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Providing Low and Moderate Income Housing in the Suburbs

BY STEPHEN L. TABER*

I. INTRODUCTION

Since 1948, when racially restrictive covenants were declared unconstitutional by the U.S. Supreme Court,¹ there has been a growing trend toward eliminating the legal barriers which maintained a racially segregated housing pattern throughout the United States. California has been in the forefront of the fight against housing discrimination, as evidenced by the Unruh Act² and the Rumford Act.³ However, it is an unfortunate truth that housing in California is today more segregated by race and socio-economic status than at any time in its history. The reason for this is that since the 1940's, there has been extensive residential development in the suburban areas surrounding major cities. This development, made possible by the two largest community development pro-

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1. *Shelley v. Kraemer*, 334 U.S. 1 (1947).

2. CAL. CIV. CODE §§ 51-52 (West 1954), as amended, (West Supp. 1976).

3. CAL. HEALTH & SAFETY CODE §§ 35700-44 (West 1973).

grams ever initiated by the federal government—the FHA mortgage guarantee and the federal highway program—was aimed almost entirely toward the middle class, leaving the poor and minorities remaining in the central cities. To make certain that a developer did not build low cost housing, many cities enacted strict building and zoning laws to “protect the quality” of the community. This “snob zoning,” which created our present residential apartheid, continues today, compounding the problems caused by the existence of a segregated society.

Beside a sense of basic compassion and desire to give fair consideration to fellow human beings, there are very important policy reasons why it is necessary to adopt an active strategy for providing low and moderate-income housing in the suburbs.⁴

A phenomenon of the last 30 years is that blue collar and low-skill jobs are moving out of the central cities and into the suburbs where inexpensive land is abundant and transportation is convenient.⁵ Jobs remaining in the central cities are often professional white collar jobs for which persons with low educational attainment often cannot qualify. Therefore, we have a pattern of commuting whereby the central city residents commute to the suburbs and the suburban residents commute to the central city. This is wasteful of energy, transportation money, and personal time. Additionally, it requires land for highways and parking facilities and results in increased air pollution. The lack of housing near work often makes it impossible for a low-income central city resident to take a job in the suburbs. This reinforces the cycle of poverty and unemployment which results in generation after generation of family poverty.

Residential segregation leads to segregation of most public facilities. Schools, shopping centers, theaters, and recreational facilities are community-oriented and are frequented by residents of the community. The residential pattern which presently exists insures that these facilities will remain segregated. A notable exception is schools, where the courts have attempted to require integration,

4. An excellent discussion of the public policy argument is contained in A. DOWNS, *OPENING UP THE SUBURBS* 26 (1973).

5. NATIONAL COMMISSION ON URBAN PROBLEMS: *BUILDING THE AMERICAN CITY* 3 (1968).

thereby violating a tradition of neighborhood schools. Only by residential integration can the concept of neighborhood schools be made compatible with *Brown v. Board of Education*.⁶

Because the costs of many programs related to the poor and disadvantaged are paid by local governments, some communities must bear a much higher burden than others which have managed to include within their boundaries high tax generating activities and exclude people who need social services. Residential integration would result in each community bearing a more equitable share of the metropolitan area's responsibility.

Finally, federal and state policies strongly favor integration and are strongly opposed to segregation. Only by actively encouraging the development of housing for low and moderate-income persons in the suburbs can this goal be achieved.

This article will discuss the manner in which a policy to open the suburbs for low and moderate-income housing can be implemented given the existing state of the law. First, the subject of motivation will be discussed, since without it no housing will ever be built. Secondly, the question of available land will be explored. Thirdly, discussion will be made with respect to making the provision of below-market-rate housing financially feasible.

II. MOTIVATION

It is a prerequisite to the provision of low and moderate-income housing in the suburbs that certain key actors in the development process be motivated to perform the necessary tasks. In the existing social, economic, and political situation, cities do not care to provide low and moderate-income housing because they do not want to encourage residence within their borders of individuals they consider to be undesirable. Such uses do not return a high property tax yield and the constituencies which such developments benefit are not presently within the jurisdiction and are not considered to be of political importance. Developers are not motivated to act because low and moderate-income housing is seldom profitable and where it is there are usually other more profitable activities. The lending institutions are not motivated, since it is felt that low-income housing is not as good a financial risk as housing inhabited by wealthier people.

