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Exclusionary Zoning Enforcement: Passe or Alive and Kicking?

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By Tim Iglesias

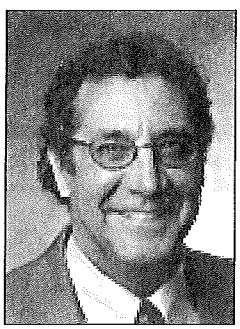
A developer's incomplete proposal for 200 condominium units (including 50 affordable units) on a contaminated and environmentally sensitive area is denied.[1] A township denies a special use permit application for four multifamily housing apartment buildings because of water runoff issues.[2] A township refuses to grant use variances for an affordable housing proposal that would more than double the allowable density.[3] A developer whose affordable housing proposal has not been denied and a couple living outside the jurisdiction sue a township on a variety of claims.[4]

The results? In each case, the local government lost on appeal.

Discussions and debates about "exclusionary zoning" flourished in the 1970s but have since b\een quiet. In the last decade, hundreds of local jurisdictions have adopted inclusionary ordinances to promote affordable housing development. But exclusionary pressures may be on the rise. Some anti-exclusionary statutes have been attacked and arguably weakened by reforms.[5] Meanwhile, some localities have regularly refused to permit affordable housing in their jurisdictions. Now four appellate courts in the Northeast recently issued decisions siding with developers seeking to build affordable housing against local governments that had denied their applications.[6] Are these decisions a harbinger of increased judicial attention and willingness to challenge exclusionary forces? Should municipalities expect more scrutiny of their land use decisions that involve affordable housing? This article reviews these cases in detail and offers a perspective on current judicial enforcement for local governments.

Kinderhook: Neighborhood "Experts" vs. Engineers

Kinderhook Development, LLC sought to build four multifamily apartments, which would include 48 affordable housing units, on vacant land in the City of Gloversville, New York. Under the city's zoning ordinance, multi-family housing was a permitted use at the site with a special use permit (SUP) and site plan approval. When concerns about stormwater runoff emerged, Kinderhook engaged an engineer who designed the site and prepared a plan that would slightly reduce the rate of runoff into the surrounding neighborhood. In addition, Kinderhook agreed to give $50,000 to the city to study drainage problems in the neighborhood. Based on the engineer's plan, the city issued a negative declaration under the state Environmental Quality Review Act. Neighbors opposed the project at a public hearing. At the hearing, one of the planning board members declared: "People living in a particular neighborhood know more about the physical conditions of where they live than any experts brought in by an applicant."[7] Thereafter, the city's Planning Board denied the application based on the runoff issue.



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Kinderhook challenged the denial. In October 2011, a New York appeals court held that the Board's denial of the special use permit was not supported by substantial evidence and annulled the decision. Citing earlier precedent, the court explained that "[t]he classification of a particular use as permitted in a zoning district is "tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.'"[8] Although the city could have denied the SUP if appropriate evidence was in the record, the "conclusory opinions of neighbors opposed to the project"[9] gave it no rational basis to do so, especially in light of "unchallenged empirical evidence" from the developer's engineer.

This was not a classic exclusionary zoning case because multi-family housing was a permitted use at the site. And, it's not news that localities commonly use environmental concerns to deny affordable housing proposals. Moreover, the Kinderhook court did not break any new legal ground in this case; rather, it merely performed a careful review. The city's blunder was to appear to act at the behest of project opponents instead of following the law. When the opposition gave it cold feet about the proposal, it appeared to contradict itself on the runoff issue while the developer acted responsibly and in good faith, and even went the extra mile. Generalized community opposition is not enough to hang your hat on when a rational basis is required.

Holliston: Inconvenient Evidence Ignored and Localism Checked

Green View Realty, LLC (GVR) applied for a comprehensive permit under the Massachusetts 40B law[10] to develop 200 condominium units (including 50 units affordable to families with 80% of area median income) in the Town of Holliston, Massachusetts, in response to the town's solicitation. The Comprehensive Permit Law (Act) was enacted to facilitate affordable housing development in communities throughout the Commonwealth by combating local opponents' use of regulatory requirements to thwart affordable housing development. The nearly 53-acre site presented

numerous environmental challenges. It was a former illegal disposal site that was not completely cleaned up yet, contained five wetland areas, and presented stormwater management and waste disposal issues. GVR's application sought waivers from Holliston bylaws that were stricter than state law. Holliston's Zoning Board of Appeals denied the application because of allegedly overriding local health and environmental concerns.

After GVR successfully appealed the comprehensive permit denial to the Housing Appeals Committee (HAC), Holliston appealed to the Land Court and then to the Appeals Court of Massachusetts. In September 2011, the Appeals Court upheld the lower courts' decision that GVR had met its prima facie case that it complied with federal and state statutes and that Holliston had failed to meet its burden to prove that a specific local health or safety concern outweighs the regional affordable housing need. The Act provides that communities whose housing stock is composed of less than 10% affordable housing must overcome a rebuttable presumption that the regional affordable housing need outweighs local concerns. The court ordered Holliston to issue a comprehensive permit to allow the development.

Substantial state regulations determined GVR's obligations for site remediation and wetlands and stormwater management, and GVR had agreed to comply with all of these requirements. All parties recognized that the proposal would need to be revised to conform to current state standards and in light of the results of environmental tests and monitoring. Still, based on long-standing precedent, the court rejected Holliston's argument that GVR's proposal was "too indefinite" to satisfy its prima facie case. The court found that Holliston's Board exceeded its authority in denying the permit based on remediation concerns because it failed to identify any relevant local law. Although GVR's project would violate Holliston's wetlands bylaw, Holliston ignored evidence that the project would enhance currently degraded wetlands, failed to show that a waiver would have an adverse effect, and failed to demonstrate that such effects would outweigh the community's need for affordable housing. Similarly, Holliston failed to identify any specific harm that would result from a waiver of its stricter stormwater bylaw and to perform the required balancing. Finally, the court rejected Holliston's undervaluing of the affordable housing ownership that the project would provide based on its claim that there was a greater need for rental housing for low-income families.

This case is closest to the classic exclusionary zoning case because the developer sought to avoid (albeit not invalidate) Holliston's local standards. In this heavily litigated case, it appears Holliston bristled at 40B's curtailing of its local autonomy and regularly tried to throw anything it could at the wall in the hopes that something would stick. The resulting impression is that Holliston seems to have gone off half-cocked and was caught in contradictions. Indeed, the court's opinion expressed frustration with Holliston: "It is not enough to point out a lack of compliance with local regulations or complain that the local board's power has been taken away. The board must [meet its burden of proof] and it quite simply made no effort to do so."[11] Finally, Holliston did not attempt to resolve its concerns by imposing reasonable conditions on the project.

Conifer Realty: Green Affordable Housing Not Green Enough?

A commercial developer, Conifer Realty, LLC ("Conifer"), proposed to construct 90 units of rental housing for very low-, low-, and moderate-income households in nine connected buildings on a 9.6-acre lot zoned "suburban residential" in the Township of Middle, New Jersey. The subject property is surrounded mostly by the Cape May National Wildlife Refuge, an undeveloped 11,500 acre preserve owned by the U.S. Fish and Wildlife Service. The building design included external finishes that would "mimic the style of some of the nearby shore-house architecture" and "energy efficient units and solar energy systems."[12] Conifer sought use and bulk variances because, inter alia, the proposed project's density was 9.37 units per acre and the tallest building 38 feet, while the applicable zoning allowed a maximum of 4.356 units per acre and 35-foot heights. The township's zoning code contained the December 2008 Housing Element and Fair Share Plan (FSP) prepared to comply with the Fair Housing Act of 1985. As justification for the variances, Conifer stated this development would meet more than 10% of the jurisdiction's affordable housing need (90 units out of 700) and that land zoned for densities necessary to develop affordable housing was "nonexistent" in the jurisdiction. At a public hearing, residents and a variety of environmental groups opposed the development. Thereafter, applying the traditional standard for consideration of variances, the township denied the variances as detrimental to the public, explaining that the requested density significantly exceeded what current zoning allows and that a township zoning ordinance provided that "no density shall be increased by affordable housing."[13] It also cited residents' concerns about traffic volume and hazards and the inadequacy of the applicant's traffic studies. Finally, it relied on the testimony of environmental advocates that the proposed development would adversely impact the wildlife refuge and its habitat.

Conifer challenged the denials in part because the township refused to apply the more lenient variance standard applicable to "inherently beneficial uses" because Conifer is a for-profit developer.[14] The trial court agreed with Conifer about the correct standard but nonetheless affirmed the township's denial of the use variances. In an unpublished opinion decided in September 2011, a state appellate court reversed. The court found the trial court's decision upholding the board's variance denials arbitrary and unreasonable because not only did the board apply the wrong legal standard, its findings were "largely conclusory and not supported by substantial, credible evidence in the record."[15] In particular, several of the environmental opponents failed to identify the basis for their conclusions,[16] and one admitted that he had not reviewed the site plans for the proposal.[17] The court remanded the case to the board for reconsidera-

tion of the variance application in accordance with analysis applicable to inherently beneficial uses.

Both the subject property and Conifer's proposed development plan were included in the township's Housing Element and FSP less than one year before the board denied the variances. Moreover, the township specifically promised in the FSP to adopt a zone amendment to support the project's higher density, but it never did so. For these reasons, the court found the board's findings that the variances were detrimental suggested arbitrariness. Neither the project's density nor its potential environmental effects concerned the township when it considered these issues in great detail in its FSP. Although inclusion of the project in its FSP did not amount to an approval, nothing in the residents' testimony or the rest of the record provided a substantial rational basis for the township to revise its judgment about the project.

This case is close to classic exclusionary zoning because the township refused to zone land at sufficient densities for affordable housing development and has enacted a local law refusing to increase density to allow affordable housing. Compared to the other cases, which involved inclusionary (mixed-income) developments, opposition to this 100% rental housing for very low-, low-, and moderate-income households could have been expected. As in *Kinderhook*, the locality appears to contradict itself. As in *Holliston*, the township failed to use its authority to work with the applicant about its concerns and impose reasonable conditions to mitigate them. Again, the efforts of the developer to design the project to meet anticipated objections were ineffectual and apparently unappreciated. Before this case, it was well-settled that state law advantages affordable housing through the "inherently beneficial use" standard, but the township avoided applying it. As in *Holliston*, the township's responsiveness to local opposition rather than state law disturbed the court: "The Board's dismissive treatment of its representations in its Fair Share Plan bespeaks a cavalier approach to its affordable housing obligation, which we cannot ignore."[18]

Torres: Discriminatory Comments and Delay = Trouble

Greenways of Franklin, LLC and New Greenways, LLC ("Greenways") proposed to develop housing on property they owned in Franklin Township. Greenways' proposal included a substantial percentage of housing for low- and moderate-income households in an effort to qualify under the *Mount Laurel* doctrine consistent with New Jersey Council on Affordable Housing (COAH) regulations. In 2008, a state court granted Greenways' motion for judgment of noncompliance against the township because of its failure to produce the affordable housing plan required by COAH. That court withheld the builder's remedy pending further proceedings to determine if the proposal qualified for the remedy. After months of unsuccessful negotiations with the township and alleged efforts to revise the project to meet the township's demands, Greenways and co-plaintiffs sued the township alleging intentional racial bias by the township as the reason for its failure to develop a COAH plan and to approve the development proposal, which constituted violations of the federal Fair Housing Act (FHA), equal protection, and due process. Co-plaintiffs, the Torreses, are an African-American woman (who had grown up in the township and continued to participate in that community) and her Hispanic husband who were seeking affordable housing in the township.

