

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

The Inclusive Communities Project, Inc., and
Dews Dell, LLC

v.

The Town of Sunnyvale, Texas

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CIVIL ACTION

No.

COMPLAINT

1. This case is related to and involves the same parties in The Inclusive Communities Project, Inc., et al v. The Town of Sunnyvale, Texas, No. 3:88-CV-1604-O (N.D. Tex.). That case was originally styled *Dews v. Town of Sunnyvale*.

2. The Town of Sunnyvale, Texas has made dwelling units unavailable because of race by using its zoning power to prevent plaintiffs from developing low income affordable rental units in multifamily structures on plaintiffs' land in the Town of Sunnyvale.

3. Plaintiff, The Inclusive Communities Project, Inc. is a Dallas based fair housing and civil rights organization. ICP works to create and maintain racially and economically inclusive communities, expand fair and affordable housing opportunities for low income families, and obtain redress for policies and practices that perpetuate the harmful effects of discrimination and segregation. ICP seeks to create and obtain affordable housing in non-minority concentrated areas within the Dallas metropolitan area for persons eligible for low rent public housing on terms substantially equivalent to the terms on which public housing is available. ICP provides the counseling and other forms of assistance to families seeking to utilize their Section 8 Voucher to move into low-poverty, non-minority concentrated areas throughout the Dallas metropolitan area.

4. Plaintiff Dews Dell, LLC is the record owner of ICP's land in Sunnyvale, Texas.

5. ICP focuses on the issues of racial segregation and policies and practices that operate to exclude low income families from higher opportunity, predominately White or non-minority areas of the Dallas metropolitan area. The term "White" and the term "non-minority" are used in this complaint to refer to the 2010 U.S. Census category for persons of the White race who are also not Hispanic or Latino. In furtherance of ICP's mission, it assists Black or African American Dallas Housing Authority Section 8 families in finding housing opportunities in the suburban communities in the Dallas area.

6. The Town of Sunnyvale is a municipal government located in Dallas County, Texas.

7. ICP or its precursors have been in litigation to end the Town of Sunnyvale's exclusion of affordable rental housing since 1988. *Dews v. Town of Sunnyvale*, 109 F.Supp.2d 526 (N.D. Tex. 2000). The claims for relief set out in this complaint arose after the *Dews v. Town of Sunnyvale* Settlement Order was entered in 2005.

8. The Town created a new zoning category in 2007 claiming it would provide for the development of the Target units at the Target Rates required by the *Dews v. Town of Sunnyvale* Settlement Order. This was the Attached Housing Commercial District ("AHC") regulation. The regulation provided that if the AHC category was applied to land then the ordinance establishing the district would include the specific number of Target Units, and the financial incentives, and the variances from the Town necessary to provide those units at the Target Rates. In return for the financial incentives and any other variances or exemptions from Town requirements, the regulation imposed a form of rent control by requiring the Target Rates to be the maximum rents that could be charged for units developed. The ordinance was amended in 2009 to impose a

maximum six unit per acre density even on multifamily developments.

9. One developer applied for zoning changes to meet the proposed purpose of the Attached Housing Commercial district zoning. The application was not approved by the Town.

10. No affordable housing units were developed within the three year period set by the Settlement Order. The Town did not comply with its obligations to provide the conditions for the development of the affordable housing units. There are still no Target units as required by the Settlement Order.

11. There are no affordable low income rental multifamily housing units in Sunnyvale. There are no Section 8 Housing Choice Voucher participants located in the Town. There are numerous Section 8 Housing Choice Voucher participants in the cities adjoining the Town of Sunnyvale.

12. After the deadline for compliance with the Settlement Order passed, the Inclusive Communities Project, Inc., through its at that time wholly owned subsidiary, Plaintiff Dews Dell, LLC, purchased 15 acres of land in Sunnyvale, Texas. The property was acquired for the development of low income affordable rental housing. At the time of the purchase, the Town had designated the site as appropriate for affordable housing. The existing zoning was Local Retail.¹

13. ICP applied to the Town for zoning that would have allowed multifamily housing at the density of 15 units per acre on ICP's property. This density would have allowed ICP to provide for the development of the units necessary for the Town to comply with the settlement Order. The Town denied the zoning request on September 28, 2009. On the same day the Town amended the AHC District zoning ordinance to limit density for multifamily uses in AHC

¹ This complaint will refer to both plaintiffs Inclusive Communities Project, Inc. and Dews Dell, LLC as ICP.

districts to a six unit per acre maximum.

