senator Mondale, the author of the Fair Housing Act, summarized the purpose of the bill as being to replace the ghettos "by truly integrated and balanced living patterns." The integration of society, both racially and economically, lies at the core of the FHA.

Basics of the Fair Housing Act

The Fair Housing Act provides that is unlawful (a) "to refuse to sell or rent … or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin" or (b) "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the Fair Housing Act]."[8]

Courts have given expansive interpretation to the statute so as to fully effectuate Congress' remedial purposes.[9] "Congress' intention in enacting and amending the Fair Housing Act was to provide broad and far-reaching relief against discrimination similar to the broad remedial scheme of other Civil Rights statutes."[10]

Furthermore, the Fair Housing Act provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."[11] In preempting discriminatory state laws, Congress recognized that "[h]ousing is an area replete with state law rules and regulations and private contracts."[12] But, "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights."[13]

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7 Huntington Branch NAACP, supra note 1 at 928; cf. Bank v. Perk, 341 F. Supp. 1175 (D. N.D. Ohio 1972) where the court stated that the City had the obligation to support the local housing authority, "to encourage them in every way, and to aid in the integration of the housing patterns of the City with all its strength" and U.S. v. Charlottesville Redev. & Housing Authority, 718 F. Supp. 461 D. W.D. Va. 1989) where the court noted that "[I]ntegration -- in housing as well as in other aspects of life -- is a prominent and significant policy goal of the law. Contrary to the government's argument, this court finds that defendant must operate its housing units so as to promote integration in housing within the limits set by the constitution and laws of the United States. This duty is pursuant to a goal which has been recognized by the Supreme Court. Linmark Assoc. Inc. v. Willingboro, 431 U.S. 85, 94-95, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977)."

8 42 U.S.C. § 3604.

9 Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 95, 104 (D.P.R. 1990) (hereinafter "ARFAPS").

10 Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo, 752 F. Supp. 1152, 1171 (D.P.R. 1990), *vacated for other reasons*, 988 F.2d 252 (1st Cir. P.R. 1993).

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12 Casa Marie, supra.

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Establishing a Fair Housing Act Violation

A plaintiff may establish a violation under the FHA by showing either: (1) that the defendants were motivated by an intent to discriminate ("discriminatory intent" or "disparate treatment"); or (2) that the defendant's otherwise neutral action has an unnecessarily discriminatory effect ("disparate impact").[14]

In a discriminatory intent case, if a statute or rule discriminates on its face, "the motives of the drafters of the facially discriminating ordinance, whether benign or evil, is irrelevant to a determination of the lawfulness of the ordinance."[15] "In order to prove intentional discrimination it is not necessary to show an evil or hostile motive. It is a violation of the Fair Housing Act to discriminate even if the motive was benign or paternalistic." [16] In other words, if a statute on its face treats a protected class of persons different than non-protected persons, motive is irrelevant, even if the statute was intended to have a positive effect on the protected class.

Discriminatory effect, on the other hand, may be proven by showing either (1) "adverse impact on a particular minority group or (2) harm to the community generally by the perpetuation of segregation."[17] For example, a policy that perpetuates segregation and thereby prevents interracial association violates the Fair Housing Act even if it has no immediate impact.[18]

The courts have established a four pronged analysis for evaluating facially-neutral conduct that produces a discriminatory effect but was taken with little or no discriminatory intent. The pertinent factors are: (1) the strength of the showing of discriminatory effect; (2) whether there is some evidence of discriminatory intent; (3) defendant's professed interest in taking the action complained of; and (4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of a protected class or merely seeks to restrain the defendant from interfering with individual property owners wishing to provide such housing.[19]

In the absence of direct evidence of discriminatory purpose, courts may consider the following: (1) discriminatory impact; (2) the historical background of the challenged decision; (3) the specific sequence of events leading up to the decision, including contemporary statements by members of the decisionmaking body; (4) any procedural and substantive departures from the norm; and (5) the legislative or administrative history of the decision.[20]

The chronology of events is frequently a leading indicator of discriminatory conduct.[21] In one case involving a city's refusal to run a sewer line to an affordable housing development[22], the court recited the following facts:

The mosaic of Lackawanna's discrimination is a sad one. First, the long standing, man-

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14 Larkin v. Michigan Dep't of Social Servs., 89 F.3d 285, 289 (6th Cir. Mich. 1996), citing Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. Utah 1995); Doe v. Butler, 892 F.2d 315, 323 (3rd Cir. Pa. 1989); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1295 (D. Md.1993); Horizon House Developmental Servs., Inc. v. Upper Southampton, 804 F. Supp. 683, 693 (E.D. Pa.1992), aff'd without opinion, 995 F.2d 217 (3d Cir. 1993).

15 Association for Advancement of the Mentally Handicapped v. City of Elizabeth, 876 F. Supp. 614, 620 (D.N.J. 1994).

16 Horizon House, supra note 14 at 696.

17 Dews v. Town of Sunnyvale , 109 F. Supp. 2d 526, 531 (N.D. Tex. 2000), citing *Huntington Branch NAACP, supra note 1 at* 937 (2nd Cir.), aff'd; see also Summerchase Ltd. Pshp. I v. City of Gonzales,970 F. Supp. 522, 527-28 (M.D. La. 1997).

18 , supra note 6 at 1290; Betsey v. Turtle Creek Associates, 736 F.2d 983, 987 (4th Cir. Md. 1984).

19 ARFAPS, supra note 9 at 106.

20 Dews, supra note 17 at 533.

21 Kennedy Park Homes Asso. v. Lackawanna, 436 F.2d 108, 110 (2d Cir. N.Y. 1970), *writ denied*, 401 U.S. 1010, 91 S. Ct. 1256, 28 L. Ed. 2d 546.

22 Id.

made, physically segregated First Ward of the City; then the long history of containment of 98.9 percent of the blacks of the whole city in the First Ward and their unsuccessful effort to escape it; and reaching into the present, the threats of violence that were made against the blacks when the proposed Kennedy Park subdivision was first publicly announced; the petitions circulated and signed against the subdivision and especially the one sent to Bishop McNulty of the Diocese containing 3,000 names; the action of the Planning and Development Board of the City in reversing its predecessor and recommending additional residential use of the land in the First Ward which already had the highest residential density in the City … ; the joint recommendation of the Planning and Development Board and the Zoning Board of Appeals to the City Council that it adopt a moratorium on new subdivisions and zone certain acreage, including the Kennedy Park subdivision site, as open space and park area despite the contrary recommendations of its planning expert; and the action of the City Council on such recommendations and on the sewerage moratorium. … The final element in this discriminatory pattern is the Mayor's refusal to approve the sewer application following repeal of both ordinances.

The disparate impact analysis of Fair Housing cases arose because "clever men may easily conceal their motivations."[23] This is especially persuasive in disparate impact cases where a facially neutral rule is being challenged. Often, such rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied.[24] Conduct that has the foreseeable consequence of perpetuating segregation can be as harmful as intentional discriminatory conduct in frustrating integrated housing.[25]

"[I]ntent, motive, and purpose are elusive subjective concepts," and attempts to discern the intent of an entity such as a municipality are at best problematic.[26] The courts have adopted discriminatory impact as a second way of proving a violation of the Fair Housing Act because, as one court put it:

> A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.[27]

Covert bigoted behavior is much less pervasive than in the 1960's and 1970's. Hidden racial prejudice is no longer the principal underlying factor in actions that have a discriminatory impact. Most of the opponents of affordable housing today are engaged in a form of "economic egalitarianism" or "economic protectionism" – or loosely phrased "I pulled myself up by my bootstraps and I'll be darned if

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23 United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. Mo. 1974), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694 (1975); cf. Huntington Branch NAACP, supra note 1 at 935; Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1037 (2d Cir. N.Y. 1979); Stewart B. McKinney Foundation, Inc. v. Town Plan & Zoning Com., 790 F. Supp. 1197, 1218 (D. Conn. 1992). "Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this." Smith v. Clarkton, 682 F.2d 1055, 1064 (4th Cir. N.C. 1982).

24 Huntington Branch, supra note 1 at 935.

25 Metropolitan Housing, supra note 6 at 1289.

26 Supra, citing Hawkins v. Shaw, 461 F. 2d 1171, 1172 (5th Cir. Miss. 1972); See Hart v. Community School Board of Education, 512 F. 2d 37, 50 (2d Cir. N.Y. 1975), Note, Reading the Mind of the School Board: Segregative Intent and the DeFacto/DeJure Distinction, 86 Yale L.J. 317, 322-26 (1976).

