POLITICAL HOT TOPICS IN THE LAND USE WORLD

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In 1981, Terry began his legal career in the Dallas City Attorney's Office and he currently is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1981, Terry has represented numerous growing communities in North Texas. He routinely represents and advises local governments on a variety of issues, including employment, land use, civil rights, police, election, natural gas drilling and other regulatory matters.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute and The University of Texas at Austin Continuing Legal Education Program. Terry's most recent publication was a chapter on municipal regulation of natural gas drilling in *Beyond the Fracking Wars*, published by the American Bar Association in late 2013. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also recently had published an article on urban sprawl in Texas in the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves as the Chair of the Board of Trustees of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In May 2014, Terry was appointed an adjunct member of the City of Dallas Civil Service Board and subsequently was appointed to the Civil Service Board in August 2015.

In his free time, Terry enjoys long distance running, having competed in 78 half-marathons as well as many other long-distance races. He completed his 46th marathon in Austin in February 2018. He has competed in the Chicago, New York, San Diego, White Rock/Dallas, Cowtown, Illinois, Marine Corps, Canadian International (Toronto), St. Louis, Austin and Berlin Marathons, all of which he ran very slowly!

I.

Introduction

As attorneys, we often encounter hot land use issues at local levels of government. While those issues may include the zoning application *du jour* or some other topic that results in droves of constituents descending on city council chambers or a county commissioners court meeting, there are a few issues out there that recently have become the subject of intense public debate. The purpose of this paper is not to address whether a position on the hot topic is right or wrong, but to review and analyze how cities across Texas and the nation have endeavored to address, and hopefully resolve, those hot-button issues. In no particular order, I have attempted to provide a synopsis of those topics.

II.

Where Did Robert E. Lee Go?: Confederate Monuments In Our Midst

Today there is perhaps no hotter political issue than the removal of Confederate statues and monuments by local governments along with the renaming of schools or streets that honor Confederate war heroes. Besides being an issue in those states which comprised the Confederacy, Confederate monuments have been removed from three of the four Border States (Missouri, Maryland and Kentucky) as well as in Ohio, California and New York while Massachusetts is still considering whether a monument on Georges Island in Boston Harbor (honoring the memory of Confederate soldiers who were prisoners of war and died there) should be removed.[1]

A. State Preemption

Several southern state legislatures have addressed the issue by prohibiting local governments from removing Confederate monuments without a vote of the legislature or a state commission. Mississippi, Georgia, North Carolina, Tennessee, South Carolina and Alabama all prohibit the removal of Confederal monuments by local governments, although state laws generally do not refer specifically to Confederate monuments and instead term their statutes "heritage preservation."[2] Alabama, for example, in the

[1] *See* https://www.cheatsheet.com/culture/states-removing-the-most-confederate-statues.html/?a=viewall.

[2] One University of North Carolina at Chapel Hill history professor has written "[l]et there be no doubt about the intent of this or similar 'heritage preservation' laws: They 'protect' and perpetuate the racist commemorative landscape that currently exists. Why shouldn't the citizens of Durham [North Carolina] have had the choice to preserve, move, or remove the Confederate monument there? Local choice may allow some communities to keep 'their' Confederate monuments. So be it. Let them defend their decision if they do so."

Alabama Memorial Preservation Act, provides that "[n]o architecturally significant building, memorial building, memorial street, or monument which is located on public property and has been so situated for 40 or more years may be relocated, removed, altered, renamed, or otherwise disturbed."[3] In South Carolina, a two-thirds vote in both the House of Representatives and Senate is required to remove a Confederate monument.[4] In 2004, Mississippi adopted legislation that prohibits the removal or alteration of statues or memorials honoring the military, including those dealing with the Civil War. It also prohibits the renaming of streets, schools or government buildings likewise named for Civil War or other military figures or events.[5] In Tennessee, the Heritage Protection Act was passed in 2013 and amended in 2016. Generally, the Act prohibits the removal, relocation or renaming of a memorial that is, or is located on, public property. A public entity exercising control of a memorial or statue honoring an "historic conflict" may petition the Tennessee Historical Commission in writing for a waiver from the prohibition. After consideration of the petition, the Tennessee Historical Commission votes whether to grant or deny the waiver. A two-thirds vote by the entire membership of the Commission is required.[6]

In 2017, Louisiana State Representative Thomas Carmody, Jr., a Republican from Shreveport, introduced House Bill No. 71, legislation to be known as the Louisiana Military Memorial Conservation Act.[7] The statute would have barred all structures, plaques, statues or monuments that mark certain wars, including the Civil War, from being altered or removed, but local governments would have been allowed to remove such structures, plaques, statues or memorials if voters approved the action at an election held for that purpose.[8] The legislation was left in committee in the Louisiana State Senate.[9] There is litigation currently pending in Virginia over the Charlottesville City Council's proposal to remove the Robert E. Lee statue since a state law bans cities that attempt to "disturb or

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See https://www.vox.com/the-big-idea/2017/8/18/16165160/confederate-monuments-history-charlottesville-white-supremacy.

[3] Ala. Code § 41-9-232(a).

[4] *See* S.C. Code § 10-1-165.

[5] *See* Miss. Code § 55-15-81.

[6] *See* Tenn. Code § 4-1-412.

[7] This bill apparently was in response to actions by the City of New Orleans to remove several Confederate monuments. A copy of House Bill No. 71 (2017 legislative session) may be found at https://www.legis.la.gov/Legis/ViewDocument.aspx?d=1041836.

[8] *Id*.