14. On October 26, 2009, ICP filed its motion for injunctive relief for the Town's contempt violation of the Settlement Order. *ICP v. Town of Sunnyvale*, No. 3:88-CV-1604-O (N.D. Tex.), Document 195.

15. The Town was held in contempt of the Settlement Order on March 22, 2010. Order, *ICP v. Town of Sunnyvale*, No. 3:88-CV-1604-O (N.D. Tex.), Document 220.

16. Sunnyvale is currently under an order to remedy its contempt of the *Dews v. Town of Sunnyvale* Settlement Order reached in 2005 by providing 70 units of affordable housing.

17. While the motion for contempt was pending, the Town of Sunnyvale rezoned ICP's land from a Local Retail use to "Attached Housing Commercial with conditions" use.

18. The Sunnyvale Town Council voted to rezone ICP's land on January 25, 2010. At this time, the ICP motion to hold the Town in contempt of the *Dews v. Town of Sunnyvale* Settlement Order was pending. The Town replaced the local retail zoning on ICP's property with an ad hoc zoning category called Attached Housing Commercial with conditions.

19. The unique conditions and requirements of the specific zoning use placed on ICP's land had never before been placed on any property in Sunnyvale. There is still no other property in Sunnyvale subjected to the same limitations and requirements as those placed on ICP's property by the Attached Housing Commercial with conditions.

20. Those limitations make ICP's land unusable for affordable housing at Target Rates and unavailable for any other use. The Town achieved this result by imposing density and other requirements that made affordable dwelling units unavailable absent financial incentives and other assistance from the Town.

21. The zoning placed on ICP's land omitted any financial incentives or the waivers and variances necessary to develop the units at the required Target Rates.

22. The Town did not provide any standards for the exercise of its discretion in whether or not to provide financial incentives and other assistance or the amount of any incentives or other assistance necessary for the development of affordable low income rental housing on ICP's land.

23. The zoning eliminated the Local Retail zoning use from ICP's land.

24. The zoning change on ICP's property was made despite ICP's objection to the change and without ICP's consent to the change.

25. Although the zoning ordinance recited the applicability of a Town Zoning Use called Attached Housing Commercial, the Town did not follow the procedural requirements for the imposition of that use. The Town did not apply the substantive elements required by that use for the establishment of an Attached Housing Commercial District.

26. Under the Attached Housing Commercial District regulation, only the property owner is designated as a party that can initiate an application for establishment of an Attached Housing District. The property owner in this instance, ICP, made no such application.

27. The Town made no application that satisfied the procedural and substantive requirements of the Attached Housing Commercial District regulation.

28. The Town did not provide the required statement of the purpose and intent of the District.

29. The Town did not set out or limit the permitted or conditional uses authorized (or restricted) in the District.

30. The Town did not set out or limit any additional design standards and conditions applicable to development within the Affordable Housing Commercial with conditions district placed on ICP's land.

31. The Town did not set out waivers, if any, from standards applicable within the District.

32. The Town did not set out or limit any required dedications or public improvements.

33. The Town did not provide a concept plan illustrating the location of the District or meeting other Town requirements for such a concept plan.

34. The Town did not provide a proposed guaranty and secured participation agreement.

35. The Town did not request any financial incentives from itself.

36. The ordinance establishing the new zoning on ICP's property did not include the following elements that are required for the establishment of an Attached Housing Commercial District:

- a. statement of the purpose and intent of the District;
- b. the permitted or conditional uses authorized (or restricted) in the District;
- c. any additional design standards and conditions applicable to development within the district;
- d. waivers, if any, from standards applicable within the District;
- e. any required dedications or public improvements;
- f. a concept plan; or
- g. the financial incentives to be provided by the Town.