27 Metropolitan Housing, supra note 6.

I'll let anyone else have a free ride into my community" or, perhaps more subtly, "I don't want those lower income kids (of whatever color) going to school with my kids." These opponents of affordable housing will vehemently deny that they are bigoted or racist – and clearly their intent and philosophy contain no racial prejudice. However, if we institutionalize this economic theory of suburban lifestyle and allow it to affect decisions on the siting of affordable housing, the result, or in Fair Housing language, the "IMPACT" is that lower income people, who disproportionately tend to be minorities, are to a large degree shut out of the community.

In essence, this protectionist viewpoint creates an "economic mote" around a city. The city lowers the drawbridge in the morning to allow the lower wage workers to enter to service the community – school teachers, firefighters, retail and restaurant employees, etc., because these functions are important to a economically thriving city. But at night the drawbridge goes up and these workers are shunted off to an adjoining city that is more open to affordable housing. Daily cross-migration of workers occurs (professionals from the suburbs to the inner-city, and inner-city blue collar workers to jobs in the suburbs in the morning, and the reverse in the evening), with resulting traffic congestion and pollution. These living/working arrangements also create issues of fairness in terms of taxes and social services between adjoining cities. Stated more succinctly, economic egalitarianism/ protectionism has direct consequences not only on residents of affordable housing, but also on the cities that accept or reject them and, ultimately, on the entire metropolitan region.

Once the affordable housing developer has made this showing of discriminatory impact, the burden of proof shifts to the governmental agency, which has a very difficult hurdle to overcome – it must prove that its actions further, in theory and in practice, a legitimate bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect.[28]

Governmental Actions Having Discriminatory Impact

Developers who attempt to place affordable housing outside of traditional lower income neighborhoods often face a bombardment of reasons why a particular site is inappropriate, and homeowner, political and governmental actions to stop the development from occurring. Some of the most egregious cases involve the opposition to AIDS and mentally challenged housing. In Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.,[29] the list of tactics deployed by the homeowners could be a handbook for fighting affordable housing: Petitions, picket lines, graffiti, administrative complaints, letters to public bodies, local court action, appearances on local television programs, employees receiving death threats, and concerns raised over flood prone issues, impact on surrounding property values, and risk to local school children.

The courts in these handicapped housing cases look at the impact that the prejudices of the majority have on the decisionmaking body – and this is critical for affordable housing/Fair Housing cases. The difficulty for the courts is allowing homeowners to exercise their First Amendment rights to free speech, even before the administrative body that will make the affordable housing decision, and then analyzing the decision made by the governmental actor, in light of the overwhelming opposition/political pressure. Homeowners have learned that petition signatures from large numbers of voters directly influence decisions at the local level, notwithstanding federal Fair Housing obligations.[30]

In discussing the impact of political pressure on housing decisions, the A.F.A.P.S. court attempted to strike a balance:

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28 Dews, supra note 17 at 532.

29 Supra note 9.

30 In one Dallas area county, the homeowners presented over 3,000 petition signatures to the county housing finance corporation, and brazenly stated to the county judge that this represented more voters than the margin of victory in the judge's most recent election.

> In the ordinary course of affairs a decisionmaker is not to be saddled with every prejudice and misapprehension of the people he or she serves and represents. On the other hand, a decisionmaker has a duty not to allow prejudices of the majority to influence the decisionmaking process. A racially discriminatory act would be no less illegal simply because it enjoys broad public support. Likewise, if an official act is performed simply to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter …. After considering the evidence in its totality, the court cannot avoid the conclusion that [the planning commission] acted in furtherance of the misguided and discriminatory notions held by many … residents concerning AIDS patients or at least bowed to political pressure exerted by these residents. By the same token, the court finds [the planning commission's] stated reason for denying the permit to be a pretext. [emphasis added]

Actions that the courts have focused on in finding disparate treatment or discriminatory impact include:

> the mayor told the city director of construction to take every legal step to stop the development; he spoke to a group of 700 citizens who were concerned about the development; imposing rules not imposed on other residences; and abuse of the code compliance process.[31]
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> changing the zoning of a multifamily parcel, or having no multifamily zoned land outside of the poor, minority areas of town[32] or refusing to rezone land to allow multifamily use or having a 1 acre lot minimum.[33]
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> refusal to issue a building permit claiming overcrowding of the local schools and recreational facilities and overburdening of the local fire fighting or sewer capabilities.[34]
>
> refusing to run a sewer line to an affordable housing development outside the city limits, when the city had done so before for single family residential subdivisions outside the city limits.[35] Disparate treatment of single family development versus multifamily development can create Fair Housing concerns.[36]
>
> taking an opinion poll prior to making an affordable housing decision.[37]
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> selective enforcement of platting and building code review process – the staff was flexible with other developments, but not with affordable housing developments.[38]

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31 Assoc. for Adv. Of Mentally Handicapped, supra note 15.