[9] *See* https://www.legis.la.gov/Legis/BillInfo.aspx?i=231424.

interfere with" historic monuments and memorials. The term "disturb or interfere with" includes "removal of, damaging or defacing monuments or memorials, or, in the case of the War Between the States, the placement of Union markings or monuments on previously designated Confederate memorials or the placement of Confederate markings or monuments on previously designated Union memorials."[10]

B. Two Other Options: Monument Removal or "Adding Context"

Clearly, feelings are intense on both sides (or perhaps I should say "any side") of the issue. Professor Gregory Downs, a Civil War historian at the University of California, Davis, offers two other possible responses by local governments on how to address Confederate monuments:

> The memorials to the Confederacy, in general, celebrate two historical crimes: (1) a treasonous effort to establish an independent nation dedicated to preserving and extending slavery forever and (2) the late-19th-century effort to deny basic rights of contract and movement to former slaves via murder, rape, arson, and intimidation in the decades after the close of the Civil War.
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> Most of the monuments were erected in that period of Jim Crow to mark not just the Lost Cause of the Confederacy but also white supremacists' triumph in wresting control over state and local governments and enacting a regime of racial segregation and oppression.
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> While individuals in both eras—secession and Jim Crow—possessed interesting and even admirable qualities, the causes the memorials commemorated were, as Ulysses S. Grant wrote, "one of the worst for which a people ever fought."
>
> Additionally, the memorials proclaim a vision of the South that ignores the fact that four million slaves were Southerners too, and deserving of representation. When people now say the memorials reflect the history of the South, they are excluding black Southerners from the story of the South that they claim to venerate.
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> * * *
>
> Some historians therefore have argued that we should keep the memorials and add large, clear historical explanations of slavery, secession, and the pernicious uses of the memorials to celebrate Jim Crow, supplemented by counter-memorialization of more admirable Southerners, black and white. Generally I agree with this as a goal. On the other hand, some of the

[10] Va. Code § 15.2-1812.

> memorials are so painful that their historical value is minimal compared to the pain they cause. It is hard to argue that communities should bear the burden of such pain for the edification of others.
>
> Only by engaging carefully with many people on the ground can we hope to decide which of these two methods is most responsive to their needs and most conducive to building, at last, more accurate and inclusive public understandings of the history of the Civil War, Reconstruction, and Jim Crow.[11]

Assuming there is no state regulation of or statutorily-mandated involvement in the removal of Confederate monuments, then local governments have two primary options: (1) removal of the monuments, or (2) keeping the monuments in place and adding some sort of historical context to those monuments.

Texas local governments have responded in both ways on this issue. For example, after having been created the week before, on August 24, 2017, Dallas Mayor Mike Rawlings appointed the Mayor's Task Force on Confederate Monuments[12] to provide recommendations related to the removal and relocation of public Confederate monuments and symbols, and renaming of public places, including parks and streets. As part of its charge, the Task Force was to provide recommendations related to the cost and process of disposal or relocation of monuments, suggesting additional standards for the naming of public places, suggesting replacements for Confederate monuments and symbols recommended for removal, and suggesting replacement names for public places. [13]

The Mayor's Task Force held five public meetings in an approximate 3-week period. At those meetings City staff provided briefing materials and presentations, and ultimately the Task Force issued its final recommendations on September 22, 2017. At one of the Task Force meetings, the following information from the American Historical Association was provided, perhaps foreshadowing the ultimate actions of the Task Force:

- History comprises both facts and interpretations of those facts
- To remove a monument or to change the name of a school or street, is not to erase history, but rather to alter or call attention to a previous interpretation of history

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[11] American Bar Association, STATE AND LOCAL LAW NEWS, *Civil War Statuary* (Fall 2017) at 1.

[12] As is generally the practice with the City of Dallas, each Dallas councilmember nominated a Task Force member.

[13] *See* http://dallasculture.org/confederatemonuments/.

- A monument is not history itself; a monument commemorates an aspect of history, representing a moment in the past when a public or private decision defined who would be honored in a community's public spaces

- Communities need to decide what is worthy of civic honor and those decisions will change over time as the communities' values shift

- Nearly all monuments to the Confederacy and its leaders were erected without anything resembling a democratic process

- African Americans had no voice and no opportunity to raise questions about the purposes or likely impact of the honor accorded to the builders [of] the Confederate States of America[14]

Public comments also were received throughout the process online via the City's website as well as at two public hearings on September 7 and 15, 2017. Interestingly, a total of 160 public comments were recorded on this matter, and the public's position was summarized in the Task Force's recommendations as follows:

Residency	In Favor of Removal	Opposed to Removal	General Information	TOTAL
Dallas	20	70	11	101
Outside Dallas	1	53	5	59
GRAND TOTAL	**21**	**123**	**16**	**160**

Source: http://dallasculture.org/confederatemonuments/.

The Task Force recommended that the City remove the Confederate War Memorial near the Dallas Convention Center and change the names of five Dallas streets (Lee Parkway, Cabell Drive, Gano Street, Stonewall Street and Beauregard Drive) that are named after Confederate leaders or generals. The Task Force did not recommend several other expensive, sweeping changes to Fair Park and the Dallas street grid. It was estimated that removal of the Confederate War Memorial would cost approximately $800,000; nonetheless, the Task Force agreed that the City must be consistent in its repudiation of Confederate symbols.

[14] *See* slide 7 of the Task Force's November 1, 2017 presentation to the City Council, at http://dallascityhall.com/government/Council%20Meeting%20Documents/a_recommendations-from-mayors-task-force-on-confederate-monuments_combined_110117.pdf.

In addition to removal of Confederate monuments and street names, the Task Force also voted to recommend adding a new public marker to downtown Dallas by adding a memorial to Allen Brooks, an African-American man lynched in downtown Dallas in 1910.[15] The Task Force recommended that the City keep the Confederate-tied art and symbols at Fair Park in Dallas, including two Texas history murals in the Hall of State, while adding appropriate historical markers and additional context to explain the state's history during the Civil War, Reconstruction and the Jim Crow era. Recognizing that Fair Park is "a local, state, and national landmark," the Task Force concluded that the historic art and architecture of Fair Park remain in place "as a piece of the history of Texas" and that

> appropriate signage, markers, digital tours guides, public art, educational programming, and/or exhibitions be added as necessary to provide the full context of the Civil War, Reconstruction, "Lost Cause" mythology, the "Jim Crow" era, and the creation of Fair Park for the 1936 Texas Centennial. Historical context should include reference to the many contributions of Mexicans, Tejanos, and indigenous peoples made during the colonization of Texas, the Texas Revolution, and during and after the Mexican War leading to the 20th Century, to also include the participation or exclusion of various communities in those historic events.[16]

The Dallas City Council received the report of the Task Force on November 1, 2017; however, on September 6, 2017, the Dallas City Council had already voted to immediately remove the *Robert E. Lee and the Confederate Soldier* monument in Lee Park (recently renamed Oak Lawn Park) and place it in storage. After a short delay because of a lawsuit filed by the Sons of Confederate Veterans,[17] the Lee statue was removed on September 14, 2017, without incident, although there was a heavy police presence during the 4-hour statue removal. The Lee monument was removed to an undisclosed location for safekeeping.[18] It is estimated that the cost of the Lee monument

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[15] *See* http://www.dallasobserver.com/news/dallas-confederate-task-force-recommendations-9907745.

[16] *See* Recommendation 2 of the City of Dallas Mayor's Task Force on Confederate Monuments, which can be found at http://s3-us-east-2.amazonaws.com/oca-media/wp-content/uploads/2017/09/29171720/9-29-17-Confederate-Task-Force-Recommendations-Waters.pdf.

[17] The Sons of Confederate Veterans obtained a temporary restraining order from a federal district court in Dallas halting the removal of the Lee statue; however, at a hearing on the merits, it was determined by the district court that the Sons of Confederate Veterans did not have appropriate standing to challenge the statue's removal.

[18] https://www.reuters.com/article/us-dallas-statue/dallas-removes-robert-e-lees-statue-from-city-park-idUSKCN1BQ07Z.

removal exceeded $450,000.[19] Due to the costs associated with the recommendations of the Task Force, it is unlikely there will be any more action on Dallas' remaining monuments to the Confederacy until later this year (2018), after Dallas city staff has been given the opportunity to evaluate the potential costs.[20]

The Commissioners Court of Denton County in October 2017 similarly appointed a Confederate Soldier Memorial Advisory Committee to evaluate the future of the Confederate monument on the south side of the Denton County Courthouse-on-the-Square. The Advisory Committee was formed following months of protests and public participation in the Commissioners Court's meetings from individuals who both opposed and supported the statue. The Confederate Soldier Memorial is the only Confederate monument in the county and was erected in 1918 by the Daughters of the Confederacy. A nearby plaque explains the monument to be

> a reminder of historic events and is intended as a memorial to Denton County citizens who sacrificed themselves for the community. Now, let this be a testimony that God created all men equal with certain inalienable rights. We are all one, citizens of Denton County.[21]

The text on the monument itself says it is "in memory of our confederate soldiers, who in heroic self-sacrifice and devoted loyalty gave their manhood and their lives to the South in her hour of need."[22]

After last summer's violent protest in Charlottesville, Virginia, "many people spoke at the Denton County Commissioners Court meeting, urging the commissioners to move the Confederate Soldier Memorial away from the courthouse. Generally, those who want monuments and statues moved, or removed, believe they honor or glorify a political movement that proposed the continuation of enslaving African-Americans."[23] The Advisory Committee held public forums and on February 6, 2018, the 15-member Advisory Committee unanimously recommended that the statue remain at its current location and that significantly more historical context be added. Specifically, the Advisory

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[19] https://www.dallasnews.com/news/dallas-city-hall/2017/10/09/will-debate-confederate-monuments-affect-dallas-politics.

[20] http://www.dallasobserver.com/news/dallas-city-council-slows-confederate-monuments-process-10030316.

[21] http://www.crosstimbersgazette.com/2018/02/08/denton-county-to-keep-confederate-monument/.

[22] *Id*.

[23] *Id*.

Committee recommended that a plaque be added below the statue with a statement that, in effect, decries slavery and racial superiority. The Advisory Committee also suggested the installation of an interactive kiosk near the monument that "tell[s] the story of all deceased veterans from Denton County from all wars and list all their names; an accurate story of race relations through all of American history, with 'no candy coating' and with an emphasis on civil rights movements in Denton County" as well as "tell the story of who we are in Denton County and where we want to go."[24] The exact wording and means of expressing the additional context will be determined at a later time.[25]

C. What To Do If The Monument Is On Private Property?

Local governments generally are powerless, however, when Confederate monuments are built on private property. In Orange, Texas, a giant concrete ring of 13 columns, representing the states the Confederacy claimed as its own, was built in 2013 on private land at the intersection of Interstate 10 and Martin Luther King, Jr., Drive. The original plans for the memorial in Orange, considered the largest Confederate monument built in a century, called for benches, scores of Confederate flags, a walkway lined with flagpoles, landscaping and fencing. The Sons of Confederate Veterans, which sponsored the project, in 2011 estimated the total cost of the memorial at $60,000.[26] Protestors have picketed the site in the past, and now hope to protest monthly.[27] Additionally, the monument has been publicly condemned by the City of Orange—in an April 2013 resolution, the Orange city council, recognizing that it would be legally indefensible to deny a building permit for the construction of the memorial, declared that it "strongly opposes the Confederate Veterans Memorial Park on its current design and location; and urges the Sons of Confederate Veterans, Inc. to consider alternative designs and locations that express the sacrifice made in an appropriate and acceptable manner to all."[28] The city has managed to limit the height of the monument's flagpoles (thus ensuring they will not be visible from Interstate 10) and it has stymied the completion of the site by forcing the Sons of Confederate Veterans to create ample parking, including parking for the disabled. Currently, the Sons of Confederate Veterans do not own enough land around the monument to construct the parking spots.[29]

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[24] *Id*.

[25] *Id*.

[26] https://www.nytimes.com/2017/08/30/us/confederate-monuments.html.

[27] https://www.beaumontenterprise.com/news/article/Protesters-picket-Confederate-memorial-in-Orange-12501147.php.

[28] http://www.orangetexas.net/wp-content/uploads/meetings/city_2013-04-09.pdf.

[29] https://dobianchi.com/2018/01/30/granvel-block-memorial-hank-vanslyke/.

III.

Here a Bike, There a Bike: Municipal Regulation of Bike Share Services

In an effort to facilitate multi-modal transportation, cities around the nation are experimenting with bike share services. Seattle has been a pioneer in this service, but bike share services have made their way to Texas, but not without controversy.

A. A Little Background

First, a few definitions and a little history. A bicycle-sharing system, public bicycle system, or bike-share scheme, is a service in which bicycles are made available for shared use to individuals on a very short-term basis for a price. Bike-share schemes generally allow people to borrow a bike from point A and return it at point B. Many bike-share systems offer subscriptions that make the first 30–45 minutes of use either free or very inexpensive, encouraging use as transportation. This allows each bike to serve several users per day. In most bike-share cities, casual riding over several hours or days is better served by bicycle rental than by bike-share. For many systems, smartphone mapping apps show nearby stations with available bikes and open docks.