37. In the zoning placed on ICP's land, the Town gave ICP three years to apply to the

Town for approval of a concept plan and a guaranty and secured participation agreement.

38. The Town's procedure imposing the zoning on ICP's property is a departure from the procedure set out in the Attached Housing Commercial District regulation. Under that procedure, a willing property owner would make a proposal to the Town. If the Town did not agree with the proposal, then the property owner would be left with the existing zoning and could proceed with other plans for the property. Under the Attached Housing Commercial within conditions zoning on ICP's land, ICP can do nothing with its property except at the unfettered discretion of the Town.

39. The Town stated it was imposing these regulatory restrictions on ICP's right to use its property to provide low income affordable rental housing because ICP had represented that ICP wanted to use the land to provide low income affordable rental housing.

40. After the Town initially applied the zoning to ICP's land, ICP submitted two proposed concept plans that would have provided housing that satisfied the criteria for Target Rate units. The Town of Sunnyvale continued to make these dwellings unavailable because of race by denying both requests. ICP subsequently submitted a third proposal for a concept plan but withdrew it after the Town indicated that it would interpret that proposal as one that waived any right to request variances, financial incentives, or other Town assistance in connection with the plan.

41. In 2011, after the Town was found in contempt for its violations of the Settlement Order and a remedial order was entered, the Town approved an Affordable Housing Commercial District for a site in the Town's industrial area. Unlike the Affordable Housing Commercial with conditions zoning placed on ICP's land, this 2011 zoning change included financial incentives,

variances, and other Town assistance for the development of Target units of affordable housing on the property. The ordinance approving this zoning did comply with the Town's Affordable Housing Commercial district regulation. The ordinance was passed at the request of and with the consent of the property owner. The developer has not yet obtained the low income housing tax credit funding from the Texas Department of Housing and Community Affairs which is a prerequisite for the future development of the units.

42. The Town's zoning decisions for ICP's property have a racially discriminatory effect making dwelling units unavailable to a disproportionately Black or African American population. These units would be disproportionately occupied by Black or African American and low income residents. In addition, these units would be used by Section 8 Housing Choice Voucher program participants, a population that is disproportionately Black or African American.

43. The Town's zoning decisions for ICP's property have the racially discriminatory effect of making dwelling units unavailable in a manner that perpetuates racial segregation in Sunnyvale and in the surrounding Dallas area. Sunnyvale had 93 total Black or African American occupied housing units in the 2010 census, 5.7% of the total 1,639 occupied housing units. The Town's occupied units were 6.6% Hispanic or Latino, 69.8% White, Not Hispanic or Latino, and 15.9% Asian. If 70 units of affordable low income rental housing were occupied by Black or African American family households on ICP's property, the Black occupied units in Sunnyvale would increase by 75% and from 5.7% of the total to 10% of the total.

44. The Town's zoning decisions for ICP's property have racially discriminatory effects because the 6 unit per acre density limitation prohibits multifamily rental housing and affordable low income rental housing at or below the Target Rates imposed by the ordinance unless the

Town provides financial incentives and variances from the combined effects of the other requirements imposed by the ordinance. These other requirements include the 2 story limitation, the 8 unit per structure limitation, the open space requirements, the covered/garage parking requirements, and the security fencing details. The Town's zoning decision did not provide these elements.

45. The Town's zoning decisions for ICP's property have the effect of making dwelling units unavailable for ICP's clients because of race and color.

46. The Town's zoning decisions for ICP's property were made with the discriminatory intent to make dwelling units unavailable for ICP's clients because of race and color.

47. There are no bona fide, legitimate governmental interests that are served by the Town's imposition of the Attached Housing Commercial with conditions zoning use on ICP's land.

48. There are less discriminatory alternatives to the provisions imposed on ICP's land that would serve any bona fide, legitimate governmental interests that might be served by the Town's imposition of the parts of the zoning category imposed on ICP's land.

49. The racially discriminatory effects of the Town's actions are the same effects that would be accomplished by the Town acting with a racially discriminatory intent.

