



The Federal Fair Housing Act and Municipal Zoning and Regulation: New Developments That May Affect "New Developments"

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I. INTRODUCTION

*"[The] NAHB has begun to use the requirements of the Fair Housing Act (FHA) as a tool to discourage land use planning that limits affordable housing for minorities. Courts have held that the FHA may be violated where the effect of a land use or zoning decision discriminates against minorities insofar as they are deprived housing opportunities. Under the FHA, it is not necessary to prove that land use officials intended to discriminate against minorities in denying a specific housing project or otherwise making a land use decision. In light of this effects-based test, the FHA may prove to be a significant vehicle to re-shape the affordable housing debate."*¹

Local Governments have long been aware of certain potential restrictions or restraints on their zoning and land use actions as a result of the Federal Fair Housing Act (the "FHA"). Recently, certain advocacy groups, including the National Association of Homebuilders (the "NAHB") and the NAACP, have embarked on a strategy to expand the application of the FHA in a manner that may dramatically abrogate the zoning authority of local governments. This paper and presentation provide a brief overview of how the FHA presently impacts the zoning and regulatory actions of local governments with regard to housing opportunities for racial minorities, and compares the current law to recent litigation and efforts to expand the reach of the FHA to even further restrict the zoning and regulatory authority of local governments.

II. THE PRESENT:

The Impact of Racial Minority Discrimination Claims Under the FHA on Municipal Zoning Authority and Actions

The relevant part of the FHA provides that it is unlawful "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 . . ." ² Discriminatory zoning practices are among the types of conduct prohibited by the FHA. ³ A plaintiff may establish a violation of the FHA by showing either (1) that a defendant was motivated by an intent to discriminate (also referred to as "discriminatory intent" or "disparate treatment") or (2) that a defendant's otherwise neutral action has an improper discriminatory effect (commonly referred to as "disparate impact"). ⁴

In an intentional discrimination 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 or the ordinance."⁵ It is important to note that "[i]n order to prove intentional discrimination it is not necessary to show an evil or hostile

¹ National Association of Home Builders, *Legal Affairs*, <http://www.nahb.org/generic.aspx?sectionID=827> (last viewed May 7, 2007) (attached as Exhibit "D" to this paper).

² 42 U.S.C. § 3604(a). The entire Fair Housing Act may be found at 42 U.S.C. § 3601, *et seq.*

³ *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir.1995).

⁴ *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).

⁵ *Association for Advancement of the Mentally Handicapped v. City of Elizabeth*, 876 F.Supp. 614, 620 (D.N.J. 1994).

motive. It is a violation of the Fair Housing Act to discriminate even if the motive was benign or paternalistic.”⁶ Thus, motive is not necessarily relevant; if a statute is discriminatory against a protected class on its face, it violates the FHA, even if the statute was intended to have a positive effect on the protected class.

Discriminatory effect, however, may be proven by showing either “adverse impact to a particular minority group” or “harm to the community generally by the perpetuation of segregation.”⁷ 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: (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.⁸

In cases where there is no direct evidence of discriminatory purpose or intent, courts may also consider the following factors: (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 decision-making body; (4) any procedural and substantive departures from the norm; and (5) the legislative or administrative history of the decision.⁹

Some examples of actions by local governments that courts have considered in finding disparate treatment or discriminatory impact in the context of the FHA include:

- Mayor told city director of construction to take every legal step to stop a development; he spoke to a group of 700 citizens who were concerned about the development; the city imposed rules not imposed on other residences; and there was abuse of the code compliance process;¹⁰
- Refusing to change the zoning of a multifamily parcel, and having no multifamily zoned land outside of the poor, minority areas of town;¹¹
- 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;¹²

⁶ *Horizon House Developmental Services, Inc. v. Upper Southampton*, 804 F.Supp. 683, 696 (E.D. Pa. 1992).

⁷ *Dews v. Town of Sunnyvale*, 109 F.Supp.2d 526, 531 (N.D. Tex. 2000) (citing *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.), *aff’d in part*, 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988)).

⁸ *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir.1977).

⁹ *Sunnyvale*, 109 F.Supp.2d at 533 (citing *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252 at 271, n. 21, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)).

¹⁰ *Association for Advancement of the Mentally Handicapped*, 876 F.Supp. 614.

¹¹ *Huntington*, 844 F.2d 926.