Bike-share began in Europe in 1965 and a viable format emerged in the mid-2000s thanks to the introduction of information technology. As of June 2014, public bike share systems were available in 50 countries on five continents, including 712 cities, operating approximately 806,200 bicycles at 37,500 stations. Of the world's 15 largest public bike share programs, 13 of them are in China.[30] The central concept behind bike-share is to provide free or affordable access to bicycles for short-distance trips in an urban area as an alternative to motorized public transport or private vehicles, thereby reducing congestion, noise and air pollution.[31]

B. Seattle Leads The Way

As noted, in the United States the City of Seattle is the pioneer, having adopted a one-year pilot program in July 2017 that includes an extensive regulatory scheme. It issues a bike share permit to those operators who apply and meet numerous requirements, including:

- A bicycle fleet consisting of at least 500 bicycles that meet federal and state safety standards;

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[30] One Chinese bike-share company, Ofo, now has eight million bikes, and 150 million users. Riders take 25 million trips a day. *See* http://money.cnn.com/2017/08/18/technology/business/seattle-bikeshare/index.html.

[31] *Bicycle-sharing system*, Wikipedia, https://en.wikipedia.org/wiki/Bicycle-sharing_system (last updated Feb. 27, 2018).

- Adequate commercial general liability insurance that indemnifies and holds the city harmless;

- A performance bond for public property repair and maintenance incurred by the city for removing and storing improperly parked bicycles; and

- A staffed operations center in the city and a 24-hour customer service phone number for reporting safety concerns and complaints, or to ask questions.

Additionally, program operators are required to have visible, written notification that lets users know bike helmets are required, bicyclists must yield to pedestrians on sidewalks, and bikes must be parked properly in the landscape/furniture zone[32] of the sidewalk.

The Seattle bike-share regulations are extensive, and include requirements addressing safety, parking, general operations, performance bonds, data sharing, fees, and application requirements.[33] The biggest problem experienced in Seattle to date is bike parking. Because the bicycles are dockless[34] and use a rear wheel lock instead of locking to a rack or dock, Seattle has found that users can and do park them anywhere—in the middle of sidewalks, blocking ADA curb ramps, and blocking business and transit access points. There also has been an issue with vandals throwing the bicycles into lakes and into the Puget Sound, as well as hanging them in trees and other creative and inconvenient places.[35]

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[32] The Landscape/Furniture Zone (including the curb) is defined as the area between the roadway curb face and the front edge of the walkway. The minimum width of this zone is 5½ feet except in locations adjacent to high and intermediate capacity transit stations. Objects in the landscape/furniture zone must be set back a minimum of 3 feet from the face of the street curb. This zone buffers pedestrians from the adjacent roadway and is the preferred location for street trees, and other elements such as pedestrian lighting, hydrants and below grade utility hatch covers. *See* Section 4.11 of the Seattle Right-of-Way Improvements Manual, at http://www.seattle.gov/rowmanual/Manual/4_11.asp.

[33] https://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BicycleSharePermitRequirements.pdf.

[34] Dockless bike share does not require a docking station. With dockless systems, bicycles can be parked within a defined district at a bike rack or along the sidewalk. Dockless bikes can be located and unlocked using a smartphone app.

[35] https://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BicycleSharePermitRequirements.pdf.

C. Bike-Share in Texas

The single biggest issue with bike-shares is not the manner by which to regulate the bicycles, but bicycles being left willy-nilly around a city. In the Dallas area, the experience has been similar to Seattle's. Bicycles have been left abandoned throughout the City, generating hundreds (if not thousands) of resident complaints. As a consequence, on January 18, 2018, the City issued an ultimatum to the bike share companies, in essence telling them to "clean up their acts" or face additional municipal regulation.[36] Specifically, the bike share companies were directed by Dallas City Manager T.C. Broadnax to:

1. Relocate all bicycles:

    - Located on sidewalks narrower than 10 feet in width
    - Located on turf, landscaping or other unimproved surfaces
    - Blocking access locations to public or private property and transit stops (including bus and rail transit)
    - Blocking sidewalk curb ramps
    - Located on multi-use trails to their respective trailheads.

2. Provide the names and contact information for persons/entities managing your operational and maintenance activities.[37]

Several of the bike share companies responded to the City's warning. LimeBike, a California-based company, sent a memorandum to the City on January 24, 2018, with its immediate actions, including stopping deployment of new bikes, redistributing its current fleet of bikes more evenly throughout the city and "continuing to work with city officials on regulations." Mobike, based in Beijing, indicated it would cap the number of its bicycles at 3,000 until the City creates firm guidelines. Mobike wrote it also would work on educating its riders to park their bikes properly and would include a feature on its app to report poorly parked bikes, which would penalize that rider's "Mobike score." Another Beijing-based company, Ofo, released a response to Mr. Broadnax's letter, writing that it "was with considerable relief that we received your letter . . . calling for an end to bad behavior and repercussions for those dockless bike share operators who have flouted generally accepted operational standards. . . . While we take issue with the failure to differentiate between the various bike share companies, we confess that the behavior of some of our fellow operators worries us deeply and tarnishes the reputation of the industry that Ofo created." Garland, Texas-based VBikes posted on Facebook the day Mr.

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[36] https://www.dmagazine.com/frontburner/2018/01/mayor-rawlings-dallas-bike-share-troubles-star-trek/.

[37] http://keranews.org/post/how-some-bike-share-companies-dallas-have-responded-city-s-warning-clean.

Broadnax sent the letter, saying it never wanted its bikes to "be an obstruction in any sort of way."[38]

Several of Dallas' sister cities are not as forgiving of the bike parking issues. On December 11, 2017, the Town of Highland Park adopted Ordinance No. 2031, finding that the streets and sidewalks in Highland Park "are narrow and therefore any unauthorized parking or storage of bicycles . . . impedes traffic flow and results in dangerous conditions." Consequently, the Town Council prohibited bicycles being parked on a street, sidewalk or other public property and if such did occur, the bicycle may be impounded. The first impoundment fee is $30.00 per bicycle and is assessed against the owner; if there is a second offense involving the same owner, the impoundment fee is $50.00 per bicycle; a third offense results in an impoundment fee of $75.00 per bicycle; and a fourth offense (or any additional offense) results in an impoundment fee of $100.00 per bicycle. If the bicycle is not timely claimed, after 15 days the bicycle may be sold by sealed bid or public auction, with appropriate public notice.[39]

The City of Denton approved an ordinance authorizing a pilot bicycle share permit program on February 20, 2018.[40] The city council agenda packet provides that the primary goal of the ordinance is to establish guidelines to ensure that bike share operators work with the city as a community partner in providing safe, orderly and flexible transportation options for citizens and visitors. Key elements of the bike share permit policy include:

- Establishment of a permit fee and license to use public right-of-way;
- Insurance requirements;
- A requirement for bike share operators to submit a detailed implementation plan with a map showing locations of virtual bike corrals (to be approved by staff);
- Require GPS capability to assist with parking/location of bikes;
- Limits total number of bikes to 150 for each bike-share company;

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[38] *Id*.