32 Huntington Branch NAACP, supra note 1.

33 Dews.

34 Dailey v. Lawton, 425 F.2d 1037 (10th Cir. Okla. 1970)

35 United Farmworkers of Florida Housing Project, Inc. v. Delray Beach, 493 F.2d 799, 808 (5th Cir. Fla. 1974), stating "we recognize that once a municipality begins to offer services beyond its incorporated area, it can no more refuse those services to an "outsider" for racial reasons than it can refuse those services for racial reasons to one of its very own residents."

36 In Hawkins v. Shaw, supra note 6, the city provided inferior street paving and street lighting, sanitary sewers, surface water drainage as well as water mains and fire hydrants to the lower income areas of town, which established a prima facie case of racial discrimination.

37 Smith v. Clarkton, supra note 23 at 1066, stating: "Such deviations from the procedural norm by governmental decisionmakers in such circumstances are suspect when they lead to results impacting more harshly on one race than on another. Arlington Heights, supra note 6 at 267."

38 ARFAPS, supra note 9 at 105.

having different rules for elderly projects versus family projects.[39]

giving city councilmen approval rights over affordable housing developments in their district.[40]

public or homeowner notification requirements and public forums allowing homeowners input into the process.[41] Similarly, notification provisions that apply only to affordable housing, which tend to house more minorities, has a discriminatory impact on minorities and is therefore suspect under the Fair Housing Act.

Three Texas Cases[42]

Three Texas affordable housing case studies illustrate how quickly opposition to a tax credit development can mount, and how to aggressively and creatively settle differences with the governmental entity that has taken action to deny the right to financing or construction.

In 1994, a developer filed a tax credit application for affordable housing in a North Dallas suburb. Before the tax credit application was filed, the developer was informed that market rate developers had been spurned over the years in their attempts to build in that suburb. The developer nonetheless decided to file the application. About 2 weeks before the tax credits were awarded, the City denied the plat. The planning and zoning commission denied the plat 4 more times over the next 6 months, during which time the City Council undertook an emergency review of its master zoning plan, focusing on apartment zoned land first, and changed the zoning on the site and most of the remaining multifamily

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39 Elderly affordable housing does not draw the same level of homeowner opposition as family affordable housing. The Fair Housing Act was amended in 1988 to add "familial status" as a protected class, making any regulations or administrative action that treats family developments inconsistently with seniors housing more suspect, but even prior to this amendment the courts were suspicious of the motives for these distinctions. Cf. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 911-912 (N.D. Ill. 1969), where the court noted "55% of elderly sites were in White areas. Elderly housing had different rules – those applicants from within the neighborhood were given preference, thus alleviating the Alderman's concerns. But the relatively equal distribution between White and Negro elderly housing sites actually developed arises from circumstances which are not applicable to family housing sites. In selecting tenants for elderly housing Mr. Rose conceived a 'proximity rule' under which the applications of persons living within a two block radius of the site of an elderly housing project were granted priority and successive priorities were given to persons living within concentric half mile circles. … The 'proximity rule helped 'very obviously' to obtain an Alderman's approval because it was a 'fair assumption' that a White site would be occupied by Whites."

40 Id. There are definite parallels between this veto power given to the Chicago Aldermen in Gautreaux and, for instance, decisive points (24) given to state senator/state representative support letter scoring that exists in Section 50.9(i)(6) of the 2006 Texas QAP. The Texas QAP further institutionalizes NIMBY by providing 14 points for letters of support from homeowner associations, and negative 14 points for letters of opposition. Since it is practically impossible to secure support letters from politicians when homeowners are galvanized in opposition, the net effect is to deny affordable housing in any area where NIMBY is organized and vocal. And yet, as pointed out in ARFAPS, supra note 9 at 104, "a decisionmaker has a duty not to allow prejudices of the majority to influence the decisionmaking process."