50. The Town's stated reasons for imposing the parts of the zoning category on ICP's land were:

A. ICP stated it wanted to use the land for affordable rental housing;

B. ICP had requested multifamily zoning at a density of 15 units per acre in order to provide low income affordable rental housing and that request had been denied by the Town;

C. The Attached Housing Commercial District Zoning was the proper district for development of Target Units consistent with the Town's Comprehensive Plan;

D. ICP filed a motion in the litigation for injunctive relief requiring the Town to approve the 15 unit per acre zoning proposal;

E. ICP alleged it was prepared to restrict the use of the property for Target Units as required by the Settlement Stipulation and the AHC District Regulations;

F. The AHC District requires submission of a concept plan and other elements before an AHC district can be imposed on the property and ICP had not submitted the plan or the other elements;

G. The Town may attach conditions to zoning map amendments;

H. Rezoning ICP's property constituted designation of that land for development of Target Units.

51. The Town's stated reasons for the zoning decisions on ICP's land were pretexts for racially discriminatory intent.

52. The Town's history opposing multifamily and low income housing is consistent with a racially discriminatory intent and show a racially discriminatory intent.

53. The Town's procedural and substantive departures from accepted and standard zoning practices are consistent with a racially discriminatory intent and show a racially discriminatory intent.

54. The Town's procedural and substantive departures from the requirements of the Towns' Comprehensive Plan requiring the Town to provide its fair share of affordable housing are consistent with a racially discriminatory intent and show a racially discriminatory intent.

55. The Town's procedural and substantive departures from the requirements of the Towns' Attached Housing Commercial District ordinance are consistent with a racially discriminatory intent and show a racially discriminatory intent.

56. The Town's refusal to comply with the procedural and substantive provisions of the Settlement Order in *Dews v. Town of Sunnyvale* is consistent with a racially discriminatory intent and shows a racially discriminatory intent.

57. Contemporary statements by the Town of Sunnyvale officials are consistent with a racially discriminatory intent and show a racially discriminatory intent.

58. The Town's actions interfere with ICP's exercise of ICP's right to prevent the Town from making dwelling units unavailable to ICP's clients and other low income families because of race.

59. The Town's actions interfere with ICP's exercise of ICP's right to make dwelling units available to its clients and other low income families in locations that do not perpetuate racial segregation.

Claims for relief

60. The Town's actions make dwelling units unavailable because of the Black or African American race of ICP's clients and the Black or African American race of a disproportionate number of the families eligible for the Target Rate units and other forms of low income affordable rental housing assistance. These actions violate 42 U.S.C. § 3604(a). ICP claims that the Town's actions are illegal under 42 U.S.C. § 3604(a) because of the disparate impact or effect of the Town's actions and because of the discriminatory intent of the Town's actions.

61. The Town's actions discriminate on the grounds of race against ICP in the availability

of Town financial assistance for constructing dwellings. These actions violate 42 U.S.C. § 3605. ICP claims the Town's actions are illegal under 42 U.S.C. § 3605 because of the disparate impact or effect of the Town's actions and because of the discriminatory intent of the Town's actions.

62. The Town's actions interfere with ICP's exercise of ICP's right to make dwelling units available to its clients and other low income families in locations that do not perpetuate racial segregation. The Town's actions violate 42 U.S.C. § 3617.

63. The Town's actions using race and ethnicity as one factor in their decisions concerning the zoning placed on ICP's property violates the 14th Amendment to the U.S. Constitution and is actionable under 42 U.S.C. § 1983.

64. The Town's actions using race and ethnicity as one factor in their decisions concerning the zoning placed on ICP's property violates 42 U.S.C. § 1982 that requires the defendants to give all citizens of the United States the same right as is enjoyed by White citizens to, lease real property.

Prayer for relief

Plaintiffs seek the following relief:

A. an injunction requiring the Town to either provide the zoning and comprehensive plan designations for ICP's property such that ICP can provide affordable low income rental housing without any financial incentives from the Town or the financial incentives and administrative approvals necessary to provide affordable low income housing under the Affordable Housing Commercial with conditions zoning that has been placed on ICP's property.

B. attorney fees and litigation expenses,

C. costs,

D. any other appropriate relief.

Respectfully Submitted,

/s/ Michael M. Daniel

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