IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE TEXAS STATE CONFERENCE OF NAACP BRANCHES AND AUSTIN BRANCH OF THE NAACP	§	
HOME BUILDERS ASSOCIATION OF GREATER AUSTIN, INC. and	§	Civil No. A05CA979LY
NATIONAL ASSOCIATION OF HOME BUILDERS, INC., Plaintiffs,	§	
v.	§	
CITY OF KYLE, TEXAS Defendant,	§	

TRIAL BRIEF OF AMICI CURIAE
ON DISPARATE IMPACT CLAIMS

Amici Curiae, City of Manor, Texas, City of Round Rock, Texas, City of Pflugerville, Texas, and City of Jonestown, Texas (the "Amicus Cities"), respectfully submit this Trial Brief on Disparate Impact Claims, and would show as follows:

PURPOSE OF THIS BRIEF:

Amicus Cities submit this Trial Brief on Disparate Impact Claims to serve as a guide to the questions and legal issues relevant to the Court's determination of Plaintiffs' Fair Housing Act ("FHA") disparate impact claim.[1] The questions to be addressed are listed in order of their logical progression according to Plaintiffs' pleadings and the governing law. As we would see in a typical jury charge, each question requires a "yes" answer before the Court proceeds to the

[1] While Amicus Cities support the City of Kyle in its defense against Plaintiffs' FHA Retaliation claim, this Brief does not address that claim or the additional issues relevant to it.

next. Further, as a reference, Amicus Cities provide a one-page flowchart of the questions, attached as Exhibit "A."

Amicus Cities believe Plaintiffs will be unable to carry their burden to establish their prima facie case under any of the requisite elements. Amicus Cities further believe that, if Plaintiffs do establish their prima facie case, the City of Kyle ("Kyle") will carry its burden in showing the propriety of its decision to enact the Revised Ordinances. This brief, however, does not address any of the relevant issues in detail. Rather, after the evidence has been presented, Amicus Cities will submit a revised Brief outlining the evidentiary basis for why the questions presented below should be answered as Amicus Cities urge.

A. PLAINTIFFS' PRIMA FACIE CASE

In an FHA discrimination claim, Plaintiffs must first prove a prima facie case of discrimination by a preponderance of evidence. *Omni Behavioral Health v. Miller*, 285 F.3d 646, 655-56 (8th Cir. 2002). The first four questions in this brief relate to Plaintiffs' prima facie disparate impact case and should be considered in light of Plaintiffs' burden of proof.

Question 1: ***Did Kyle take a facially-neutral action that caused an increase in the cost of dwellings?***

A disparate impact claim is based upon effect rather than intent; thus, such a claim necessarily arises from a facially-neutral action. Based upon the pleadings in this case, no party contends that Kyle's enactment of the Revised Ordinances was *not* facially-neutral.

The FHA makes it unlawful to make unavailable or deny a ***"dwelling"*** to a person because of race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604(a). A "dwelling" is "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure,

or portion thereof." 42 U.S.C. § 3602(b). Plaintiffs have not pleaded that Kyle denied or made unavailable any *existing* building or structure; thus, only the vacant-land portion of this definition is applicable here. Further, the only effect of the allegedly discriminatory ordinances is the purported increase in cost of a new, detached, single-family house in Kyle, and thus, this Question is tailored to that allegation.

Authority for Question 1:

- "A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group. " *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988); *accord Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574-75 (2d Cir. 2003).

- To make a prima facie case under the FHA on a disparate impact theory, a plaintiff must demonstrate that an outwardly neutral practice actually or predictably has a discriminatory effect. *Fair Housing in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 366 (2d Cir. 2003).

Question 2: ***Did the increase in the cost of dwellings attributable to the Kyle's action make dwellings unavailable?***

The Court should reach this Question only if it answers Question 1 "yes." For a discussion of "dwellings" and related authority, see Issue 1, above. As analyzed by the applicable case law and consistent with the meaning of the term, the issue of availability (and therefore, unavailability) is one that is defined by supply and demand.