¹² *United Farmworkers of Florida Housing Project v. Delray Beach*, 493 F.2d 799, 808 (5th Cir. Fla. 1974) (stating that “once a municipality begins to offer services beyond its incorporated area, it can no more refuse those services

- Taking an opinion poll prior to making an affordable housing decision, when such an opinion poll had never been conducted before;¹³ and
- Selective enforcement of platting and building code review process – the staff was flexible with other developments, but not with the housing development for a protected class at issue in the case.¹⁴

Importantly, in disparate impact cases, a plaintiff may establish a prima facie case under the FHA by demonstrating that an outwardly neutral practice actually or predictably has a significantly adverse or disproportionate impact on minorities, or perpetuates segregation; at that point, the burden shifts to the defendant to show that "its actions furthered . . . a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."¹⁵ The balancing test is summed up as follows: though a town's interests in zoning requirements are substantial, they cannot automatically outweigh significant disparate effects.¹⁶

The leading case on FHA challenges to zoning ordinances based on disparate impact is *Huntington Branch NAACP v. Town of Huntington*, a Second Circuit opinion that was later affirmed *per curiam* by the U.S. Supreme Court.¹⁷ In *Huntington*, the city had enacted a zoning ordinance that restricted private construction of multi-family housing to a small "urban renewal" area, and had also refused a non-profit developer's request to rezone a parcel of land located outside the urban renewal area on which the developer wished to develop an integrated, multi-family, subsidized apartment complex. Plaintiffs challenged both the zoning ordinance itself and the city's refusal to rezone the particular parcel of land.

Fashioning a disparate impact test that generally applied the *Arlington Heights* factors¹⁸ (less any requirement of discriminatory intent), the Court found that the city's zoning ordinance had both a "segregative effect" and an adverse impact on African Americans.¹⁹ Once the Court found that the Plaintiffs had established a prima facie case of disparate impact, the burden shifted to the city to show that (1) its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest, and (2) no alternative course of action could be adopted that would enable

to an 'outsider' for racial reasons than it can refuse those services for racial reasons to one of its very own residents.").

¹³ *Smith v. Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) ("Such deviations from the procedural norm by governmental decision-makers in such circumstances are suspect when they lead to results impacting more harshly on one race than on another.").

¹⁴ *Association of Relatives and Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F.Supp. 95, 104 (D.P.R. 1990).

¹⁵ *Huntington*, 844 F.2d at 936.

¹⁶ *Huntington*, 844 F.2d at 937 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)).

¹⁷ *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.), *aff'd in part*, 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988).

¹⁸ *Arlington Heights*, 558 F.2d at 1290: (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 *Id.* at 937-938.

that interest to be served with less discriminatory impact.²⁰ The Court then balanced the two sides, and found that the discriminatory effects far outweighed the city's justifications for its actions.²¹ Finally, applying the final *Arlington Heights* factor, the Court held that the scale should be tipped in the plaintiff's favor when the plaintiff is seeking to enjoin interference with its own development plans rather than to compel the municipality to build the housing itself.²²

Of particular interest in Texas is the *Sunnyvale* case, a case from 2000 involving a small suburban enclave in Dallas County and relying heavily on the reasoning and precedent of *Huntington*.²³ In *Sunnyvale*, at issue was a decades-long regulatory scheme, with evidence of overt discriminatory intent, that effectively prohibited the construction of *any* high-density (and thus more affordable) housing, including apartments and other similar multi-family housing units, and which actually led to the denial of a specific multi-family residential construction project. In finding a violation of the FHA, Judge Buchmeyer summarized the numerous bases for his judgment:

. . . the Court concludes that Sunnyvale's actions in [1] maintaining a one-acre zoning ordinance, [2] in enacting a resolution banning apartments, and [3] in refusing to consider the rezoning application of Hammer-Smith Construction Co, Inc., [1] have a discriminatory effect on African-Americans *and* [2] are motivated by a discriminatory purpose . . .²⁴

The Court thus considered the totality of Sunnyvale's regulatory scheme and the impact thereof. In examining the injury to the Plaintiffs, Judge Buchmeyer noted that the defendant city's actions

in excluding multifamily housing *and* affordable single-family housing *and* imposing one-acre zoning have interfered with WPI's and its members' rights . . . Specifically, Sunnyvale's planning and zoning regulations have placed a large geographical section of the suburban section of Dallas County effectively off limits for both multifamily rental housing *and* affordable single-family rental housing . . .²⁵

Sunnyvale remains a potential benchmark case, and it apparently provides some foundation for recent FHA litigation in Texas, discussed in detail below.

