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COLIN CRAWFORD

USING FEDERAL PROPERTY RIGHTS LAWS FOR ENVIRONMENTAL JUSTICE

I. Introduction

The late Ralph Santiago Abascal, who worked for years out of California Rural Legal Services and became one of the most admired legal service attorneys of his generation, was co-counsel in a celebrated environmental justice victory, *El Pueblo Para Agua y Aire Limpio v. County of Kings*.¹ *El Pueblo* successfully blocked the proposed siting of a hazardous waste incinerator by holding that the project's proponents had not translated the public review documents into Spanish in a majority monolingual Spanish-speaking community. Despite this victory, however, Abascal later observed, "The handful of reported environmental justice cases that have raised civil rights claims have been litigated under the wrong theories." Instead of the "difficult" theory of Fourteenth Amendment equal protection, Abascal argued, lawyers seeking to achieve environmental justice should bring claims under federal statutes designed to insure equal property rights. In particular, he advocated bringing environmental justice claims under Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act ("FHA").² The FHA is, he suggested, the "statute with perhaps the broadest reach" in environmental justice cases.³

This essay will explore Abascal's suggestion, looking in particular at both FHA claims and possible claims under 42 U.S.C. Section 1982. At the outset, it bears emphasizing that no reported cases have successfully advanced such claims in the environmental justice context. However, if carefully drawn, cases using these statutes could help achieve important environmental justice victories. There is another advantage to using these federal property rights statutes to achieve environmental justice. Specifically, the most likely success under these statutes will occur when the

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federal property rights claims are brought as part of a coordinated community development strategy. Too often, “environmental” issues such as the siting of noxious industrial uses are considered in isolation from other public interest goals. The federal property protection statutes provide one avenue to avoid such intellectual ghetto-ization, and thus make environmental claims an integral part of activists’ community organizing goals.⁴

II. FHA Claims.⁵

The FHA was enacted *both* to end discrimination in residential housing *and* to end segregated housing patterns. Both purposes should be kept in mind when considering the possible usefulness of FHA claims in the environmental justice context (especially the FHA’s pro-integration aim, which is often neglected amid efforts to secure better quality housing for persons protected by the law.)

Three sections of the FHA present themselves as potentially useful in an environmental justice lawsuit. The first such section is 42 U.S.C. Section 3604(a), which makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” A central question raised by case law interpreting this section is who can be sued under it. Clearly, the section applies to municipal authorities and private providers of housing services. Thus, for instance, zoning decisions have been held to fall within the ambit of Section 3604(a).⁶

The harder question is whether this phrase also applies to municipal authorities and private parties *not* directly involved in the provision of housing services—such as an agency responsible for environmental permitting or a private developer of a waste disposal facility. The Seventh Circuit has confirmed that “although Section 3604(a) applies principally to the sale or rental of dwellings, courts have construed the phrase ‘otherwise make unavailable or deny’ in subsection (a) to encompass mortgage ‘redlining,’ insurance redlining, racial steering, exclusionary zoning decisions, and other actions by individuals or governmental units which directly affect the availability of housing to minorities.”⁷

However, this dictum in turn raises the question of what “other actions” might be said directly to affect housing availability. Regrettably, this has not been definitely answered by the courts, although there is a

basis for concluding that defendants uninvolved in the provision of services but whose actions affect housing availability are reachable by the section.⁸ One clear lesson that emerges from the case law, however, is that plaintiffs must establish that defendants have acted so as to make housing unavailable. For instance, plaintiffs in a Brooklyn, New York case mis-stepped when they argued that the City of New York discriminated against the largely African-American residents of the Bedford-Stuyvesant neighborhood by placing a disproportionate number of homeless shelters there. The court held that plaintiffs not only failed to establish their factual case, they also erred because they maintained that the concentration of shelters endangered the health of and access to public education in the community. Threats to such community activities are not, the court suggested, the concern of the FHA.⁹ Simply put, plaintiffs therefore need to understand that Section 3604(a) is not a general land use reform statute; claims under the section instead must concentrate on demonstrating that a plaintiff has been discriminated against in an effort to secure housing.

