Legal Alert: Real Estate & Land Use

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THE NINTH CIRCUIT RULES ON NIMBY-ISM AND DISCRIMINATORY ZONING IN YUMA

The Ninth Circuit Court of Appeals issued an opinion on March 25, 2016 finding that the Yuma City Council violated the Fair Housing Act (FHA) in its denial of a residential rezoning request, which was likely motivated by discriminatory intent against Hispanic residents. The case, *Ave. 6E Invs., LLC v. City of Yuma*, is a cautionary tale regarding the fine line between ugly NIMBY-ism and illegal discrimination, and one of the first significant opinions since the U.S. Supreme Court reaffirmed liability for disparate impact in its decision in *Texas Dep't of Hous, & Cmity Affairs v. Inclusive Communities Project, Inc.* last year.

The Case

Two Yuma, Arizona-based real estate developers submitted an application to rezone 42 acres from R1-8 (8,000 sf lots) to R1-6 (6,000 sf lots) to develop moderately priced single-family homes. The application was filed in 2008, during the Great Recession, and the developer claimed that the slightly higher density zoning was necessary to make the project economically viable. The requested R1-6 zoning was consistent with the City's General Plan and conformed with the City's established pattern of approving similar rezoning requests. Yuma's planning staff supported the request, and the Planning Commission unanimously recommended approval.

Residents of neighboring subdivisions, which were 75% white, complained that potential residents of the new subdivision would have "large households, use single-family homes as multi-family residences, allow unattended children to roam the streets, own numerous vehicles which they parked in the streets and in their yards, lack pride of ownership, and fail to maintain their residences." According to the developer, such descriptors echoed stereotypical descriptions of Yuma's Hispanic neighborhoods, in which they had previously developed homes. When the case reached the Yuma City Council, opposition was in full swing. One resident went so far as to author a letter stating that "households with incomes of less than $75,000 account for 91% of all crimes nationally as well as 91% of all rape, murder, assault, armed robbery, etc. … how many innocent victims from Belleza, Terra Bella and Tillman Estates will fall victim to a predator in this 91% demographic?"

Against the backdrop of significant neighborhood outcry, the Yuma City Council denied the request 5-2. The Avenue 6E application was the only application, out of 76 rezoning requests considered by the City over the past three years, to be denied.

The Lawsuit

The developers filed suit claiming intentional discrimination on the basis of race and, alternatively, that the City's decision had a discriminatory impact by denying Hispanic families access to housing within this specific area of the City. The district court ruled in favor of the City. On appeal, the Ninth Circuit reversed the lower court's rulings.

The Yuma City Council Was Motivated by Discriminatory Intent

The Ninth Circuit found it plausible that the Yuma City Council's actions were motivated by discriminatory intent. The court noted that while the city council may not have intentionally discriminated against Hispanics, its decision to deny the application was clearly influenced by the obvious discriminatory bias of residents. The Ninth Circuit noted that discrimination is not always blatant and is sometimes disguised by 'code words.' Statements made by residents regarding large families, children roaming the neighborhood unattended, and numerous vehicles parked in yards were considered hallmarks of Hispanic neighborhoods in Yuma and were sufficient evidence to impute discriminatory intent.

Denying Hispanic Families Access to a White Neighborhood Could Have Discriminatory Impact

The Ninth Circuit also found that the City's denial potentially created disparate impact by denying Hispanic residents access to housing in a predominantly white neighborhood, thus furthering historic segregation patterns. The district court found no disparate impact since similarly priced housing on similarly sized lots was available in other areas of the City. Hispanics residents could buy a similar house, just not in this part of town. The Ninth Circuit took umbrage with this line of reasoning and went to great lengths to clarify that simply having access to similar housing in a different part of the City is not sufficient to overcome disparate impact. The court noted "that neighborhoods change from mile to mile, if not from block to block, …" and "For any family, … housing that is a fair distance from where the family would otherwise choose to live cannot in all likelihood be described as comparable." When evaluating whether a class of citizens has equal opportunities with respect to housing, the court noted that:

> Truly comparable housing, however, is not simply a question of price and model, but also of the factors that determine the desirability of particular locations-factors such as similarly or better performing schools, comparable infrastructure, convenience of public transportation, availability of amenities such as public parks and community athletic facilities, access to grocery or drug stores, as well as equal or lower crime levels.

The fact that similarly priced and styled housing was available in other parts of Yuma did not necessarily provide a comparable lifestyle opportunity and was not sufficient evidence to overcome a potentially discriminatory impact.

The Lesson

This case reinforces that land use decisions should really be rooted in land use. Denial of zoning based on the fear that a particular class of citizen may occupy a newly built subdivision flies in the face of the protections afforded by the FHA. The FHA, however, only protects seven distinct classes of citizens (race, color, national origin, religion, sex, disability and familial status). This case does not provide an opening for developers to claim discrimination after every rezoning denial. Importantly, discrimination based on income has no protection under the FHA. Further, a municipality may cite a legitimate non-discriminatory purpose for a seemingly discriminatory decision as a defense. Nonetheless, this case could signal the beginning of a check and balance on the growing impact of NIMBY-ism. The Ninth Circuit's ruling shows the potential reach of the Supreme Court's recent decision in Texas Dep't of Housing v. Inclusive Communities Project, which held just last year on a 5-4 vote that disparate impact claims are a viable theory under the FHA. At the end of the day, *Ave. 6E Invs., LLC v. City of Yuma* provides a how-to guide for developers to challenge what they believe is true discrimination, and is a cautionary tale for our elected officials.