In December 2011, the U.S. District Court for New Jersey denied defendants' motion for summary judgment on all of plaintiffs' claims. Plaintiffs submitted evidence of statements by a former mayor disparaging African Americans as likely residents of the proposed development and anti-Semitic comments about one of Greenways' principals by another mayor. Actions that limit the availability of affordable housing can violate the federal Fair Housing Act if they discriminate against a protected class by making housing "otherwise unavailable." The court turned away ripeness and standing challenges to the FHA and due process claims despite the fact that the township had allegedly made no final decision on the proposal, the co-plaintiffs had not actually applied for any housing in the township, and their asserted property interest was their desire to move into Greenways' development. Citing numerous cases, the court found that the township's stalling the project counted as an injury and so a final decision on the project was unnecessary for the litigation to proceed. The court accepted plaintiffs' contention that "Franklin Township's failure to satisfy its COAH obligations and approve low-income housing" could constitute "'arbitrary and capricious' acts.[19] Plaintiffs only presented evidence of two city leaders" mostly off-record discriminatory statements, not a quorum of decision makers in the context of a decision about the project. Yet, the court allowed the case to move forward because plaintiffs articulated viable theories for their claims and sufficient evidence with unresolved genuine issues of material fact, including credibility determinations.

Of the cases reviewed in this essay, this is probably the most controversial. Compared to the other opinions, the *Torres* court did not draft a tightly reasoned and strongly supported opinion. Some might even question the court's authorities and conclusions. Importantly, enforcement against exclusionary zoning often requires courts to go beyond formalism because it challenges non-action, delay, and ambiguous representations. These decisions inherently risk charges of "judicial activism." For this reason, courts should be attentive to detail and solid precedent. For their part, local governments need to consider whether particularly damaging evidence may influence a court's judgment in making close calls.

Reminders for Local Governments

These cases furnish useful reminders of long-understood lessons. First, localities must obey the law. Some state laws advantage affordable housing. While affordable housing advocates decry their deficiencies, cities and their citizens bristle at the limitations imposed on their autonomy. In at least three of these cases, courts were merely doing their jobs, and attempts at exclusionary zoning did not get a pass with a wink and a nod. Localities must work with the law that exists,

(continued on page 15)

slew of unemployed lawyers who would be happy to take on any government service they can" and therefore questioned whether the absence of qualified immunity would chill the advice given by attorneys to their government clients because attorneys have independent fiduciary duties to their clients. In response, Ms. Saharsky maintained that the government lawyer faced the same dilemma, and they are entitled to qualified immunity.

Michael McGill argued on behalf of respondent that petitioner's proposed test was unworkable, that the court should apply the test announced in *Richardson,* and under that test there was no historical basis for qualified immunity, nor did the purposes for qualified immunity support affording it to Mr. Filarsky here. Justice Alito followed up asking whether respondent was making a distinction between employees and private contractors, and Justice Scalia pressed respondent on the issue. Justice Breyer continued by asking if Abraham Lincoln would have qualified immunity if, in private practice, he were asked to prosecute a case. It appeared that Justice Alito, Justice Scalia, and Justice Breyer were having difficulty with the distinction between public and private attorneys performing the same function. During his argument, Mr. McGill attempted to focus the court on the lack of historical basis for immunity for a private attorney. In response, the Chief Justice noted that this case highlights "why the lawyer ought to have qualified immunity . . . [because] we don't want him to be worried about the fact he might be sued." Justice Ginsberg questioned the procedural posture and why there was not a cross appeal on the Ninth Circuit's finding that ordering the production of the materials on the lawn was a clearly established violation. Respondent agreed with Justice Kagan when she stated that there is no historic basis for immunity and that lawyers only had a malice defense at common law because the notion of qualified immunity developed in 1970. To say that there is no historic basis means, in effect, that private people never get qualified immunity. Respondent also agreed with Justice Alito that these cases are a mix of history and policy and that absolute immunity has been recognized in situations where it did not exist in the common law. Respondent also agreed with Justice Scalia that the rule of malice applied to all lawyers at the common law.

On rebuttal, Ms. Millett emphasized the deterrence effect the Ninth Circuit's decision may have because outside government counsel frequently work at cut rates or even pro bono and that, although there may be warm bodies to fill their seats, those warm bodies may not be the most qualified for the job—and the government needs skilled attorneys of a high caliber. Because the individual decision to take on a governmental client may be a marginal one because of discounted rates and other issues, the Ninth Circuit's decision would further deter qualified attorneys from government service.

It is difficult to determine where the Court will come down on this issue, however; it is conceivable that it will abandon the *Richardson* historic purposes test for the functional approach presented by Justice Scalia in his *Richardson* dissent.

Exclusionary Zoning Enforcement

(continued from page 11)

and, if the administrative record is weak, be realistic about their chances in court.

Second, beyond obedience, some courts expect localities to demonstrate respect for the law. Local "attitude" may not be helpful, especially when the developer appears responsible and demonstrates good will.

Third, acting consistently with previous actions and keeping promises can be critical. Laws that require cities to plan for affordable housing set up the potential for contradictory acts, which some courts may seize on, especially when localities' denial appears to be merely bending to community opposition. While what counts as a decision or a commitment may not always be clear, if a city's actions appear inconsistent, it is worth carefully documenting how and why they are consistent.

Fourth, localities should always use their land use powers in a good faith effort to work through actual issues and concerns. Failure to do so raises the specter of discriminatory bias against affordable housing and its potential residents.

Four cases decided in the Northeast, including two jurisdictions with laws that specifically favor affordable housing development, do not make a national trend. But a recent study of cases brought under Massachusetts 40B between the 1990–99 and 2000–11 periods revealed a substantial increase in successful enforcement in the 2000–11 period.[20] Further, no one can predict if the "Occupy" movement or general citizen discomfort with growing economic inequality will affect courts. Still, at a minimum, some courts in some states are willing to be relatively exacting with local government to enforce compliance with existing legal requirements not to exclude affordable housing. Other courts may begin to take notice.

Endnotes

1. Zoning Board of Appeals of Holliston v. Housing Appeals Committee, 953 N.E.2d721 (Mass. App. Ct. 2011) (hereinafter "*Holliston*").
2. Kinderhook Development, LLC v. City of Gloversville Planning Board, 931 N.Y.S.2d 447 (App. Div. 2011) (hereinafter "*Kinderhook*").
3. Conifer Realty, LLC v. Township of Middle Zoning Board of Adjustment, No. A626809T2, 2011 WL 3962642 (N.J. Super Ct. App. Div. Sept. 9, 2011) (hereinafter "*Conifer*").
4. Torres v. Franklin Township, No. 09-6268, 2011 WL 6779596 (D.N.J. Dec. 22,2011) (hereinafter "*Torres*").
5. For example, there have been several attempts to weaken Massachusetts's 40B in recent years.
6. *See* notes 1–4 *supra.*
7. *Kinderhook,* 931 N.Y.S.2d at 449.
8. *Id.* at 448.
9. *Id.* at 449.
10. Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20–23.
11. *Holliston,* 935 N.E.2d at 420.
12. *Conifer,* 2011 WL 3962642, at *2.
13. *Id.*
14. *Id.* at 5.
15. *Id.* at 8.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Torres,* 2011 WL 6779596, at *6.
20. Unpublished analysis on file with author. The analysis considered all federal and state reported cases brought under Massachusetts' 40B law (Mass. Gen. Laws. Ann. ch.40B, §§ 20–23) from 1990–2012. Only three cases were brought during the 1990–99 period, compared to 22 cases in the 2000–12 period. Of the 2000–12 cases, 19 out of 22 can be reasonably interpreted as "wins" for affordable housing. These include 11 casebrought by abutters challenging approvals of affordable housing proposals, all of which failed. The author thanks Maya Kevin Grey (USF J.D. candidate) for her excellent research assistance.