OC HOUSING NEWS

A surprising legal maneuver that could stymie California Nimbys

The Fair Housing Act may be used to strike down land development restrictions that cause a disparate impact on minorities, which California's process clearly does.

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Fact: California house prices are high relative to income due to a shortage of available homes.

Fact: California Nimbys lobby local officials to prevent housing from being built to alleviate the shortage.

Fact: Calfornia Nimbys will not change because they personally benefit from reduced traffic congestion and higher home prices.

What can we deduce from these facts?

First, education will make no difference. Some activists try to convince Nimbys to embrace more homes in their neighborhoods. It's a futile effort.

I pointed out that Nimbys are hypocrites. I demonstrated that Nimbys don't love their own children. Most people realize that the root cause of California's housing problems is homeowner greed and hypocrisy. Yet, despite the obviousness of the problem, nothing is done to change it.

Second, the current political environment offers no hope. Land use decisions are made at the local level, and nimbys rule local politics. All attempts by State legislators or the governor to solve the problem failed. I put forward a possible political solution to California's housing crisis, but I'm not hopeful it will actually come to pass.

Perhaps California's ballot initiative process could be used to defeat the Nimbys. Eventually, if we continue to say no to new housing, California will become a renter state, and renters will become a significant voting block. The problem could be solved in one swoop if renters passed an anti-nimby initiative. With no big-money interest on the no, nimbys might find a unified and pissed off renter class imposes an unpopular decision on them.

Third, the courts might rule against nimby activity and force sweeping changes in land use regulations. If the courts find something amiss in the laws that nimbys rely on to block new development, the problem might be solved without a political firestorm.

Could The Fair Housing Act Be Used To Abolish Restrictive Zoning?

Scott Beyer, DEC 2, 2016

In the debate on how to solve the urban housing affordability issue, there is a theoretical side and a political side. On the theoretical side, a growing bipartisan cluster of journalists, academics, business people, and even the president himself has concluded that zoning and other land use regulations increase housing costs, and must be reformed or abolished. But politically speaking, such deregulation is unlikely, since these regulations are enforced at local level, where they are preserved by homeowners who benefit from restricting the housing supply.

This is why no political solution is likely.

As a result, there have been calls for states and the federal government to intervene, using various carrots and sticks to encourage local-level reform. One of the more provocative recent ideas is to use the Fair Housing Act, with its "disparate impact" clause, as a cudgel against regulations that disproportionately hurt low-income minorities.

It shouldn't be difficult to prove the shortage of housing has a disparate impact on minorities who tend to be less affluent and much more likely to be priced out of California.

The Fair Housing Act was signed in 1968 by President Lyndon Johnson to curb nationwide housing discrimination against minorities. In 2015, the act was strengthened following the Supreme Court case Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. The court found that by concentrating most of its federally-funded affordable housing in segregated, low-income areas, Texas' housing department was disproportionately harming minorities, thus violating the Fair Housing Act.

This was a very controversial ruling because it eliminated the need for intent. The intent of the law may not be racist, but if the effect harms minorities, it can be deemed in violation of the Fair Housing Act.

Before then, the act was meant to prevent overt cases of discrimination against minorities–such as hanging signs that exclude certain races or nationalities–which is defined as "disparate treatment." The Supreme Court ruled in 2015 that the act also outlaws policies that have a negative "disparate impact" on minorities, even if those policies aren't intentionally discriminatory. As Justice Anthony Kennedy wrote in his majority opinion, "in contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."

The decision has since been celebrated by Cato Institute economist Randal O'Toole as a way to abolish certain land-use restrictions. In several speeches, along with a white paper for the Grassroot Institute, O'Toole argues that such laws, while not written with intentional bias (at least not provable bias), nonetheless disproportionately hurt racial minorities. He notes that various regulations, such as zoning, rent control, and urban growth boundaries, have been found demonstrably to increase housing costs. And because certain groups–such as African-Americans–have lower median incomes, these regulations have a "disparate impact" on them, often driving them from select cities.

This is a very strong argument. Restricting housing supply clearly does impact minorities the most.

Meanwhile, the "legitimate rationale" that Justice Kennedy said must be a precondition for such regulations is largely non-existent, since most would not survive a valid cost-benefit analysis. While some regulations provide public protections–such as preventing runoff from entering streams, or demolition of historic structures–most are built on subjective aesthetic notions. People living in a single-family neighborhood, for example, may find nearby multi-family housing distasteful. But this doesn't justify outlawing it, if the result is housing shortages.

The preservation of "neighborhood character" is the most obvious sign of nimby bullshit. It's become a code word like "gangbangers" that's designed to elicit an emotional, tribal response. The implication is that neighborhoods should be cast in amber and preserved in their current form for all time. That isn't how cities grow and develop.

The delicious irony here is that progressives that would aggressively defend the Fair Housing Act would decry using the act for this purpose, laying bare their glaring hypocrisy.

O'Toole's argument that land use regulations have disparate impacts on minorities is so blatantly obvious, it's surprising no other urban commentator mentioned it following the Supreme Court decision.

Kudos to Mr. O'Toole.

The only debate is which regulations the federal government should target first. O'Toole believes state-level growth management plans, which restrict new sprawl housing in rural areas, drive up prices the most. A recent "housing toolkit" published by the Obama administration focused more on regulations preventing urban infill housing, such as minimum parking requirements, setback requirements, and density limits. Perhaps more odious than the regulations targeting density or sprawl, specifically, are the broader approval barriers affecting all housing types. These include overly-strict building codes, lobbying costs, affordability set-asides, design review, environmental review, fire department review, community benefits agreements, and on and on.

In other words, the Fair Housing Act could completely reshape the California real estate development process with respect to housing — for the better.

For the future of California's children, let the lawsuits begin.