Authority for Question 2:

- "The [Fair Housing] Act has been interpreted to prohibit municipalities from using their zoning powers in a discriminatory manner, that is in a manner which excludes housing for a group of people on the basis of one of the enumerated classifications." *Dews v. The Town of Sunnyvale*, 109 F. Supp. 2d 526, 530 (N.D. Tex. 2000)(internal citations omitted).

- "In order to prevail on a claim under the FHA, a plaintiff must demonstrate 'unequal treatment on the basis of race that affects the *availability* of housing.'" *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1283 (11th Cir.

2006)(citing *Jackson v. Okaloosa County*, 21 F.3d 1531, 1542 (11th Cir. 1994))(emphasis added).

- A disparate impact is demonstrated by statistics and the appropriate inquiry is into the impact on the total group to which a policy or decision applies. *Hallmark*, 466 F.3d at 1286.

- "[T]he availability of housing within the relevant price ranges is relevant to the accuracy of . . . statistics. If there is a glut in the market of homes in Hallmark's projected price range, the lack of the Hallmark's particular development is not likely to have an impact on *anyone*, let alone adversely affect one group disproportionately. As explained above, adverse impact is consistently found when there is a housing shortage." *Hallmark*, 466 F.3d at 1287 (emphasis in original).

- "However, there is no federally protected right *to housing in a particular community*, an allegation which lies at the essence of plaintiff's action.... Plaintiffs are not prevented from obtaining all housing in the . . . community as a result of [the decision not to re-zone]." *Hallmark*, 466 F.3d at 1288 (emphasis in original).

- " [P]laintiff must show a causal connection between the facially neutral policy and the alleged discriminatory effect. " *Tsombanidis*, 352 F.3d at 575.

Question 3(a): ***Did the unavailability of dwellings actually or predictably have a disparate adverse impact on a minority group?***[2]

If the Court answers "yes" to Question 2, it may consider Question 3(a), Question 3(b), or both. To establish that the Revised Ordinances had a significantly disparate adverse impact on minorities, Plaintiffs must prove they actually or predictably result in discrimination. Plaintiffs will not meet this burden if they merely raise an inference of discriminatory impact. Nor will it be sufficient for them to show only that (1) a regulation would increase housing costs and (2) members of a protected group tend to be less wealthy than others. Rather, they must furnish the Court evidence that permits it to compare who could afford dwellings in Kyle before the Revised Ordinances' enactment with who could afford dwellings in Kyle thereafter. Accordingly,

[2] Question 3 is a two-part question. That is, Plaintiffs can meet their burden of establishing a prima facie case by a "Yes" answer to Question 3(a), followed by a "Yes" answer to Question 4, or by a "Yes" answer to Question 3(b), discussed *post*.

Plaintiffs must present evidence that accurately indicates the before-and-after costs of dwellings and the percentages of protected and non-protected persons who will be priced out of the market as a result of the increase.

Authority for Question 3(a):

- "Under disparate impact analysis . . . a prima facie case is established by showing that the challenged practice . . . 'actually or predictably results in racial discrimination . . . .'" *Huntington*, 844 F.2d at 934 (citing *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974); accord *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902 (8th Cir. 2005); *Tsombanidis*, 352 F.3d at 575; *Fair Housing in Huntington*, 316 F.3d at 366; *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81,at 90 (2d Cir. 2000).

- "A plaintiff has not met its burden if it merely raises an inference of discriminatory impact." *Tsombanidis*, 352 F.3d at 575.

- "It is not enough . . . to show that (1) a regulation would increase housing costs and (2) members of a protected group tend to be less wealthy than others. It is essential to be able to compare who could afford the housing before the new regulations with who could afford it afterwards . . . Accordingly, the [Plaintiffs] must provide evidence indicating before-and-after costs of dwellings and the percentages of protected and nonprotected persons who will be priced out of the market as a result of the increase." *Reinhart v. Lincoln County*, 482 F.3d 1225, 1230-31 (10th Cir. 2007).

- "The difficulty, however, is that the group 'affected by the disputed decision' is inherently speculative. Whether a person who currently owns a home or rents an apartment within the price ranges proposed by Hallmark for its development would purchase or rent one of Hallmark's homes is speculative. This renders [the expert's] estimation of the impact on minorities suspect. There is no evidence that the statistics based on this general population of home owners and renters bears 'a proven relationship to the actual applicant flow.'" *Hallmark*, 466 F.3d at 1286.

- A statistical analysis must involve the appropriate comparables, and in the majority of cases "the appropriate comparables must focus on the local housing market and local family statistics." *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. and Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995).

<u>Question 3(b)</u>: ***Did the unavailability of dwellings harm the community by perpetuating segregation?***

Again, if the Court answers "yes" to Question 2, it may consider Question 3(a), Question 3(b), or both. It logically follows that, to show that it is more likely than not that an unavailability of dwellings perpetuates segregation in Kyle, Plaintiffs must first establish the predicate fact that there historically exists in Kyle segregation that can be perpetuated.

<u>Authority for Question 3(b)</u>:

- "If [an action] perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

- "What was present in Black Jack and Kennedy Park was a strong argument supporting racially discriminatory impact in the second sense. In each case the municipality or section of the municipality in which the proposed project was to be built was overwhelmingly white. Moreover, in each case construction of low-cost housing was effectively precluded throughout the municipality or section of the municipality which was rigidly segregated. Thus, the effect of the municipal action in both cases was to foreclose the possiblity of ending racial segregation in housing within those municipalities." *Metropolitan Housing*, 558 F.2d at 1291.

<u>Question 4</u>: ***Was the adverse impact of 3(a) significantly disparate as compared to the adverse impact on non-minorities?***

The Court should address this Question only if it answers Question 3(a) "yes." Proving a disparate impact is not tantamount to proving an FHA violation. Rather, Plaintiffs must prove that the disparate adverse impact was *significant*.

<u>Authority for Question 4</u>:

- "To establish a prima facie case of disparate impact discrimination, plaintiffs must show that a specific policy caused a significant disparate effect on a protected group." *Mountain Side*, 56 F.3d at 1251; accord *Reinhart*, 482 F.3d at 1229.

- "[W]e refuse to conclude that every action which produces discriminatory effects is illegal. Such a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases." *Metropolitan Housing*, 558 F.2d at 1290.

- "The relevant question in a discriminatory effects claim against a private defendant, however, is not whether a single act or decision by that defendant has a significantly greater impact on members of a protected class, but instead the question is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of protected class." *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996).

B. BURDEN SHIFTS TO DEFENDANT

Question 5: ***Did Kyle's action further a legitimate governmental interest?***

Only if Plaintiffs prove their prima facie case would the burden shift to Kyle to prove that its Revised Ordinances further in theory and in practice a legitimate, bona fide governmental interest. Kyle's interest is not legitimate and bona fide if it is pretextual – that is, if it is not based on valid, non-discriminatory considerations. Plaintiffs may prevail on their disparate impact claim only if the Court finds that Kyle has *not* so proved. If, however, the Court finds Kyle *has* so proved, the Court should move on to Question 6.

Authority for Question 5:

- ". . . [W]hen a defendant can present valid non-pretextual reasons for the challenged practices, the courts should not be overzealous to find discrimination. Mountain Side presented two legitimate, non-pretextual reasons for its occupancy limit: (1) sewer systems limitations, and (2) concern over the quality of park life. These overcame plaintiffs' prima facie case . . . ." *Mountain Side*, 56 F.3d at 1253.

- Zoning legislation is entitled to deference and respect. *Doe v. The City of Butler*, 892 F.2d 315, 318 (3d Cir. 1989).

- ". . . [T]he Housing Authority must demonstrate that the proposed action has a 'manifest relationship' to the legitimate, non-discriminatory policy objectives and 'is justifiable on the ground it is necessary to' the attainment of these objectives. *Darst-Webbe*, 417 F.3d at 903 (citing *Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003)).

- ". . . [I]f the defendant is a governmental body acting within the ambit of legitimately derived authority, we will less readily find that its action violates the Fair Housing Act. In this case the Village was acting within the scope of the authority to zone granted it by Illinois Law. Moreover, municipalities are traditionally afforded wide discretion in zoning." *Metropolitan Housing*, 558 F.2d at 1293 (internal citations omitted).