The most recent case of interest, decided in April of this year, is *Reinhart v. Lincoln County*, which involved the County's adoption of a comprehensive development plan and land-use regulations, allegedly in response to planned development of a subdivision of "affordable" one-acre lots.²⁶ The Reinharts planned to subdivide their land and sell these lots, which would have been permitted under the existing comprehensive plan.²⁷ The County then placed an

²⁰ *Id.* at 939.

²¹ *Id.* at 940-941.

²² *Id.* at 940.

²³ *Dews v. Town of Sunnyvale*, 109 F.Supp.2d 526, 531 (N.D. Tex. 2000).

²⁴ *Sunnyvale*, 109 F.Supp.2d at 529-530 (numbering added).

²⁵ *Sunnyvale* 109 F.Supp.2d at 560 (emphasis added).

²⁶ *Reinhart v. Lincoln County*, --- F.3d ---, 2007 WL 1041428 (10th Cir. 2007).

²⁷ *Id.* at *1.

emergency moratorium on land-use permits in unincorporated areas of the county, and then adopted new regulations that divided the County into (1) mixed-use zones, covering about 10% of the area, permitting high-density housing and commercial and industrial uses, and (2) rural zones, covering about 90% of the area, permitting residential development of five-acre lots.²⁸

The Plaintiffs alleged that neither of the zones were suitable for affordable housing: the undeveloped areas in the mixed-use zones were small and located far from services, and the high minimum lot size in the rural zones made the lots too expensive.²⁹ The Plaintiffs alleged that the regulatory scheme had a disparate impact on housing opportunities for minorities, and produced evidence that showed that racial minorities generally have lower incomes than the general population of the area, and that the regulatory scheme would increase the cost of residential development within the rural zone.³⁰

The District Court granted summary judgment for the County, reasoning that a disparate impact claim based only on increased costs that affect the entire community is not a cognizable claim under the FHA.³¹ The Appellate Court upheld the summary judgment, although for different reasons. The Appellate Court noted that the Plaintiffs disparate impact claim was based on the alleged additional costs imposed by the new regulations, which allegedly made it impossible to provide affordable housing, thereby disproportionately injuring racial minorities.³² The Court acknowledged that another court had suggested that a disparate-impact claim based solely on increased costs is not cognizable under the FHA,³³ but did not decide on that issue, instead deciding that the Plaintiffs' claim failed because they failed to "provide evidence indicating before-and-after costs of dwellings and the percentages of protected and nonprotected persons who will be priced out of the market as a result of the increase."³⁴

Thus, there may or may not be such a thing as an FHA claim based solely on increased costs, but in the event that there is, a plaintiff must show specific evidence of the number of racial minorities who would be priced out of the entire market at issue (in this case, Lincoln County). While the Court's reasoning as to the Plaintiffs' evidentiary shortcomings appears to be sound, by leaving open the question of whether a claim based solely on increased costs is cognizable under the FHA, the Court left a door open to the argument that it is cognizable, which may result in additional litigation of the issue.

III. THE (POSSIBLE) FUTURE:

Recent FHA Litigation Relating to Local Government Regulatory Authority and Actions, and Possible Outcomes

As noted at the beginning of this paper, there presently is a concerted effort by certain local and national advocacy groups to use the FHA to significantly abrogate the authority of

²⁸ *Id.* Certain other zoning categories were in place, but were not at issue in the litigation.

²⁹ *Id.*

³⁰ *Id.* at *3.

³¹ *Id.*

³² *Id.* at *5.

³³ *Id.* (citing *Hemisphere Building Co. v. Village of Richton Park*, 171 F.3d 437 (7th Cir. 1999)).

³⁴ *Id.*

local governments to enact and enforce Euclidean zoning,³⁵ or to enact or enforce any regulatory provision that might materially increase the cost of housing within the jurisdiction.³⁶ Of particular interest in Texas is *NAACP v. City of Kyle, Texas*, Civ. No. A-05-CA-979-LY (W.D. Tex., filed Nov. 22, 2005) (hereafter, "*City of Kyle*"), which is presently pending in the Federal District Court for the Western District of Texas, Austin division.³⁷