The above problems have many causes, such as inequitable distribution of income, a high unemployment rate, a bad tax struc-

6. *Brown v. Board of Educ.*, 347 U.S. 483 (1953).

ture, and other basic institutional defects. This article will focus on practical solutions to these problems. The existing law which can be implemented to encourage integrated housing is not as effective as it might be, but if utilized, can be effective.

The Federal Housing and Community Development Act of 1974⁷ sets forth some federal policy and furnishes incentive for local governments to provide for the housing needs of low and moderate-income people. One of the goals of the law is

the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spacial deconcentration of housing opportunities for persons of lower-income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income.⁸

To achieve its goals, the legislation provides for a community development revenue sharing program, 80% of which is paid, according to a formula based on population, poverty, and housing overcrowding, to cities and counties in metropolitan areas.⁹ In order to be eligible for this money, the local government must submit an application to HUD which contains, among other things, a community development plan which specifies objectives established in accordance with areawide development planning and national urban growth policies.¹⁰ The application must also contain a housing assistance plan which surveys the condition of housing of people residing in or expecting to reside in the community and indicate general locations of proposed housing for lower-income persons to promote greater choice of housing opportunities and avoid undue concentrations of assisted persons in areas containing a high proportion of low-income persons. Grants may be made only on condition that the local government certify to HUD's satisfaction that its community development program has been developed so as to give maximum priority to activities which will benefit low or moderate-income families.

Although the language of the act is not entirely clear and not as emphatic as it could be, it appears that the Congress was

7. 42 U.S.C.A. § 5301 (West Supp. 1976).

8. *Id.* § 5301(c) (6).

9. *Id.* § 5306.

10. *Id.* § 5304.

concerned with the overconcentration of low-income persons in central cities and the lack of housing opportunities for such people in the suburbs and wished to do something to remedy the situation. To insure that the needs of people throughout the region, rather than only those residing in individual cities, are taken into account, the law requires that each local agency application be submitted for review and comment by an areawide planning agency, such as the Southern California Association of Governments.¹¹

State law also requires local governments to be concerned with housing. Each city and county must adopt a housing element of its general plan which has been prepared pursuant to guidelines promulgated by the Department of Housing and Community Development.¹² Although the regulations are weak, they require that provision be made for housing all persons regardless of income and that an open and free choice of housing for all be promoted.¹³ Foster Knight's discussion of the requirements contained in last year's symposium issue is excellent and need not be repeated here.¹⁴

Finally, many local governments have voluntarily established low and moderate-income housing programs even though they do not presently have large low-income populations. They do so because it is equitable to assume their share of the metropolitan's area's burden and because a balanced community offers cultural and social advantages over a segregated community. The Patomac Institute's book *In Zoning* contains a good account of the moral reasons why an inclusionary housing program should be established.¹⁵

There are many ways in which developers can be motivated to develop balanced communities.

A. *Density bonus*

The problem is what to give developers as an economic incentive to provide low and moderate income housing. Direct subsidies are scarce and usually limited to low, as opposed to moderate, income housing. Low interest loans can help, but other subsidies are needed, especially in areas of high land values. A number of years

11. *Id.* § 5304(e).

12. CAL. GOV'T CODE § 65302(c) (West Supp. 1976).

13. COMMISSION ON HOUSING AND COMMUNITY DEVELOPMENT: HOUSING ELEMENT GUIDELINES (June 17, 1971).

14. Knight, *California Planning Law: Requirements For Low and Moderate Income Housing*, 2 PEPPERDINE L. REV. S159 (1974).

15. PATOMAC INSTITUTE, INC., *IN ZONING* (1974).

ago, Marin County devised a scheme whereby the land would essentially subsidize itself. Generally, it may be said that the more density allowed on a piece of property (up to the point at which demand does not justify the additional cost of constructing multi-storied buildings), the more benefit the developer will receive and the more valuable the land will be. Therefore, if the density can be increased, above that which is currently allowed by the zoning ordinance, the owner receives a benefit, which can be conditioned on his doing something beneficial for the community. This idea has been used successfully to permit "cluster" development whereby houses are built at a higher density than otherwise allowed and land is devoted to exclusive open space.¹⁶ This device was used by the County of Marin to require a developer to commit units for moderate-income housing.

In *Marin County v. Birge*,¹⁷ the county entered into an agreement with the defendant whereby Birge agreed to devote 15 units to moderate-income housing in return for being allowed to build at a higher density than prescribed in the zoning ordinance. When he completed his project, he refused to limit the rent of his project and was sued by Marin County. The superior court held that although the statutory authority was vague and density bonuses might not be allowed, the equity was clearly against the developer, who had received a benefit and refused to assume his obligations; therefore, a judgment was given in the county's favor.

Although the legislature has refused to enact laws authorizing density bonuses for housing, it appears that the zoning law is broad enough to permit them.¹⁸ However, there may be constitutional problems in permitting the local government to "sell" its police power in return for housing, however desirable the housing is, unless a relation can be shown between the housing and the public purpose for which the density limit was established. These constitutional ramifications, however, remain to be seen.

16. *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970).

17. *Marin County v. Birge*, No. 72526 (Marin County Super. Ct., Jan. 17, 1975).

18. CAL. GOV'T CODE § 65800 (West 1966), as amended, (West Supp. 1976), declares a legislative intent to provide a minimum of limitation on a local government's power to regulate land use.

B. Subdivision dedications

The Subdivision Map Act defines the terms "design" and "improvement" to include characteristics of a subdivision which are necessary to comply with the general plan of the city or county in which it is located.¹⁹ Local governments are granted the power to regulate design and improvement,²⁰ and permission to subdivide property will be denied if the subdivision is inconsistent with the general plan.²¹ Since the general plan contains a housing element, which should provide for the housing needs of all income groups, it would be reasonable, if not mandatory, for a city or county to deny permission for a subdivision which does not contain low or moderate-income housing.

It has been held that the power to regulate implies the power to condition approval upon the dedication of property by the developer to the city for purposes contained in the definitions of design and improvement.²² Therefore, it appears that the Subdivision Map Act can be interpreted as allowing local governments to require subdividers to dedicate land for low and moderate-income housing.²³ Such a dedication must be reasonably related to the proportion of the need for such housing which can be attributed to the subdivision.

III. LAND

There are many laws requiring local governments to provide for the housing needs of the community and disapproving of discrimination in land use decisions. The problem is enforcing these laws. The connection between a legal requirement or right and a particular piece of ground may be difficult to establish and, even if it could be, there may not be standing in court to establish it.

A city may not use its zoning power to discriminate against people on the basis of race, national ancestry, or religion. Furthermore, a local agency may not discriminate against a housing project because of the manner in which it is being financed.²⁴ In other words, a project may not be turned down solely because it was

19. CAL. GOV'T CODE §§ 66418-19 (West Supp. 1976).

20. CAL. GOV'T CODE §§ 66421, 66473 (West Supp. 1976).

21. CAL. GOV'T CODE § 66473.5 (West Supp. 1976).

22. See, e.g., *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1947); *Associated Home Builders, Inc., v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

23. See discussion in Comment, *Land Development and the Environment: The Subdivision Map Act*, 5 PAC. L.J. 55, 71 (1974).

24. CAL. GOV'T CODE § 65008 (West Supp. 1976).

financed by a federal loan or a state housing finance agency loan. This offers some protection, however, it is always possible to rezone the land for other purposes or to enact land use restrictions which make construction of the project difficult. In *SASSO v. City of Union City*,²⁵ the court upheld a referendum from constitutional attack which turned down rezoning of land for a subsidized housing project. It is possible that such a referendum would be illegal under this code provision, which was added after that case was decided.²⁶

Zoning and subdivision regulation must be consistent with the local general plan, which must contain a housing element, as discussed above. If the general plan makes adequate provision for low and moderate-income housing to accommodate the needs of the community (and, indeed, it is required to do this), the city or county is required by law to exercise its zoning power to assure that there is adequate land available for this purpose. In addition, subdivisions must be disapproved if they are contrary to this goal.