41 Potomac Group Home, supra note 14. The Potomac court noted that "the obvious result of these notifications to neighbors is the antithesis of the professed 'integration' goal of defendants. Indeed, notices of this sort galvanize neighbors in their opposition to the homes. … Neighbors in the communities have typically responded with an outpouring of hostility vented by way of a letter writing campaign opposing the proposed group home. For example, one neighborhood petition opposing the licensing … expressed the fear that the group home would lead to the 'demise' of their 'refined neighborhood' and to the lowering of property values. … Hearings of program review boards have focused on such nonprogrammatic concerns as 'community relations,' the compatibility of the group homes with the surrounding neighborhood, the impact of the group homes on property values, and the fears of neighbors about living near people with disabilities." Id. at 1296.

42 Three actual cases faced by the author in North Texas suburbs.

sites in the City. A Fair Housing lawsuit was filed against the City. After a year of litigation discovery and $125,000 in legal, the litigation was delayed to allow negotiations with the City Manager. A very creative settlement agreement was achieved with the City and its insurance company that allowed retail and commercial development on the former apartment site and zoning and development fee waivers for 600 apartment units in the City.

In 2004, an application was filed for a tax credit development in a suburb north of Dallas. Extensive discussions were held with the neighboring homeowners, who kept coming back with more and more questions, all of which were answered. Although the homeowner's appeared to be pacified, at the City hearings the homeowners opposed the development and asked the City Council to strictly enforce the City's building standards, including requiring the developer to rebuild both sides of 6/10^{ths} of a mile of City road in concrete and a mile of sidewalk, for an apartment complex that had only 1000 feet of frontage on that road. This road construction requirement would have added approximately $750,000 to the development budget. One of the other City rules that adversely affected affordable housing was the parking ordinance – 1 parking garage per unit and an additional parking space for every bedroom, or approximately 3.7 parking spaces per unit. The City insisted on this road construction requirement and would not issue the building permits unless the developer contractually agreed to build the road, which stopped the bond closing. A Fair Housing lawsuit was filed that included an inverse condemnation claim – that requiring the construction of the road and sidewalk amounted to a taking of property for public purposes. Settlement negotiations were immediately entered into with the City and its insurance company whereby the developer agreed to build the road in asphalt and not in concrete (adding approximately $450,000 to the development costs) and the City agreed to waive 80 garages, which saved around $600,000.

One of the more fascinating instances of homeowner opposition and a governmental entity pacifying homeowners occurred in December of 2005. A developer proposed two family tax-exempt bond apartment complexes in South Texas in 2004 and secured the required consistency with Consolidated Plan letters from the County Judge. For technical reasons the developer terminated the bond applications, and then reapplied for bonds in August of 2005. Between the first and second bond applications, organized homeowner opposition resulted in 3,500 petition signatures against the two developments. To secure tax credits to accompany the new bond reservation, the Texas Department of Housing & Community Affairs (TDHCA) required updated consistency letters. Incredibly, the County refused to issue the updated letters, stating in a letter from the County administrator (not the Judge this time) that the County was not certain that it could determine the impact of Hurricane Katrina evacuees on its Consolidated Plan. TDHCA threatened to terminate the tax credit applications for these two transactions – after the developer invested over $1.5 million into the development process. A Fair Housing lawsuit was drafted and sent to the County. The lawsuit draft included the testimony of the County Judge before the US Congress, 3 weeks after Katrina, where he requested additional tax credits so that the citizens of the county would not have all of the affordable housing taken up by Katrina evacuees. Within two weeks the County issued the updated consistency letters.

Strategies for Facing City Opposition

One of the most important lessons learned in over 15 years of facing city actions to halt affordable housing in response to NIMBY opposition from homeowners, is – to borrow an analogy from football – "a good offense is the best defense." Many of the articles on dealing with NIMBY recommend educating the homeowners and politicians on the societal benefits of affordable housing, and countering their objections, point-by- point: multifamily generates less children than single family, so impact on schools is minimized; apartments have fewer cars per residence than single family, so that traffic is not increased; the City needs a place for its school teachers, firefighters, policemen; etc. Certainly, all of these statements are true and helpful up front. However, no amount of logic will persuade homeowners who are emotional and oftentimes irrational, and the developer will find an ever-expanding list of rationales for keeping affordable housing out of their neighborhood. Faced with a rising tide of voter opposition, politicians will typically seek to pacify the homeowners/fellow citizens of the City. When the

momentum starts to run against the development, and one or more of the politicians starts to take up the homeowners' cause, the likelihood of turning the situation around with education on the benefits of affordable housing is slim at best, and once the first official action is taken, the developer needs to boldly discuss Fair Housing rights and obligations with the City attorney and the City's insurance company.