In *City of Kyle*, the Plaintiffs³⁸ challenge certain revisions that Kyle made to its zoning and subdivision ordinances in 2003, which constituted a comprehensive modification of Kyle's existing but rudimentary Euclidean zoning scheme. Plaintiffs allege that the revised ordinances allow construction of single-family homes primarily within two zoning districts, Single Family Residential 1 (District R-1-1) and Single Family Residential 2 (District R-1-2). Plaintiffs also allege that these revised ordinances have the following effects:

³⁵ The term "Euclidean zoning" refers to the type of zoning scheme which was upheld by the U.S. Supreme Court in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning is generally characterized by the segregation of permissible land uses into specific geographic districts and dimensional standards which limit or otherwise control development on lots within each type of district. Typical types of land-use districts in a Euclidean zoning scheme are residential (single-family), residential (multi-family), commercial, and industrial. Euclidean zoning of some form remains the preferred mechanism of most cities for controlling and regulating development within their jurisdiction.

³⁶ As one of the "Action Steps for Moving Forward" outlined in a recent joint report, the NAACP and the NAHB pledge to:

Continue to pursue legal and other actions against agencies that violate the Fair Housing Act. A good example is the joint litigation by the NAACP and the NAHB in Texas to stop one city from imposing exclusionary development regulations that would push the cost of housing beyond the means of many families. *Building on a Dream: A Joint Housing Report by the NAACP and the National Association of Home Builders* (August, 2006), p. 36, available at <http://www.naacp.org/advocacy/economic/full-report.pdf>.

³⁷ The authors are counsel for amici curiae (the cities of Manor, Round Rock, Pflugerville, and Jonestown, Texas) in *City of Kyle*. However, the analysis of *City of Kyle* in this paper is intended to be illustrative, and not necessarily as advocacy of any specific matter or any admission thereof. As reference materials for this discussion, attached as Exhibits to this paper are the following material pleadings from *City of Kyle*:

- A. Plaintiffs' First Amended Complaint and Request for Declaratory and Injunctive Relief (hereafter, "Complaint");
- B. Defendant's Original Answer to Plaintiff's Original Complaint and Request for Declaratory and Injunctive Relief; and
- C. The City of Manor's Motion to Intervene and Brief in Support.

Procedurally, *City of Kyle* was essentially on hold for almost nine months, while Defendant City of Kyle's 12(b)(6) motion challenging the standing of Plaintiffs was pending. After the court denied Defendant's 12(b)(6) motion, Defendant filed its Original Answer on August 14, 2006, and the amici curiae cities filed their Motions to Intervene in October and December of 2006. The amici curiae cities were granted amicus status in May of 2007. The case is presently set for trial in February of 2008.

³⁸ The Plaintiffs are National Association for the Advancement of Colored People ("NAACP"), Texas Conference of NAACP Branches, Austin Branch of the NAACP, the Home Builders Association of Greater Austin ("HBA"), and the NAHB. Thus, there is an NAACP plaintiff group and a Home Builders plaintiff group.

- In District R-1-1, to require single-family residences must have a minimum of 1,600 square feet of living area and accessory structures on a minimum lot size of 8,190 square feet, with no more than 3.9 houses per buildable acre;
- In District R-1-2, to require single-family residences must have a minimum of 1,200 square feet of living area and accessory structures on a minimum lot size of 6,825 square feet, with no more than 4.7 houses per buildable acre;
- In both Districts, to require that "all buildings and structures, garages, and/or accessory buildings must have all four (4) sides composed of 100% brick, stone, hardiplank, or other approved masonry product;" and
- In both Districts, to require all single-family residences to have a garage that is at least 480 square feet in size.³⁹

Plaintiffs allege that these ordinances have the effect of increasing the sale price of a new entry-level home from \$100,000 to approximately \$138,500.⁴⁰ Plaintiffs then go on to allege that this effect reduces the affordable housing opportunities for lower-income individuals, particularly minorities, who have disproportionately lower-incomes as compared to whites.⁴¹ The Plaintiff's thus summarize their FHA cause of action as follows:

6. On an overall basis, the increase in housing costs caused by the City's adoption of the revised ordinances has the effect of pricing a significantly disproportionate higher number of minorities out of the new home market in Kyle compared to white households. Plaintiffs will show that the disparity of impact on minorities is substantial and prohibited by the Fair Housing Act.⁴²

The Plaintiffs specifically pleaded their cause of action under the FHA by stating that:

51. The City's adoption and enforcement of the Revised Ordinances has or will have a discriminatory effect on African-Americans and Hispanics by virtue of its significant disparate impact on their ability to obtain housing in the City compared with whites in violation of the Act. The Revised Ordinances also have the effect of perpetuating segregation by excluding minorities from the City and thereby depriving current residents of the City of the opportunity to live in a racially integrated community. For those reasons, the Revised Ordinances are illegal.

52. The City articulated no rational reason or otherwise legitimate governmental purpose justifying the Revised Ordinances that would otherwise obviate the substantially disproportionate effect against minorities. Alternatively, assuming *arguendo* that such a rational reason or legitimate governmental purpose existed,

³⁹ Complaint at paragraphs 27-30.

⁴⁰ Complaint at paragraph 4.

⁴¹ Complaint at paragraph 5.

⁴² Complaint at paragraph 6.

the City could still have accomplished its goals in a manner having a less discriminatory effect on Hispanics and African Americans in Kyle, Hays County and the Austin-San Marcos MSA, who are and will be denied opportunities to purchase affordable housing in Kyle under the illegal Revised Ordinances.⁴³

The expert reports submitted by Plaintiffs, while still preliminary, reflect the substance of those allegations. The reports generally advocate the positions that (1) the cost of newly constructed single family homes will increase from \$100,000 to \$138,500 under the ordinances, (2) via statistical analysis of census and other similar data, minority homebuyers in either Kyle, Hayes County, or the Austin San-Marcos metropolitan statistical area would be disproportionately harmed by the alleged cost increase, and (3) the statistical analysis of demographics and income levels utilizes sound methodology.⁴⁴

In various proceedings and filings before the court in *City of Kyle*, the Plaintiffs have contended that *City of Kyle* is not a novel case, as it is nearly identical to *Sunnyvale*.⁴⁵ These arguments were advanced mostly in the context of opposing the intervention of several area cities. However, *City of Kyle* is actually quite different from *Sunnyvale*, as the alleged FHA violation in *City of Kyle* is based only on the purported impact on the cost of construction of new, single-family homes in the two zoned districts; it is silent as to any impact on the availability, for purchase or rent, of existing single-family homes, existing or potential multi-family housing, or potential new construction of single-family homes on certain "grandfathered" lots within Kyle, which are exempt from the 2003 regulations.

The multi-tiered inquiry in *Sunnyvale* generally reflects the broad concern over the FHA's impact on a city's total zoning and regulatory scheme of which cities have been aware since *Huntington*. *City of Kyle* would be the first case to find a violation of the FHA based on just a single alleged restriction on one sub-category of housing (new construction of single-family homes). The chart below compares the circumstances of each case (as indicated in the *Sunnyvale* opinion and in Plaintiff's most recent amended Complaint):

<i>Dews v. Sunnyvale (with page cite):</i>	<i>NAACP v. City of Kyle:</i>
Evidence that a member of town council supported one-acre zoning because it kept "n-----s" out of Sunnyvale. p. 533.	N/A
Sunnyvale was founded to discourage development of black households. p. 539.	N/A
The zoning plan effectively banned apartments. p. 547.	N/A
Zoning plan ban on apartments effectively eliminated public housing and section 8 housing. p. 565.	N/A

⁴³ Complaint at paragraphs 51-52. Plaintiffs also allege a cause of action for Declaration of Retaliation under the FHA and a cause of action for Declaration of Unconstitutional Action and Injunction, but those causes of action are not specifically germane to the subject matter of this paper and therefore are not addressed herein.

⁴⁴ Plaintiffs, National Association of Home Builders and Home Builders Association of Greater Austin, Inc.'s Rule 26(a)(2) Expert Disclosures, *NAACP v. City of Kyle, Texas*, Civ. No. A-05-CA-979-LY (W.D. Tex.) Docket No. 87; Plaintiff National Association for the Advancement of Colored People's Rule 26(a)(2) Expert Disclosures, *NAACP v. City of Kyle, Texas*, Civ. No. A-05-CA-979-LY (W.D. Tex.) Docket No. 90.

⁴⁵ See, e.g., Plaintiff NAHB's Reply to Intervenors' Objections to Magistrate Judge's Report and Recommendation, *NAACP v. City of Kyle, Texas*, Civ. No. A-05-CA-979-LY (W.D. Tex.) Docket No. 70.