[39] TOWN OF HIGHLAND PARK, TEXAS, Ordinance No. 2031 (adopted December 11, 2017). One possible area of legal concern is that the impoundment fee may be abated by the Director of Public Safety "upon showing of good cause," although there is no guidance as to what may constitute such "good cause."

[40] CITY OF DENTON, TEXAS, Ordinance No. 18-277 (adopted February 20, 2018). The author wishes to thank Denton City Secretary Jennifer Walters for her kind assistance.

- Service area, including any planned expansions over the pilot program;
- Education and outreach plan for proper bicycle parking and riding;
- Implementation/establishment of a robust bicycle rebalancing program;
- Outlines performance metrics on rebalancing bikes and addressing complaints.
- Requires contact information on all bicycles for notification and customer service purposes;
- Data sharing to assist with program evaluation and future infrastructure planning; and
- Requires bike share operators to coordinate with Denton County Transportation Authority.[41]

The new ordinance provides that the permit program will operate as a six-month pilot program. During the pilot program, Denton city staff will note any issues that arise with comments from either the vendors, users, citizens or staff. It is hoped by the City that the pilot program will provide data to assist with the development of future bike infrastructure projects.[42]

On February 26, 2018, the City of Plano adopted an ordinance prohibiting bike share companies from placing any bicycles in the city's right-of-way without a bike-share permit.[43] A bike-share permit authorizes bicycle parking zones throughout the city but delineates the locations where bicycles are not permitted to be parked, such in ADA sidewalk areas, corners of sidewalks or within 5 feet of crosswalks, curb ramps or visibility triangles, and similar areas. The draft bike-share permit also requires that bicycles shall stand upright when parked, current contact information must be provided to the City, there must be a 24-hour customer service telephone number for reporting safety concerns and there are mandatory reporting requirements about bike-share usage in the City, among others.[44] Plano has requested that nearby municipalities consider a uniform bike-share ordinance, hopefully simplifying enforcement activities for the northern tier of Dallas suburbs.

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[41] https://denton-tx.legistar.com/LegislationDetail.aspx?ID=3347531&GUID=57FC73BB-D003-4E55-93C1-BD6906DE29CA.

[42] *Id*.

[43] CITY OF PLANO, TEXAS, Ordinance No. 2018-2-06 (adopted February 26, 2018).

[44] *Id*.

IV.

What, You Want Low Income Housing Tax Credit Apartments in Our City?

More and more frequently, Texas municipalities are being requested to support low income housing tax credit development by adoption of a city council resolution in support of the proposed housing project. While this may be a highly politically charged issue in the city, there are several ways by which municipalities respond to this request, ranging from outright opposition to full-throated support. While responses not surprisingly vary, there are considerations that should be addressed prior to the determination whether to support or oppose such an application.

A. A Brief Overview of the Fair Housing Act

While a detailed overview of the federal Fair Housing Act (FHA)[45] is far beyond the scope of this paper, a brief review of issues may be instructive. Although the FHA has been the law since 1968, recently it is being used more and more to challenge a local government's planning and zoning decisions (or even non-decisions) and has expanded the reach of the FHA into municipal decision-making, including cases where cities were sued in federal court for alleged discrimination in planning and zoning decisions that were not intended to discriminate, but nevertheless were cases that were pursued by nonprofit organizations seeking to impose affirmative obligations upon the cities, under the FHA, to provide low-income housing in those cities. Although the cities in each case were victorious, the legal defense costs were significant, and practical insights learned in those cases can be helpful.

The seminal municipal fair housing case is *Arlington Heights v. Metro. Housing Corp*.[46] in which the Supreme Court stated that the following six factors may be probative of racially discriminatory intent: (1) the racial impact of the official action; (2) the historical background of the discriminatory housing decision; (3) the specific sequence of events leading up to the challenged housing decision; (4) departures from normal procedural sequences; (5) departures from normal substantive criteria; and (6) the legislative or administrative history of the decision.[47] The issue in most FHA cases involving cities is whether the municipal defendant can rebut the plaintiff's *prima facie* case by coming forward with evidence of some legitimate, nondiscriminatory reason for not dealing with

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[45] 42 U.S.C. §§ 3601-3619 and § 3631. I also wish to thank my law partner, Ed Voss, for his assistance in addressing Fair Housing Act issues. I have relied on several of the papers he has presented to the American Planning Association, the Alaska Municipal League and for the Brown & Hofmeister annual seminar.

[46] 429 U.S. 252 (1977).

[47] *Arlington Heights,* 429 U.S. at 266-67.

the plaintiff. Second, the issue then focuses on whether the plaintiff can show that this reason is merely a pretext for unlawful discrimination.

Generally, however, housing decisions are often made for multiple reasons. For example, a city council is likely to make its decision on the basis of a combination of different factors.[48] In *Arlington Heights,* the Supreme Court held that proof of discriminatory intent is required to make out a violation of the equal protection clause, but proof that the defendant was motivated in part by a racially discriminatory purpose would not necessarily violate the equal protection clause. Rather, the burden would shift to the defendant to establish that the same decision would have resulted even had the impermissible purpose not been considered.[49] If the municipal defendant is able to meet this burden, it would prevail because the plaintiff then no longer could attribute the injury complained of to improper consideration of a discriminatory purpose.[50] A strong consensus has developed in the courts that race need be only one of the factors considered by the defendant to establish a violation of the FHA.[51] If a plaintiff establishes by a preponderance of the evidence that race was a significant or substantial factor in the municipal defendant's housing decision or action, the municipal defendant may avoid liability if it proves that it would have made the same decision or taken the same action anyway, even in the absence of the illegitimate consideration.[52] If the defendant satisfies this burden, there is no liability under the FHA for disparate treatment.

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[48] *Id.* at 265 ("rarely can it be said that a legislature or an administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one"). *See also United States v. City of Parma,* 494 F.Supp. 1049, 1054 (N.D. Ohio 1980), *aff'd,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* 456 U.S. 926 (1982) (a city's political decisions "inevitably involve the consideration and balancing of numerous competing interests.").

[49] *Arlington Heights,* 429 U.S. at 271 n.21.

[50] *Id.*

[51] *Hanson v. Veterans Admin.,* 800 F.2d 1381, 1386 (5th Cir. 1986); *Green v. Century 21,* 740 F.2d 460, 464 (6th Cir. 1984); *Marable v. H. Walker & Assocs.,* 644 F.2d 390, 395 (5th Cir. 1981); *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1042-43 (2d Cir. 1979); *Smith v. Anchor Bldg. Corp.,* 536 F.2d 231, 233 (8th Cir. 1976); *Moore v. Townsend,* 525 F.2d 482, 485 (7th Cir. 1975).

[52] *Bachman v. St. Monica's Congregation,* 902 F.2d 1259, 1263 (7th Cir. 1990); *Cato v. Jilek,* 779 F.Supp. 937, 943-44 n.19 (N.D. Ill. 1991); *Aloqaili v. National Hous. Corp.,* 743 F.Supp. 1264, 1270 (N.D. Ohio 1990) ("[The defendants] instead must show that [their] legitimate reason[s], standing alone, would have induced [them] to make the same decision.").

B. The United States Supreme Court Addresses Low-Income Housing Tax Credits

A low-income housing tax credit (LIHTC) program here in Texas was the genesis for a recent United States Supreme Court decision, *Texas Dep't of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*[53] In general terms, an LIHTC system involves the coordinated efforts of the Federal government, State governments and for-profit entities to provide affordable housing by making federal tax credits available (via distribution to state housing agencies) to for-profit entities that invest in the development or rehabilitation of certain types of housing projects. Federal law favors the distribution of these tax credits for the development of housing units in low-income areas.[54] Once the LIHTCs are accessed, they can be used by developers to help finance low-income housing, and can also be sold to investors, and the proceeds then used to upgrade and maintain the low-income housing that was the basis for the award of the credits. The distribution of LIHTCs is administered in Texas by the Texas Department of Housing and Community Affairs (TDHCA). In 2008, the Inclusive Communities Project, Inc. (ICP), a non-profit organization dedicated to racial and economic integration of communities in the Dallas area, sued TDHCA in Dallas federal district court claiming that the agency disproportionately granted tax credits to developments within minority neighborhoods and denied the credits to developments within Caucasian neighborhoods. ICP asserted that this practice led to a concentration of low-income housing in minority neighborhoods, which perpetuated segregation in violation of the FHA.[55]

There are generally two methods that have developed in the law that may be available to establish unlawful discrimination: (1) evidence of intentional discrimination, or (2) evidence that the complained-of practice has a discriminatory effect (also known as "disparate impact") on a protected group (usually racial minorities).[56] At trial, ICP attempted to show disparate impact through the use of statistical evidence of census tract data about where the LIHTCs were distributed, and the district court found that the statistical allocation of tax credits constituted a *prima facie* case for disparate impact. Using a standard for disparate impact claims that the Court articulated in *Town of Huntington v. Huntington Branch*,[57] the district court then shifted the burden to TDHCA to show that the allocation of tax credits was based on a compelling governmental interest and that no less discriminatory alternatives existed. TDHCA was unable to show that no

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[53] 135 S.Ct. 2507 (2015).

[54] *Id*. at 2513.

[55] *Id*. at 2514.

[56] *Id*. at 2516-20 (detailed description of Supreme Court jurisprudence).

[57] 488 U.S. 15 (1988).

less discriminatory alternatives existed, so the district court found in favor of ICP. TDHCA appealed to the United States Court of Appeals for the Fifth Circuit and claimed that the district court used the wrong standard to evaluate disparate impact claims. The Court of Appeals affirmed the district court's decision, and held that the district court's standard mirrored the standard recently promulgated by the United States Department of Housing and Urban Development (the agency tasked with implementing the FHA). TDHCA petitioned the United States Supreme Court to hear the case, and that petition was granted.

The question before the Supreme Court was whether the district court used the correct standard for evaluating an FHA claim of discrimination based on disparate impact. Whether a discriminatory effect claim could be brought under the FHA was an issue of first impression for the Supreme Court[58]; the nine Courts of Appeals that had addressed the question had all found in the affirmative, *i.e.*, that a discriminatory effect claim could be brought under the FHA, not just an intentional discrimination claim.[59] In a 5-4 decision, the Supreme Court held that the statutory language of the FHA focuses on the consequences of the actions in question as well as the actor's intent, comparing the FHA to Title VII of the Civil Rights Act of 1964 (used in employment cases), and the Age Discrimination in Employment Act, both of which were enacted around the same time as the FHA. Further, the 1988 amendments to the FHA retained language that several Courts of Appeals had already interpreted as imposing disparate impact liability, which "strongly indicates Congress' intent" to that broad reading of the FHA statute. The Court further found that disparate impact liability is consistent with the FHA's purpose of preventing discriminatory housing practices because it allows plaintiffs to counteract unconscious prejudices and disguised discrimination that may be harder to uncover than intentional discrimination.

The Supreme Court's rationale was supported by the language in the FHA describing the central purpose of the FHA: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[60] The Court also cited language from the congressional legislative history explaining that the FHA "provides a clear national policy against discrimination in housing."[61] Specific to municipalities and local governments, the Supreme Court noted: "These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits

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[58] *Texas Dep't of Housing and Community Affairs*, 135 S.Ct. at 2515.

[59] *Id*. at 2519 (listing of federal appellate cases that hold the Fair Housing Act encompasses disparate-impact claims).

[60] 42 U.S.C. § 3601.

[61] *Texas Dep't of Housing and Community Affairs*, 135 S.Ct. at 2521.

targeting such practices reside at the heartland of disparate-impact liability."[62] The Court recognized with approval previous cases that found liability against local governments under the FHA for enacting zoning laws that prevented construction of multifamily rental units and dwellings, or limited the rental of housing units to only "blood relatives." On the other hand, the Supreme Court also recognized that while disparate-impact liability mandates the removal of artificial, arbitrary, and unnecessary barriers, it does not require the displacement of valid governmental policies: "The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."[63]

To that end, the Supreme Court stated that an important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies, similar to the business necessity standard under Title VII applicable to discrimination in employment cases. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a reasonable measurement of job performance, so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. The Court recognized that "[z]oning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities." Other legitimate governmental objectives include ensuring compliance with health and safety codes. The Court stopped short of establishing a hard and fast set of objective standards, stating that "disparate-impact liability does not mandate that affordable housing be located in neighborhoods with any particular characteristic." Government policies will be found contrary to the FHA if they create artificial, arbitrary, and unnecessary barriers.[64]

The Court cautioned, however, that disparate impact claims under the FHA must meet "robust causality" requirements, since mere statistical evidence of racial disparity on its own is not sufficient.[65] As a result, the Court was critical of ICP's statistical evidence providing the basis for the district court's finding of discrimination. The Court also found that a one-time decision may not be a policy at all, and the focus is on unlawful policies.[66] The district court placed the burden of proof incorrectly on the TDHCA to prove that the

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[62] *Id*. at 2521-22.

