There's Something Happening Here: Affordable Housing as a Nonstarter in the U.S. Supreme Court

Michael Allan Wolf
Richard E. Nelson Eminent Scholar Chair in Local Government
University of Florida Levin College of Law

18th Annual Alfred B. DelBello Land Use and Sustainable Development Conference: Building the Infrastructure for our Sustainable FuturePace Law School
December 5, 2019

UF Levin College of Law
Environmental and Land Use Law Program
UNIVERSITY of FLORIDA

UNFORTUNATE FIVE CASE #1:

James v. Valtierra, 402 U.S. 137 (1971) (ballot box zoning, equal protection)

"The present suits were brought by citizens of San Jose, California, and San Mateo County, localities where housing authorities could not apply for federal funds because low-cost housing proposals had been defeated in referendums."

"The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.'"

UNFORTUNATE FIVE CASE #2:

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

"Petitioners, various organizations and individuals resident in the Rochester, N.Y., metropolitan area, brought this action . . . against the town of Penfield, an incorporated municipality adjacent to Rochester, and against members of Penfield's Zoning, Planning, and Town Boards. Petitioners claimed that the town's zoning ordinance, by its terms and as enforced by the defendant board members, respondents here, effectively excluded persons of low and moderate income from living in the town, in contravention of petitioners' First, Ninth, and Fourteenth Amendment rights and in violation of 42 U.S.C. §§ 1981, 1982, and 1983."

"[A] plaintiff who seeks to challenge exclusionary zoning practices 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. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied.'"

UNFORTUNATE FIVE CASE #3:

City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976)(ballot box zoning)

"In May 1971, respondent applied to the City Planning Commission for a zoning change to permit construction of a multifamily, high-rise apartment building. The Planning Commission recommended the proposed change to the City Council, which under Eastlake's procedures could either accept or reject the Planning Commission's recommendation. Meanwhile, by popular vote, the voters of Eastlake amended the city charter to require that any changes in land use agreed to by the Council be approved by a 55% vote in a referendum."

"The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See, e.g., The Federalist, No. 39 (J. Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."

UNFORTUNATE FIVE CASE #4:

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (equal protection)

"In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois. They alleged that the denial was racially discriminatory and that it violated, inter alia, the Fourteenth Amendment and the Fair Housing Act of 1968."

"[T]he evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance."

UNFORTUNATE FIVE CASE #5:

Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003)(ballot box zoning, equal protection, due process)

"In 1995, the city of Cuyahoga Falls, Ohio (hereinafter City), submitted to voters a facially neutral referendum petition that called for the repeal of a municipal housing ordinance authorizing construction of a low-income housing complex. The United States Court of Appeals for the Sixth Circuit found genuine issues of material fact with regard to whether the City violated the Equal Protection Clause, the Due Process Clause, and the Fair Housing Act, by placing the petition on the ballot."

"[T]o establish discriminatory intent, respondents and the Sixth Circuit both rely heavily on evidence of allegedly discriminatory voter sentiment. But statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant to equal protection analysis, do not, in and of themselves, constitute state action for the purposes of the Fourteenth Amendment."

DEVELOPERS WHO ARE FAVORED BY PRIVATE PROPERTY RIGHTS CONSERVATIVES (A SELECTION)

- *Kaiser Aetna v. United States,* 444 U.S. 164 (1979) (landowner dredged a channel from Kuapa Pond to Manalua Bay and to the Pacific Ocean to service the "marina-style community of approximately 22,000 persons [that] surrounded Kuapa Pond)"

- *Lucas v. S.C. Coastal Council*, 505 U.S. 1003(1992) (developer who purchased two unsold beachfront lots for $975,000).

- *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) (developer who owned a 37.6-acre ocean-front parcel).

THE "OBVIOUS" EXPLANATIONS

- *Racial Bias*
- *Class Bias*

But where's the evidence?

THE SUBTLE EXPLANATION

- *Unintentional (implicit) race and class bias*
- *Justices' desire to protect the private property rights of neighbors and community members who fear the negative effects of affordable housing developments on their own real property values*

ANECTODAL EVIDENCE

Arlington Heights: “Many of the opponents [of the rezoning] . . . focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites.”

Cuyahoga Falls: “Some of the citizens expressed concern about the impact that the project would have on their neighborhood." The mayor "noted that 'people who spent a lot of money on their condominiums simply don't want people moving in their neighborhood that are going to be renting for $371.'"

EMPIRICAL EVIDENCE

"[T]he vast majority of studies have found that affordable housing does not depress neighboring property values, and may even raise them in some cases. Overall, the research suggests that neighbors should have little to fear from the type of attractive and modestly sized developments that constitute the bulk of newly produced affordable housing today. That said, the research shows that negative effects can occur in certain circumstances, and suggests ways to protect nearby property values."

Center for Housing Policy, *"Don't Put it Here!" Does Affordable Housing Cause Nearby Property Values to Decline?, pages* 1-2 (Insights from Housing Policy Research, 2009).

EMPIRICAL EVIDENCE

"Using a difference-in-difference hedonic regression approach, this study finds that almost all the LIHTC [low-income housing tax credit] projects examined have generated significantly positive impacts on nearby property value.“

Lan Deng, “The External Neighborhood Effects of Low-Income Housing Tax Credit Projects Built by Three Sectors,” 33 *Journal of Urban Affairs*, May, 2011, at 143-66.

EMPIRICAL EVIDENCE

"*In the end, we find no evidence that the opening of ELH* [Ethel Lawrence Homes] *caused an increase in crime rates, a decline in property values, or an increase in property taxes in Mount Laurel after the project opened in late 2000.*"

Len Albright et al., "Do Affordable Housing Projects Harm Suburban Communities? Crime, Property Values, and Taxes in Mount Laurel, NJ," *City* Community, June, 2013, pages *89-112*.

EMPIRICAL EVIDENCE

"[I]nstances in which affordable housing appears to have no effect occur when (1) affordable housing is sited in healthy and vibrant neighborhoods, (2) the structure of the affordable housing does not change the quality or character of the neighborhood, (3) the management of affordable housing is responsive to problems and concerns, and (4) affordable housing is dispersed. Furthermore, the evidence reveals that rehabilitated housing always has beneficial outcomes for neighboring property values."

Mai Thi Nguyen, "Does Affordable Housing Detrimentally Affect Housing Values? A Review of the Literature," 20 *Journal of Planning Literature*, pages 15-26 (2005).

EMPIRICAL EVIDENCE

"[I]nstances in which affordable housing appears to have no effect occur when (1) affordable housing is sited in healthy and vibrant neighborhoods, (2) the structure of the affordable housing does not change the quality or character of the neighborhood, (3) the management of affordable housing is responsive to problems and concerns, and (4) affordable housing is dispersed. Furthermore, the evidence reveals that rehabilitated housing always has beneficial outcomes for neighboring property values."

Mai Thi Nguyen, "Does Affordable Housing Detrimentally Affect Housing Values? A Review of the Literature," 20 *Journal of Planning Literature*, pages 15-26 (2005).

THE GOAL: JUDICIAL RECOGNITION OF "IRRATIONAL PREJUDICE"

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985): "[T]he [City] Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, *whether by referendum or otherwise*, could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic."