
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE INCLUSIVE COMMUNITIES PROJECT, INCORPORATED,
Plaintiff-Appellee,

v.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS;
MICHAEL GERBER; LESLIE BINGHAM-ESCARENO; TOMAS CARDENAS;
C KENT CONINE; DIONICIO VIDAL FLORES, Sonny; JUAN SANCHEZ
MUNOZ; GLORIA L. RAY, In Their Official Capacities,
Defendants-Appellants,

FRAZIER REVITALIZATION, INCORPORATED,
Intervenor-Appellant.

On Appeal from the United States District Court
Northern District of Texas, Dallas Division

**BRIEF OF THE NATIONAL ASSOCIATION OF HOME
BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL**

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June 19, 2013

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- The Inclusive Communities Project, Inc., Plaintiff-Appellee
- Michael M. Daniel and Laura Beth Beshara of Daniel & Beshara, P.C., counsel for Plaintiff-Appellee
- Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C. Ken Conine, Dionicio Vidal (Sonny) Flores, Juan Sanchez Munoz and Gloria L. Ray, Defendants-Appellants
- Timothy Irvine, J. Paul Oxer, Tom H. Gann, Lowell A. Keig, J. Mark McWatters, Defendants-Appellants to be substituted
- Beth Klusmann and James “Beau” Eccles of the Office of the Texas Attorney General, counsel for Defendants-Appellants
- G. Tomas Rhodus, William B. Chaney, David Cameron Gair, James D. MacIntyre and Michael C. Kelsheimer of Looper, Reed & McGraw, P.C.,

and Shelley N. Dahlberg and Timothy Earl Bray of the Office of the Texas Attorney General, former counsel for Defendants-Appellants

- Frazier Revitalization, Inc., Intervenor-Appellant
- Brent M. Rosenthal of the Law Office of Brent M. Rosenthal, P.C., counsel for Intervenor-Appellant

s/ Michael Klein

Michael Klein

Lead Counsel for Amicus Curiae

National Association of Home Builders

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INTEREST OF *AMICUS*

The National Association of Home Builders (NAHB) submits this *amicus curiae* brief, not necessarily in support of any party to the appeal.¹ NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 140,000 members are home builders or remodelers, and approximately four percent of NAHB's builder members list their primary business as land development. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

Many of NAHB's members are represented by the NAHB Multifamily Council and build multifamily housing that qualifies for the LIHTC. Therefore, the NAHB is concerned with any decision that impacts the availability of the LIHTC.

¹ Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* certify that no counsel for any party authored this brief in whole or in part, and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission.

QUESTION PRESENTED

Should the distribution and allocation of Low-Income Housing Tax Credits be subject to a disparate impact analysis under the Fair Housing Act?

STATEMENT OF THE CASE

Amicus NAHB adopts both Defendant-Appellant's Statement of the Case set forth in its Brief filed in the U.S Court of Appeals for the Fifth Circuit on April 22, 2013 and Intervenor-Appellant's Statement of the Case set forth in its Brief filed in the U.S Court of Appeals for the Fifth Circuit on April 29, 2013.

SUMMARY OF ARGUMENT

This Court should not apply a disparate impact analysis to the distribution of housing financed by allocations of Low-Income Housing Tax Credits. Such an analysis will constrain and diminish the distribution of Low-Income Housing Tax Credits to low-income communities. In turn, those low-income communities will be deprived of the substantial economic benefits that flow from the construction and operation of low-income housing.

ARGUMENT

I. THE SCANT LEGISLATIVE HISTORY DOES NOT SUPPORT THE CONSTRUCTION OF THE LOW INCOME HOUSING TAX CREDIT

By affirming this appeal, this Court would be elevating the Congressional objectives of the FHA over the Congressional objectives of the LIHTC. This would be problematic for several reasons. First, no party to this appeal has cited

any legislative history to indicate that Congress intended for the LIHTC to be limited by a disparate impact analysis under the FHA. Although the legislative history of the LIHTC is scant, the purpose of the LIHTC—as its name suggests—seems quite simply to be to increase the construction and rehabilitation of low-income housing. By constraining the LIHTC through a disparate income analysis under the FHA, this Court would be thwarting the relatively straightforward objectives of the LIHTC.

The limited legislative history that is available supports this conclusion. Tax preferences that existed prior to the 1986 low-income housing tax credit had numerous shortcomings. A major problem with the prior preferences was that the subsidies were not limited to the number of affordable units serving low-income persons. Thus, developers were not incentivized to create more than the minimum number of affordable units.² Furthermore, the previous tax subsidies were not “targeted to persons of truly low income.”³ In fact, persons who earned 80% of the median income were allowed to occupy units reserved for low and moderate-income tenants.⁴ Finally, the rents that could be charged were not limited.

² *Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986*, JCS-10-87, 152-53, May 1987.

³ *Id.* at 153.