<i>Dews v. Sunnyvale (with page cite):</i>	<i>NAACP v. City of Kyle:</i>
City refused to work with the City of Dallas Housing Authority on the use of HUD Section 8 certificates in the City, while agreeing to do so with Dallas County, when Dallas County was majority white, and City of Dallas client population was majority black. p. 548-549.	N/A
Miniscule percentage of total city land area was zoned for density greater than 1.4 units per acre, and much of that land was in an area with no sewer service. p. 557.	N/A
Finding that race was a significant factor in city planning decisions. p. 570.	N/A
A proposed project to build Section 8-eligible apartments was tabled and effectively denied. p. 557-559.	N/A
Evidence of racial comments made during consideration of the proposed apartment project. p. 559.	N/A
Ban on apartments AND preclusion of construction of less costly single-family housing perpetuates segregation in a town that is 97% white. p. 568	N/A
Minimum lot size for single-family residences also has a discriminatory effect because it increases housing costs. p. 566	Ordinance restrictions, including minimum lot size, structure size, parking structure, and brick requirement, allegedly have a discriminatory effect because they increase purchase price of single family residence in certain districts.

In short, a finding in Plaintiffs' favor in *City of Kyle* would be the first time that a court has ever found that a set of ordinances that increases the purchase price of one subset of home types, standing alone, violates the FHA. Likewise, a finding in Plaintiff's favor might provide authority for the position that a claim based solely on increased costs is cognizable under the FHA (the question that the *Reinhart* court chose to defer).

Plaintiffs have yet to fully articulate all of the questions and issues that they believe are presented before the court by their Complaint, but some of them are apparent by the nature of the claims, and by statements made in various pleadings and arguments before the court. Among those possible questions and issues:

- Does the FHA guarantee a right to own a new home?
- Is a disparate impact claim based solely on increased costs that affect the entire community a cognizable claim under the FHA?
- If a significant percentage increase in purchase price of one subset of housing units, standing alone, is sufficient to raise a FHA claim, what must be the monetary starting point or baseline for determining what the amount of the "increase" actually is?
- What of the newly-incorporated municipality, which by definition will start from a zero zoning requirement (and therefore no prior regulatory impact on cost)? Under those circumstances, the establishment of *any* initial zoning or building requirements would likely result in an enormous percentage-increase in initial construction costs.

- What if the zoning ordinances were phased in over time, rather than as a part of a comprehensive reformulation effort? The resulting various incremental percentage increases each could be minimal, but the overall increase occasioned by the combined ordinance package, over time, could be significant. What time frame for such increases might be permissible?
- What is the impact of existing, grandfathered lots that aren't subject to the challenged restrictions?
- How do available and potential rental units, including multi-family housing units, fit into the calculus of alleged discriminatory impact?
- How do available existing single-family homes for sale fit into the calculus of alleged discriminatory impact?

Importantly, if the eventual answer to any or all of these questions imposes additional hurdles for local governments to clear before enacting any zoning or other development regulations, how should cities go about clearing those hurdles? Plaintiffs have suggested that cities should perform some sort of "impact analysis" for each such ordinance or other regulatory action, presumably containing the same sort of demographic and income-level data and analysis as put forward by Plaintiffs in *City of Kyle* in their expert reports. Such an analysis therefore might entail a calculation of any cost increase for new single-family homes (or perhaps other housing types, if at issue), then a demographic analysis by race and income level, in order to determine the amount and any potential disparity of the economic impact of the city action at issue.

City of Kyle is still in the early stages of litigation, and it is likely that some or all of the potential questions and issues listed above will be addressed and/or resolved as the case progresses through summary judgment, and possibly trial and appeal. At the very least, the very existence of the lawsuit serves as a caution flag to local governments who might seek to enact zoning and other regulations that might face opposition from similarly-situated advocacy groups. Indeed, one of the plaintiffs in *City of Kyle* has stated its goals and tactics on a broad scale:

*NAHB has learned that a court victory, or simply the pressure of a lawsuit filed against [a regulatory body], better equips our regulatory and government affairs staffs to do their jobs. Whether the ultimate goal is to secure favorable legal precedent, lay the groundwork to negotiate fair regulations, or set the foundation for legislative reform, the Litigation Department has established strategies to bring suit and appeal decisions whenever it is necessary to advance the interests of the home building industry and NAHB's members.*⁴⁶

Until the questions deferred in *Reinhart* and raised in *City of Kyle* are resolved, the caution flag will continue to wave.

⁴⁶ National Association of Home Builders, *Legal Affairs*, <http://www.nahb.org/generic.aspx?sectionID=827> (last viewed May 7, 2007).