Coates' Canons Blog: Zoning and North Carolina's Fair Housing Act

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Suppose that a town council holds a public hearing on a proposal to rezone one of the last vacant tracts of land in the northwest area of town from a single-family residential district to a multi-family residential district. Suppose also that this area of town is comprised predominately of single-family houses on larger lots. The proposal has been made by a developer who has sponsored both mid-range rental complexes and developed subsidized low-and moderate-income housing. A number of the residents in the area of the proposed rezoning attend the public hearing to express their opposition. The council is inclined to vote against the rezoning. Should the council be concerned that such an action might be a violation of North Carolina's Fair Housing Act (G.S. 41A et seq.)?

Suppose further that at the council's public hearing, rezoning opponents refer to the "outsiders" who will be attracted to the area, to the crime rate that will be associated with those who will end up in such a project, to the social habits of those who live in complexes such as these, and to the threat of foreclosure, abandonment, and vandalism for projects that cater to people who can't pay their bills. Others simply claim that the project will diminish their property values. Housing of this type, they say, is fine if it is appropriately located, but it does not belong in our backyard.

The town council listens to the presentations and comments. In answer to a question from the mayor, the sponsor says that the land will likely be developed for low-income housing. One council member reminds his colleagues that the comprehensive land-use plan does not indicate that the subject area is appropriate for multi-family development. The council ultimately votes to deny the proposed rezoning. In response the developer brings legal action, alleging that the failure to rezone is an unlawful discriminatory housing practice under the state's Fair Housing Act. Yes, the council should be very concerned.

In 2009 the North Carolina General Assembly adopted amendments to the North Carolina Fair Housing Act (G.S. chapter 41A) that expanded its coverage. In addition to discriminatory practices based on race, color, religion, sex, national origin, handicapping condition, and familial status, the Act now also applies to discrimination "in land-use decisions or in the permitting of development . . . " (G.S. 41A-5(a)(4)). According to the act, a local government "intends to discriminate" if, in making the decision, the local government "was motivated in full, or any part at all, by the fact that a development or proposed development contains affordable housing units for families or individuals with incomes below eighty percent (80%) of area median income." If discrimination is deemed to be intentional, the only apparent defense that a local government may offer is that the decision "is based on considerations of limiting high concentrations of affordable housing." If discrimination is unintentional but has a disparate effect, then the governmental unit may alternatively interpose as a defense "that the action or inaction was motivated and justified by a legitimate, bona fide governmental interest."

In order to establish an intention to discriminate, the local government board making the zoning decision must have reason to believe that the "proposed development" includes affordable housing. Of course, if the decision is whether to rezone to a general-use district, it may not be obvious whether affordable housing is involved or not. After all, in the scenario described earlier, if the land were to be rezoned to a multi-family district, it could be used for high-end residential condos or any other use allowable in that district. But what if it is generally understood by the governing board (and most everyone else) that it is the developer's intention to use the multi-family zoning to build low-income housing? In such a case the governing board is caught on the horns of a dilemma.

Here's the dilemma. If the governing board does rezone the property to multi-family based on assurances from the petitioner that the land will be used for low-income housing, then the rezoning may be vulnerable to a claim that the council failed to evaluate the suitability of the full range of uses allowed in the district. As a result, the opposition may be able to invalidate the rezoning on grounds that it is arbitrary and capricious. (See Hall v. City of Durham, 323 N.C. 293, 374 S.E. 2d 586 (1988))

On the other hand if the council refuses to rezone the land after it has good reason to believe that the developer/petitioner would have used the land to build a low- or moderate-income housing project, then whatever impact the board's decision may have is arguably intentional. Keep in mind that intentional discrimination occurs if the decision was "motivated in full, or in any part all" by the fact that affordable housing is proposed. The only defense available is that existing affordable housing in the area is already over-concentrated.

Fair housing litigation under the federal Fair Housing Act suggests that intentional discrimination may also be found when public officials act in reliance on the discriminatory viewpoints of private parties. Intentional discrimination has been found in circumstances where public officials themselves made no discriminatory statements, but the record of the public hearing was replete with damaging comments by members of the general public. Even though such comments cannot necessarily be controlled or restrained in advance, it is possible that they contribute to a finding of intentional discrimination. In such a circumstance it may be incumbent upon a local board to disavow publicly and specifically comments such as these and to offer a legally satisfactory justification for the action that the board is about to take.

What happens if an action under this legislation is brought against a local government? A complaint filed with the North Carolina Human Relations Commission is the first step. A complex administrative process follows, including the possibility of a hearing conducted by a state administrative law judge. The commission itself is authorized to impose civil penalties against violators. The Fair Housing Act authorizes a reviewing court to order not only appropriate equitable relief but also to award actual and punitive damages, court costs, and attorney fees to the prevailing party. In the past the Fair Housing Act has not generally been used to attack the practices of local governments. Thus the likely outcome of an enforcement action brought against a local government remains unclear.

The legal landscape for local land-use decisions has again changed. Advocates for affordable housing have a new legal tool that may be used against reluctant local governments. Where low-and moderate-income housing is concerned, local governments must clearly proceed with special caution. An ounce of realistic housing market assessment and of local housing policy will be far more valuable than a pound of legal cure.