C. BURDEN SHIFTS BACK TO PLAINTIFFS

Question 6: ***Could Kyle adopt an alternative course of action that would both serve its legitimate governmental interest and have a less discriminatory impact?***

If Kyle shows the Revised Ordinances further a legitimate governmental interest, it has overcome any presumption of discrimination that Plaintiffs have established by their prima facie case. The burden then shifts to Plaintiffs to show there is an alternative course of action that would both serve Kyle's legitimate governmental interests and have a less discriminatory impact.[3]

Authority for Question 6:

- ". . . [T]he burden shifts back to the plaintiffs to show that a viable alternative means is available to achieve those legitimate policy objectives without discriminatory effects." *Darst-Webbe*, 417 F.3d at 903.

---

[3] Amicus Cities note that there is a split in authority as to whether the burden for Question 6 shifts back to Plaintiffs or remains with Defendant as part of its rebuttal burden. (Kyle has previously addressed this split in authority in summary judgment papers.) Keeping the burden with Defendant on this issue would require it to prove a negative ("there is *no* alternative course of action that would enable the legitimate governmental interest and have a less discriminatory impact"), and proving a negative is essentially a logical and practical impossibility. Amicus Cities thus believe that the *Mountain Side* line of cases (discussed in "Authority for Question 6")—which hold that the burden shifts back to Plaintiffs—is the better view. For a discussion of the logical impossibility of proving a negative, see *Metropolitan Housing,* 558 F.2d at 1295 n16 ("The concurrence argues that plaintiffs ought to bear the burden on this issue. Allocating the burden in this fashion, however, would compel plaintiffs to attempt the almost impossible task of proving a negative. It is far easier for defendant to show that a single parcel of land which is suitable does exist than for plaintiffs to show that no suitable land exists").

- ". . . It is not sufficient for the plaintiffs merely to prove the viability of an alternative housing plan or housing mix. Rather, the plaintiffs must offer a viable alternative that satisfies the Housing Authority's legitimate policy objectives *while reducing the revitalization plan's discriminatory impact*." *Darst-Webbe*, 417 F.3d at 906 (emphasis in original).

- "'Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its [housing] practices are based on legitimate business reasons, the plaintiff must show that other [policies], without a similarly undesirable ... effect, would also serve the [defendant's] legitimate interest.'" *Mountain Side*, 56 F.3d at 1254 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975))).

CONCLUSION AND PRAYER

Amicus Cities respectfully ask the Court to consider the Questions and legal issues delineated above at trial and to grant such relief as is appropriate.

Respectfully submitted,

LLOYD GOSSELINK BLEVINS ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, TX 78701
(512) 322-5800 - Telephone
(512) 472-0532 - Telecopier

By:
JAMES CHRISMAN PHILLIPS
State Bar No. 15930500
JOSE E. DE LA FUENTE
State Bar No. 00793605

ATTORNEYS FOR AMICI CURIAE CITY OF MANOR, TEXAS, CITY OF ROUND ROCK, TEXAS, CITY OF PFLUGERVILLE, TEXAS, AND CITY OF JONESTOWN, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2008, a complete and correct copy of the foregoing Trial Brief of Amici Curiae on Disparate Impact Claims was filed electronically with the United States District Court for the Western District of Texas, Austin Division, with notice of case activity to be generated and sent electronically by the Clerk of the Court with ECF notice being sent to the following counsel of record:

Michael Klein
Craig M. Douglas
Smith, Robertson, Elliott,
Glen, Klein & Bell, L.L.P.
221 West 6th Street, Suite 1100
Austin, Texas 78701

Duane J. Desiderio
Mary Lynn Pickel
National Association of Home Builders
1201 15th Street, NW
Washington, DC 20005

Robert Notzon
509 West 16th Street
Austin, Texas 78701

Anson Asaka
Angela Ciccolo
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland 21215-3297

William M. McKamie
J. Frank Onion, III
Bradford E. Bullock
Law Offices of William M. McKamie
13750 San Pedro, Suite 640
San Antonio, Texas 78232

Jose E. de la Fuente