⁴ *Id.*

Therefore, there was a concern that low-income tenants were paying high rents when compared to their disposable income.⁵

To address these concerns, Congress developed the LIHTC. “The credit was designed to direct tax incentives more efficiently to low-income individuals by linking the incentive to the number of low-income individuals served and requiring that individuals with incomes lower than previously required be served.”⁶ In contrast, while a laudable societal goal, Amicus has not found any evidence that Congress’s intent in creating the LIHTC was to ensure that lower-income persons had housing available in higher-income neighborhoods. In fact, the language of the act points to the opposite conclusion by preferring projects that serve the lowest-income tenants for the longest periods of time, and are located in qualified census tracts.⁷ In addition, the act not only provides a tax credit for new construction, but also for rehabilitation.⁸ Rehabilitation projects generally are not found in higher-income areas. This again illustrates that when Congress developed the LIHTC, its purpose was not to ensure lower-income tenants would live in high-income areas, but that lower-income areas would benefit from improved housing.

⁵ Andrew Blatter; Elena Mary-Nelson, *An Overview of the Low Income Housing Tax Credit*, 17 U. Balt. L. Rev. 253, 255 (Winter 1988).

⁶ *Joint Committee on Taxation, Provisions Affecting Low-Income Rental Housing*, JCS-2-88, 13 (March 1988).

⁷ 26 U.S.C. § 42(m)(1)(B).

⁸ 26 U.S.C. § 42(e).

II. THE LOW INCOME HOUSING TAX CREDIT PROVIDES SUBSTANTIAL ECONOMIC BENEFITS TO LOW-INCOME COMMUNITIES

The potential constraint of the LIHTC is not simply a philosophical exercise. Constraining the LIHTC will have a quantifiable economic effect on the low-income communities that will be deprived of such projects. To quantify this economic effect, the NAHB has developed a model to estimate the economic benefits flowing from the construction of housing under the LIHTC, which is attached as an appendix.⁹ While the model can be applied to any project, the attached economic calculation is based upon an actual project, the Cliff Creek Crossing, that was proposed to be constructed in Dallas County, Texas. Cliff Creek Crossing was to consist of 252 family tax credit apartments. Also in the appendix is the Background and a Brief Description of the Model Used to Estimate the Economic Benefits.¹⁰ The model breaks down the economic benefits into three phases: (1) Construction; (2) the Construction Ripple; and (3) the Ongoing Impacts.¹¹ For the Cliff Creek Crossing, the total one-year impact of the first two phases is as follows: Local Income, \$18,688,000; Local Business Owners' Income, \$5,474,200; Local Wages and Salaries, \$13,213,400; Local Taxes, \$1,655,700; and Local Jobs Supported, 223.¹² Thus, the total first-year impact is a

⁹ See Appendix A.

¹⁰ See Appendix A at p. 10.

¹¹ *Id.*

¹² See Appendix A at p. 5.

whopping \$39,031,300. This constitutes quite a substantial economic injection into a low-income community from just a single project.

III. THERE IS NO EVIDENCE THAT LOW INCOME HOUSING TAX CREDIT PROJECTS WILL BE BUILT IN HIGH-INCOME AREAS

None of the briefs filed in this case contain any evidence that if LIHTC projects are not built in low-income/high-minority areas, that those projects instead will be built in high-income/low-minority areas. Without such evidence, there is no factual basis for this Court to assume that the volume of LIHTC construction will remain the same if LIHTC projects are geographically redistributed because of a disparate impact analysis. To the contrary, one author, in quoting a Brookings study, posited that location of LIHTC units in high-minority areas may be due to a perception of greater need in central cities, NIMBY-ism, and exclusionary zoning in the suburbs.¹³ In other words, there is every reason to believe that the volume of LIHTC projects might decline if a disparate impact analysis reduces the number built in high-minority areas by unsuccessfully attempting to “re-locate” them to low-minority/high-income areas. If so, there will be a consequent reduction of economic injection into low-minority communities as shown by the NAHB model, above. This likely would have the unintended consequence of actually harming low-income/high-minority areas, as certain commentators have noted that LIHTC

¹³ J. William Callison, *Achieving our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. Cal. Rev. L. & Soc. Just. 213, 247 (2010).

projects likely improve distressed neighborhoods and make them more attractive to higher-income individuals and families.¹⁴

IV. THIS COURT SHOULD RESERVE JUDGMENT PENDING THE SUPREME COURT'S OPINION IN *TOWNSHIP OF MOUNT HOLLY, NEW JERSEY*

The U.S. Supreme Court just recently granted certiorari to decide whether the FHA supports a disparate impact cause of action.¹⁵ If this Court were to decide the present case under a disparate impact analysis and the Supreme Court were later to rule that the FHA does not support a disparate impact analysis, there would be total chaos as to the effect of this Court's holding on the TDHCA's allocation of LIHTCs. Until the Supreme Court rules, this Court should not apply a disparate impact analysis to this matter.

CONCLUSION

There is no legislative history to support application of the disparate impact analysis to the LIHTC. In fact, the available legislative history argues against such application. Further, this Court should not elevate the purposes of the FHA over those of the LIHTC, thereby depriving low-income communities of the substantial economic benefits flowing from the construction of such housing. Therefore, the Court should reject the application of the disparate impact analysis to the LIHTC.

¹⁴ *Id.* at 248 and fn. 116.

¹⁵ *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011, cert. granted in part by, *Township of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 2013 WL 2922132, 80 USLW 3711, 81 USLW 3032 (U.S. Jun 17, 2013) (No. 11-1507).

Respectfully submitted,

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Dated June 19, 2013

CERTIFICATE OF SERVICE

This is to certify that on June 19, 2013, a copy of the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following counsel of record:

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