[63] *Id*. at 2522.

[64] *Id*. at 2523.

[65] *Id*.

[66] *Id*. at 2523-24.

governmental interests at issue could be served by another practice that has a less discriminatory effect – that burden should be placed on the complaining plaintiff, both as a requirement of previous case decisions and under the new HUD rules that were applied by the Fifth Circuit Court of Appeals in the underlying appellate decision in this case. The Court, therefore, ordered the case remanded to the district court for further proceedings. The dissenting opinions, written and joined by Justices Thomas, Alito, Scalia and Chief Justice Roberts, were vigorous in disputing the rationale behind the majority's holding, but those arguments were unavailing. As referenced in the Supreme Court's decision, and as was recognized in the Fifth Circuit Court of Appeals' opinion, HUD enacted a new rule that recognizes the discriminatory effect standard as a basis for liability under the FHA. That rule states:

> **§ 100.500 Discriminatory effect prohibited.**
>
> Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section. The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.
>
> (a) *Discriminatory effect*. A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (b) *Legally sufficient justification*.
>
> (1) A legally sufficient justification exists where the challenged practice: (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and (ii) Those interests could not be served by another practice that has a less discriminatory effect.
>
> (2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.

(c) *Burdens of proof in discriminatory effects cases*.

(1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

(d) *Relationship to discriminatory intent*. A demonstration that a practice is supported by a legally sufficient justification, as defined in paragraph (b) of this section, may not be used as a defense against a claim of intentional discrimination.[67]

C. Flower Mound Fights and Wins: *Inclusive Communities Project, Inc. v. Town of Flower Mound, Texas*

In April 2008, The Inclusive Communities Project, Inc. (the same non-profit organization involved in the Supreme Court litigation) wrote a letter (through its attorney) to the Town Mayor and Town Manager. ICP is the successor to the Walker Project, Inc., a court-created organization formed in the early 1990s as part of the remedy in a Dallas-area housing desegregation case. In that letter, ICP accused the Town of being racially discriminatory in its housing policies and practices, particularly the Town's zoning and SMARTGrowth policies, and alleged that the Town was not meeting its legal obligations under the FHA to provide affordable housing. The letter compared the Town to other cities in the North Texas area that had been found in violation of the FHA, and specifically compared the Town with the City of Lewisville, the Town's neighbor to the east. The letter was the first contact made by ICP with the Town, and ICP requested a meeting to address affordable housing and alleged barriers to the creation of affordable housing in the Town. More specifically, ICP sought to expand available low-income housing opportunities in the Town so that ICP could place more of its clients in the area with greater ease and at less cost. ICP proposed to enter into an agreement with the Town to assist ICP's program

[67] 24 C.F.R. § 100.500.

to obtain state-issued low-income housing tax credits that not only provide incentives to the development of low-income housing, but also guarantee that such developments do not prohibit the use of housing choice vouchers.

In the proposed arrangement, ICP offered to provide the Town a short-term loan (potentially for as much as $1 million), from the Walker Housing Fund, and in turn the Town would agree to promise the money to a developer who would pursue a LIHTC project. The ICP funds, when funneled through the Town in such manner, would earn the developer up to eighteen points in the State's LIHTC ranking system, giving the developer a competitive advantage in an application for LIHTC tax credits. ICP's goal was to attract low-income housing developers to the Town and increase the likelihood that an LIHTC project would be developed. The ICP proposal would not have required any direct monetary investment by the Town. ICP also asked the Town to identify a site where the Town would support multifamily development. ICP alleged that the Town's roughly two acres of vacant land zoned for multifamily use was also discriminatory because it was such a small area, particularly where a developer attempting to use LIHTC credits needs to have a site larger than that, and have appropriate zoning in place before the tax credits will be awarded by the State.

The Town Manager considered ICP's accusations, and nonetheless met with ICP's President in June 2008. Both parties were accompanied by their attorneys. During the meeting, the Town listened to ICP's proposal, but no draft agreement was offered by ICP. ICP disclosed that it did not have a developer lined up to pursue ICP's plan, nor had a developer ever expressed interest in investing in an LIHTC project in the Town. The success of ICP's plan would have depended on, among other things, finding a developer who was able to secure the tax credits. ICP also did not have a particular location in mind, prompting its request to the Town to identify and support an appropriate location. The Town Manager told ICP that he would discuss the information provided by ICP with the Town Council, and he did so in June 2008 after the meeting with ICP. ICP followed-up the meeting with another letter that purported to summarize the meeting, and further stated that ICP understood that the Town was not interested in ICP's proposal. There was no more contact or discussions between ICP and the Town after that follow-up letter.

In November 2008, ICP filed suit against the Town in federal district court in Sherman, Texas (in the Eastern District of Texas, which includes Denton County, where the Town is located). ICP alleged that the Town violated the FHA when it did not participate in ICP's proposal to enter into an agreement with ICP, and when the Town did not identify a site where it would support development of a multifamily project. ICP's lawsuit sought injunctive relief requiring the Town to participate in ICP's LIHTC housing development program (or an equivalent program), and ordering the Town to identify land that could be zoned for low-income multifamily development. ICP also sought attorney's fees from the Town, but ICP did not seek damages.

