Exclusionary Zoning
and the Federal Fair Housing Act

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Presentation Overview

• What is exclusionary zoning?

• Relationship between exclusionary zoning and the Fair Housing Act (FHA)

• Efforts to incentivize affordable housing development
  o Low-income housing tax credits
  o Inclusionary zoning
  o Local case study: Model Group
Exclusionary Zoning

- Keeps affordable housing out of neighborhoods through land use and building code requirements
- Used as a means to keep lower-income people (disproportionately minorities) out of middle and upper-class neighborhoods
- Limits low-income families’ access to school and employment opportunities
Exclusionary Zoning

- Imposes requirements which make it difficult to build multi-family units and drive up housing costs in an area
  - Minimum lot size
  - Single residence per lot
  - Minimum square footage
  - Costly building codes
Fair Housing Act

- Federal statute prohibiting housing discrimination based on:
  - Race
  - Color
  - National origin
  - Religion
  - Sex
  - Disabilities
  - Familial Status

- Notably does not prohibit class-based/economic discrimination
Fair Housing Act

- Prohibits imposition of land-use regulations and issuance of conditional/special use permits...
  - Intentionally designed to discriminate;
  - Which contain a discriminatory classification; or
  - Have a disparate impact/discriminatory effect on a protected class.
Discriminatory Classifications

- Zoning regulations which only applies to a certain class of individuals
- Discriminatory on its face (must pass strict scrutiny analysis)
- Examples:
  - Ordinance requiring notice to neighbors of group home’s existence (not imposed on any other residential property)
  - Ordinance requiring group homes be separated by a particular distance
Disparate Impact

• Zoning regulations which are “facially neutral” (apply to all persons), but have a discriminatory effect on a certain class of people

• Discriminatory intent/purpose behind regulation is irrelevant\(^1\)

• Common example is regulation which defines “family” and allows any number of related individuals to live together, but limits number of unrelated people from living together (discriminatory against group homes/foster homes)

\(^1\) Hollis v. Chestnut Bend Homeowners Ass’n, 760 F.3d 531 (6th Cir. 2014).
Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.¹

- Zoning which disproportionately affects protected class (regardless of discriminatory intent) was reaffirmed as unconstitutional under FHA by U.S. Supreme Court in 2015
  - Concerned allocation of federal tax credits for low-income housing
  - Texas Department of Housing and Community Affairs was tasked with distributing the credits
  - Texas-based nonprofit brought disparate impact claim against Department claiming it had caused continued segregated housing patterns by allocating too many tax credits to housing in predominately black inner-city areas (and not enough in white suburban neighborhoods)

Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.

- Nonprofit presented statistical evidence demonstrating disparate impact
  - From 1998-2008, the Department approved tax credits for 49.7% of proposed affordable housing units in 0-9.9% Caucasian areas, but only approved 37.4% of units in 90-100% Caucasian areas
  - 92.29% of low-income housing tax credit units in the city of Dallas were located in census tracts with less than 50% Caucasian residents
- Court held the FHA prohibits housing decisions which have a disparate impact on a protected class and statistics were sufficient evidence upon which to base a disparate-impact claim
Anderson v. City of Blue Ash\(^1\)

- 6th Circuit decided whether City was entitled to summary judgment in its favor against claims that a zoning ordinance violated the FHA
- Ordinance prohibited keeping farm animals at residences in the City
- Plaintiff-property owner was the mother of a child with a handful of disabilities who kept a miniature horse as a service animal for the child
- City fined property owner for violating the zoning ordinance and ordered her to remove the horse from the property

\(^1\) Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015).
Anderson v. City of Blue Ash

- Property filed claim against City alleging a violation of the FHA with the assistance of HOME (Housing Opportunities Made Equal, Inc.)

- Property owner advanced FHA claim under 3 theories:
  1. Disparate treatment (requires showing discriminatory intent/purpose)
  2. Disparate impact (no intent requirement)
  3. Failure to make reasonable accommodations (FHA creates an affirmative duty on political subdivisions to afford their disabled citizens reasonable accommodations in its zoning practices so that such citizens have an equal opportunity to use and enjoy their properties

1 HOME is a nonprofit, fair-housing assistance organization in Cincinnati, which advises clients of their rights to fair housing and helps them file fair housing claims.
**Anderson v. City of Blue Ash**

- **Disparate treatment**
  - **Property owner:** City enacted ordinance with intent to discriminate against the disabled
  - **Court:** Granted SJ to City – no evidence that City intended to discriminate against property owner’s child or the disabled generally

- **Disparate impact**
  - **Property owner:** Ordinance disproportionately affected disabled individuals to their detriment because they are unable to benefit from mini-horse therapy
  - **Court:** Granted SJ to City – ordinance included a provision specially exempting “any animals protected by federal law” (which includes the FHA), so ordinance actually has *less* of any impact on disabled individuals who rely on mini horses than it does on the general population
**Anderson v. City of Blue Ash**