A cogent argument exists that land use regulation must be carried out in a reasonable manner in order to be found to be constitutional. The United States Supreme Court held in *Euclid v. Ambler Realty Co.*²⁷ that the "general public interest" could possibly outweigh the interest in a municipality in a given case and local land use regulation could be overturned if it is found that the region's need for low and moderate-income housing is being frustrated by a community's exclusionary zoning practices.²⁸ This rationale has been followed in several Pennsylvania and New Jersey cases, but has not been adopted by California or federal courts.

The need for active regional planning, rather than judicial action, is pointed out in both *Appeal of Girsh*,²⁹ a Pennsylvania Supreme Court case, and *Ybarra v. City and Town of Los Altos Hills*,³⁰ a

25. *SASSO v. City of Union City*, 314 F. Supp. 967 (N.D. Cal. 1970), *aff'd* 424 F.2d 291 (9th Cir. 1970).

26. CAL. GOV'T CODE § 65008 (West Supp. 1976).

27. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

28. See discussion in Marks and Taber, *Prospects for Regional Planning in California*, 4 PAC. L.J. 117, 121-43 (1973).

29. *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

30. *Ybarra v. City and Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974).

Ninth Circuit federal appellate case. In *Girsh*, the court invalidated the township's zoning because it contained no apartment zone and there was no provision for apartments in the zoning of any community nearby despite a regional need for apartments. In *Ybarra*, the court held that in order for discrimination based on wealth to be ruled unconstitutional, it was necessary to show that the benefit could not be obtained elsewhere. The court found that neighboring cities contained sites on which low and moderate-income housing could be built, thereby finding no wealth discrimination. Governmental action, rather than judicial intervention, appears to be the most sound recourse in resolving the problem of discriminatory zoning.

In attempting to resolve this dilemma, both the Association of Bay Area Governments and the Southern California Association of Governments are developing housing allocation plans which contain formulae for determining the fair share of low and moderate-income housing which is to be provided in each city and county within the respective regions. ABAG's preliminary draft allocation plan contained such factors as housing need, fiscal capacity, environmental quality, and access to employment. The final plan will be based on a study of future employment trends in the region, which ABAG is now conducting. When the allocation plan is completed, ABAG will use it in reviewing and commenting on applications for community development grants.

The Southern California Association of Governments has developed a housing allocation plan which is more useful than that proposed by ABAG because it specifies the number of housing units for each of eight income classifications required in each city and county. Based on employment and housing availability, it can be helpful in litigation. For example, the City of Irvine planned a large industrial area and was sued by the Orange County Fair Housing Committee because it did not provide adequate housing for low and moderate-income people who would seek jobs in the industrial facilities. The case is now being settled out of court and SCAG's housing allocation plan is being used as a guideline for determining the proper amount of housing the city must provide.

A major problem is that although there are several bases in law for challenging the exclusionary zoning practices of local governments, it is extremely difficult, at least in the federal courts, to obtain standing to sue. In the 1975 case of *Warth v. Seldin*,³¹ a group of low-income persons in a central city, joined by a homebuilders' association, sued a suburban city to challenge its exclu-

31. *Warth v. Seldin*, 422 U.S. 490 (1975).

sionary zoning practices. The low-income persons claimed that they had searched for housing in the community for several years but had been unable to obtain any. They also alleged that two housing projects which would have provided housing they could afford had been refused by the city. The United States Supreme Court held that these facts were not sufficient to satisfy standing requirements. The court said:

Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.³²

Stating it another way, the court said that the plaintiff must "allege specific, concrete facts demonstrating that the challenged practices harm *him* and that he personally would benefit in a tangible way from the court's intervention."³³ This substantially eliminates low-income people as plaintiffs unless they happen to have an interest in land in the community or some other tangible interest.