Besides the scant factual background, the most significant aspect of ICP's claims against the Town was that ICP accused the Town of intentional discrimination, rather than allege a violation of the FHA by asserting that the Town's actions had a discriminatory

effect on minorities (as was alleged in an FHA lawsuit against the City of Kyle, Texas[68]). To establish a *prima facie* case of intentional discrimination, ICP was required to prove: (1) the evidence supports an inference that the Town's stated reasons for its action are pretextual, and (2) race was a significant factor in the decision. The Town could rebut ICP's *prima facie* case with proof that the outcome would have been the same regardless of the racial discrimination.[69] The Town's actions "may have been unsound, unfair, or even unlawful, yet not have been violative of the FHA if there is no evidence . . . that race was a significant factor in [the] decision."[70]

Prior to trial, the Town twice filed motions to dismiss ICP's claims, not only on the merits, but also on other affirmative defenses (*e.g.*, alleging that ICP lacked standing to bring suit, that ICP's claims were not ripe, and other defenses). Both motions were denied. A two-day bench trial occurred in July 2010, and the District Court took the matter under advisement. The Court's Findings of Fact and Conclusions of Law were issued on March 29, 2011. The Court ruled in favor of the Town, dismissing all of ICP's claims.[71]

First, the District Court listed the Town's reasons for its actions that ICP challenged in this case, and simply assumed that those reasons were pretextual (the first element necessary to establish ICP's intentional discrimination claim). Next, the Court analyzed whether ICP proved that race was a significant factor in the Town's challenged decisions (which were (1) refraining from participating in ICP's plan to develop a LIHTC unit, and (2) refusing to identify property in the Town for multifamily development). There was no direct evidence of intentional discrimination. As a result, the Court considered the six factors set forth in the *Village of Arlington Heights* case. Those factors include consideration of whether circumstantial evidence exists of the discriminatory effect of a defendant's actions to establish a violation of the FHA. It was that part of the case that provided a great deal of confusion, since ICP seemed to be attempting to establish discriminatory intent through the use of discriminatory effect evidence.

The six *Arlington Heights* factors, as noted above, reviewed by the District Court, were: (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, (5) legislative history, and (6) whether the action had a disparate impact.[72] The District Court methodically analyzed the evidence vis-à-vis each factor,

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[68] *N.A.A.C.P. v. City of Kyle, Tex.*, Cause No. A-05-CA-979-LY, slip op. (W.D. Tex. Mar. 30, 2009); and 626 F.3d 233 (5th Cir. 2010).

[69] *Village of Arlington Heights*, 429 U.S. at 271 n.21.

[70] *Simms v. First Gibraltar Bank,* 83 F.3d 1546, 1556 (5th Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996).

[71] Cause No. 4:08-CV-433, slip op. (E.D. Tex. Mar. 29, 2011).

[72] *Village of Arlington Heights*, 429 U.S. at 266-68.

and found that two factors weighed slightly in favor of discriminatory intent, two weighed strongly against establishing discriminatory intent, and two factors were neutral (therefore not suggesting racial animus on the part of the Town). As a result, ICP did not prove that race was a significant factor in the Town's decisions. Since ICP failed to establish discriminatory intent, judgment was entered for the Town. ICP did not appeal the District Court's judgment.

It should be noted that ICP presented a great deal of statistical evidence at trial. The use of statistical evidence was also a key component of the plaintiffs' evidence in the *City of Kyle* case, referenced above. In order to address that statistical evidence, both Kyle and Flower Mound hired outside experts who testified at trial. In fact, in the *ICP v. Flower Mound* case, the Town hired four experts who testified at trial, not only to address the statistical evidence presented by ICP, but also to address the LIHTC program and other land use issues. Those costs are not recoverable, even when the municipality wins the case. As a result, the defense of these FHA cases can be very expensive. As these three cases prove, however, such expense was both necessary and valuable to protect the municipal zoning and land use interests being challenged as discriminatory under the FHA.

D. Practical Pointers When Considering An LIHTC Project

The key to a successful defense in an FHA case alleging that a city has discriminated in its planning and zoning actions is not only the ability to point to a record of administrative and legislative decisions and actions devoid of discriminatory animus, but also evidence that the reasons for the decisions were legitimate and non-discriminatory. As the Flower Mound case above shows, even when the factual record is strong, a federal lawsuit may still be filed. The successful defense of such a lawsuit, while expensive, will nonetheless maintain a city's lawful, non-discriminatory planning and zoning policies and practices.

Following is a list of practical pointers for local governments to consider when an LIHTC project is under consideration in your community:

1. Be consistent in reviewing proposals for all types of developments.

2. But, make reasonable accommodations[73] for proposed developments involving a protected class.

[73] "An accommodation is reasonable under the FHA if it does not cause any undue hardship or fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve." *Oxford House, Inc. v. Town of Babylon,* 819 F.Supp. 1179, 1186 (E.D.N.Y. 1993) (handicap discrimination).

3. If a proposed development involving a protected class nevertheless must be denied due to legitimate reasons, enunciate those reasons clearly and the bases therefor on the record. Some legitimate reasons may include:
   a. cost (including increased cost to city services)
   b. traffic patterns
   c. preserving historic architecture
   d. quality of life (must be careful with this one)
   e. no racial quotas
   f. no artificial, arbitrary or unnecessary barriers
   g. other sites in the city where the multifamily project could be better located (for a variety of reasons).[74]

4. Develop fair housing policy (with help of city attorney and experts) of inclusion and objective factors.[75]

5. Do not ignore seriousness of issues or federal court authority.[76]

V.

Conclusion

The beauty of this topic is that there are no right or wrong answers to these thorny issues. As local government practitioners, we research how other local governments around the nation or around the state have attempted to deal with these matters, and we endeavor to learn from their successes and their failures. Possible solutions will continue to evolve and perhaps next year we will be updated on creative new solutions for our consideration. Good luck!

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[74] *See, e.g., Artisan/American Corp. v. City of Alvin*, 2008 WL 8894683 (S.D. Tex., Nov. 19, 2008) (ordinance requiring 300-foot distance by apartment projects from single family residences, and other evidence, held not to establish city liability under FHA).

[75] The City of McKinney, Texas, for example, has adopted a Low Income Housing Tax Credits Resolution Policy "[t]o provide administrative procedures by which the City will review and process requests for resolutions to be considered by the City Council . . . on housing development projects utilizing low income housing tax credits as a component of project financing, consistent with the City of McKinney Affordable Housing Policy, City ordinances, and applicable law." CITY OF MCKINNEY, TEXAS, Resolution No. 17-03-071(R) (adopted March 21, 2017).

[76] *See, e.g., Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 648 F.Supp.2d 805 (E.D. La. 2009), and 641 F.Supp.2d 563 (E.D. La. 2009) (parish held in contempt of court multiple times for ignoring court's remedial orders and terms of consent decree, largely based upon elected officials' dissatisfaction with federal court's oversight).