**City:**
- Child could receive same therapy off-site by traveling to a local farm/stable
- Child could move around property adequately without mini horse’s assistance
- Allowing mini horse to remain on the property would fundamentally change the City’s zoning scheme (detrimental to public health and property values)

**Court:**
- Factual disputes exist as to whether the City failed to provide reasonable accommodations
- Availability of alternative treatment away from child’s home and whether child could function adequately without mini horse were irrelevant – FHA requires accommodations that allow disabled individual to receive the same enjoyment of property as a non-disabled person
- City didn’t sufficiently demonstrate allowing the mini horse to stay on the property would fundamentally alter the nature of its zoning code
  - Property owner presented evidence that horse would not create unsanitary conditions
  - “[W]e have long since rejected the notion that making an exception to a zoning scheme to permit something that would normally be forbidden automatically amounts to a fundamental alteration.”
Reach Counseling Services v. City of Bedford

District Court for the N.D. of Ohio considered whether City ordinance placing certain restrictions on group homes violated FAA.

Group homes were permitted in residential zoning district as a conditional use, subject to 2 restrictions:

1. Signs displaying the name of the home/business were not permitted on the property and the address of the home could not be publicized in marketing materials, online or otherwise.

2. If the property was sold/ transferred to a new owner, the conditional use for the group home did not run with the land (the use would expire).

Reach Counseling Services v. City of Bedford

- No signage
  1. City: Signage is not permitted on residential property for any home business in the City
  2. Court: City has a legitimate non-discriminatory reason for the sign restriction and no evidence that any other home business is permitting to have signs on their properties/or advertise their addresses online

- Conditional use expiration upon property transfer
  1. City: Need to know who the next owner will be for health and safety reasons
  2. Court: Generalized justification, without more, doesn’t demonstrate a legitimate nondiscriminatory reason exists for the restriction, nor illustrate that the restriction applies equally to other commercial property transfers in residential zone
Incentivizing Affordable Housing Development: LIHTC

- Low Income Housing Tax Credit Program (LIHTC)
  - Created in 1986 and administered by the IRS
  - Largest funding source for affordable housing in the country
  - Provides tax incentives for developers who create affordable housing
    - Gives investors a dollar-for-dollar reduction in federal tax liability in exchange for providing financing to develop affordable housing (paid out in annual allotments usually over the course of 10 years)
  - Must keep affordable housing units rent-restricted and available to low-income tenants for at least 30 years after project completion
Incentivizing Affordable Housing Development: Inclusionary Zoning

- Zoning policies that encourage the development of affordable housing by requiring developers to build affordable housing units in residential developments in exchange for certain building incentives
  - Density bonuses (allowing more high-profit units than area is zoned for)
  - Fast-tracking permitting to speed up development process
- Effective in increasing affordable housing and also disbursing such housing to prevent exclusive communities
Inclusionary Zoning Example

- Atlanta, Georgia: imposed a requirement on new developments with 10+ units located in popular areas of the city (BeltLine and Westside Overlay District)
  - Developers must reserve units for households at or below the median income (or pay a one line in-lieu fee)
  - Developers can choose up to 3 incentives, including density bonus, transfer development rights, elimination/reduction of parking requirements and priority permit review to expedite process
Inclusionary Zoning Example

- Montgomery, Maryland County Council ordinance: requires all new housing developments of 20+ units to devote 12.5-15% of units to affordable housing
  - In some circumstances, developers have option to instead contribute a housing fund
  - Program has produced over 11,500 affordable units since 1973 and generated $477.4 million of private sector investment in affordable housing
Incentivizing Affordable Housing Development: Local Case Study – The Model Group

- Company in the Cincinnati area involved in property development, construction and management

- Passionate about revitalizing urban neighborhoods and providing affordable housing

- Develops affordable housing in a way that is indistinguishable from market-rate properties to aid in revitalization of urban areas
Incentivizing Affordable Housing Development: Local Case Study – The Model Group

- Instrumental in revitalization efforts of Over the Rhine community
- In early 2000s, OTR had over-concentration of run-down, low-income housing
- Model Group secured funding from affordable housing incentivization programs such as LIHTC, New Markets Tax Credit Program, Federal Historic Tax Credits, etc. to take on housing problems in OTR
Incentivizing Affordable Housing Development: Local Case Study – The Model Group

- Gutted and rehabilitated 8 affordable housing developments (restored 73 historic buildings and created 383 top-quality housing units)

- Reduced low-income housing by 30% and transformed affordable housing that remained into housing indistinguishable from market-rent properties
  - Hardwood flooring, ceramic tile kitchens/baths, new appliances and HVAC systems
Presentation Recap

• Cannot adopt and enforce zoning regulations which have the effect of discriminating against/excluding from an area certain protected classes of people under the FHA

• Political subdivisions can incentivize affordable housing developments by adopting inclusionary zoning policies and working with local public interest groups

  • Positive effects: increasing affordable housing options, disbursing affordable housing more evenly throughout the area and revitalizing urban neighborhoods
Questions

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