The court then turned to the homebuilders' association. The association contended that its members were being harmed by not being able to build low and moderate-income housing in the community. The court rejected the association's claim of standing, contending that it could not represent its members, since they were not substantially equally affected by the alleged act. The court concluded:

Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.³⁴

It appears that the court is saying that one does not have standing to sue unless he has an interest in land in the community and has been denied a building permit because of alleged unlawful exclusionary regulations.

Seemingly, this favors the builder who has applied for a permit but has been refused. He, however, is denied standing by the recent Ninth Circuit Court of Appeal's decision in *Construction*

32. *Id.* at 504.

33. *Id.* at 508.

34. *Id.* at 516.

Industry Association v. City of Petaluma,³⁵ in which the court held that a builder could not assert the right to travel of prospective residents of his project. The only time standing will be granted to assert the rights of third persons is when Congress specifically grants it, when a criminal statute is involved, and where the challenged law adversely affects a special ongoing relationship between the plaintiff and the third persons (the buyer-seller relationship not being sufficient).

IV. FINANCING

Even with land and motivation, nothing will be constructed unless it is financially feasible to do so and money is available. This section will not discuss the financial aspects in detail, but will mention some mechanisms which are available and problem areas which must be addressed.

First, there is a major problem in the area of state codes. Building codes are often established to require more expensive materials or labor than required in the uniform codes. This increases the cost of construction unnecessarily and causes a multiplicity of differences between codes from jurisdiction to jurisdiction, making it difficult and expensive for developers to operate. Although legislation was passed in 1970 requiring all local agencies to adopt standards equal to those in the uniform codes, a loophole exists which allows local agencies to make modifications based on a finding of special circumstances.

The Housing and Community Development Act of 1974³⁶ provides for rent assistance agreements to be entered into between owners of rental property and the Secretary of HUD, whereby the owner agrees to make a unit available for low-income people for up to 20 years (40 years if the financing is public) and the federal government agrees to subsidize the difference between that which the tenant can afford to pay and the fair rental value of the property.³⁷

In order to provide low-interest loans for low and moderate-income housing and to utilize the 40 year provision of the Housing & Community Development Act, the state enacted the Zenovich-Moscone-Chacon Housing & Home Finance Act,³⁸ which authorizes a state housing finance agency to issue revenue bonds and make loans to persons, associations, or local governments to construct housing, which must be balanced between low-income, market rate,

35. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3467 (U.S. Feb. 24, 1976).

36. 42 U.S.C.A. § 5301(c) (6) (West Supp. 1976).

37. 42 U.S.C.A. § 1437 (West Supp. 1976).

38. CAL. HEALTH & SAFETY CODE §§ 41000 *et seq.* (West Supp. 1976).

and elderly persons. Local governments may be designated as local housing agents, thereby allowing them to screen applications for loans within their respective jurisdictions. In order to be certified, the local government must adopt a housing element of its general plan which is consistent with any housing assistance plan submitted to the federal government and which "makes adequate provision for all economic and racial segments of the community in new and rehabilitated housing throughout its jurisdiction."³⁹ The local agency must also adopt a procedure to expedite processing of zoning changes, permits, and other approvals or clearances required. Certification as a local housing agent is reviewed once a year by the Department of Housing and Community Development and recertification may not be granted if the agent does not meet the aforementioned criteria.

It appears that the legislature intended for this section, by the distinction between "community" and "jurisdiction" in Section 41512, to require the local agency to take into account the housing needs of racial and economic segments outside of its jurisdiction and to provide housing for these people within its jurisdiction when it is needed. It is in this area of certification that the Housing Finance Agency can be most influential in promoting integrated communities. It would be natural for the Agency to concentrate its lending in areas where the local governments are most cooperative—those with a high concentration of poor minorities—not concerning themselves with those communities that engage in exclusionary practices, since not enough money exists to fund all proposed projects. However, such a policy would result in further inequalities in housing distribution and would violate the intent of the law.⁴⁰

V. CONCLUSION

The problem of racial and socio-economic segregation in housing has grown more severe over recent years and action is necessary to reverse this alarming trend. Although existing law is insufficient to totally obviate these housing ills, the authority exists which can generate a major impact and begin to create integrated and healthy residential communities.

39. *Id.* § 41512(b) (2).

40. *Id.* § 41006.