Plaintiffs drafting pleadings under Section 3604(a) should remember the law's pro-integration purpose. For example, the 11th Circuit ruled that it might well violate Section 3604(a) if a housing project was located in a neighborhood dominated by people of color when most residents of the housing project would also be people of color.¹⁰ In the environmental justice context, it is possible to imagine a situation where, similarly, the siting of an undesirable land use would have the effect of further segregating the residential property in an area, and therefore constitute an FHA violation. This might be true even if it was established that racial and ethnic minorities "came to the nuisance" when they moved into an area with a number of undesirable land uses (because of lower property costs.)¹¹

The second FHA section potentially useful to an environmental justice advocate is 42 U.S.C Section 3604(b), which, in relevant part, prohibits discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith." As with much FHA case law, there is considerable judicial disagreement as to the proper reading of the statutory language. One interpretive debate of consequence for environmental justice advocates concerns the proper reading of the above-quoted phrase. The narrower reading holds that the words "terms, conditions and privileges" necessarily modify the entire phrase "sale or rental of a dwelling"; a

broader reading would lead one to understand that the section applies to *any* discrimination in terms, conditions and privileges related to dwellings. For environmental justice advocates, the preferred reading clearly would be the broader one, since it would not restrict environmental justice challenges under the statute solely to situations involving sales and rentals of realty. Unfortunately, the most widely-adopted view is that the narrower reading is correct.¹² Nonetheless, even if the narrower reading of the statutory language is adopted, discriminatory sales and rental activities are likely to occur during the course of an environmental justice controversy, raising possible causes of action under the statute. Moreover, it should be remembered that the narrower reading of the statute is not the only and inevitable interpretation of the section.

Those considering possible causes of action under Section 3604(b), should be aware courts have held that owners and renters of already-acquired property can bring actions under the section in order to protect "intangible" property interests.¹³ It is easy to imagine circumstances where one seeking to advance environmental justice goals could use such a reading of Section 3604(b). For example, 3604(b) might be used by an African-American property owner who opposed a proposed hazardous waste incinerator in her neighborhood on the grounds that the project would discriminate against her in the "terms, conditions and privileges of sale" of her dwelling. Similarly, an Asian-American tenant could invoke Section 3604(b). Additionally, a Latino-American owner or tenant residing in an area through which hazardous materials were routinely transported might seek protection under Section 3604(b).

Another important interpretive question raised by the language of Section 3604(b) concerns the meaning of the words "services or facilities." Again, there is no consensus as to the meaning of this phrase. Although a county's holding of tax deeds was not deemed a "service or facility" subject to FHA scrutiny,¹⁴ mortgage financing, insurance redlining and similar financial activities have been held to be covered by Section 3604's anti-discrimination provisions, as have exclusionary zoning practices.¹⁵ Moreover, Department of Housing and Urban Development regulations give an even more extensive list, including recreational and parking facilities, and cleaning and janitorial services.¹⁶ For the environmental justice advocate, the broader the reading of the phrase "service or facility" the better, especially inasmuch as likely defendants in an environmental justice lawsuit may not be involved directly in the provision of housing services.

For example, a Section 3604(b) claim might have been advanced successfully in a much-scrutinized environmental justice case such as *Bean v. Southwestern Waste Management Corp.*¹⁷ In *Bean*, the Texas Department of Health permitted the location of a solid waste disposal facility near homes and churches in a largely African-American neighborhood that, plaintiffs claimed, was already disproportionately burdened with such facilities. In dicta, the *Bean* court observed, "It simply does not make sense to put a solid waste site so close to a high school, particularly one with no air-conditioning. Nor does it make sense to put the land site so close to a residential neighborhood."¹⁸ Plaintiffs nonetheless lost because they could not demonstrate discriminatory intent. Conceivably, however, they might have won under Section 3604(b) if they could have shown a disparate impact that was racially discriminatory (by limiting or adversely affecting housing opportunities) in the exercise of the "service" of waste disposal permit issuance.

The third FHA section possibly useful to environmental justice lawyers is 42 U.S.C. Section 3617, which prohibits coercion, intimidation, or interference with one who either provides housing opportunities or helps another secure rights guaranteed by the FHA. Typically, Section 3617 is pled only in connection with other FHA claims (because it relates to alleged deprivation of FHA rights), although this is not required.¹⁹ It should be noted that some courts require actual acts of physical intimidation or coercion to trigger the section's application.²⁰ However, at least one federal court of appeals declined to read the section narrowly, finding that physical coercion was not required to sustain a Section 3617 claim.²¹

If Section 3617 is read broadly, its value to environmental justice litigants is enormous, so long as the rights interfered with are present and not merely prospective. This is because the section creates a cause of action for "interference" with the exercise of FHA rights. In addition, for purposes of Section 3617, potential defendants need not be housing providers.²² Thus, for instance, a city's refusal to help housing developers construct integrated developments was found to constitute a Section 3617 violation.²³ Similarly, a local ordinance that interfered with the rights of low-income housing developers to help create housing opportunities for African-Americans was found to violate both Sections 3604(a) and 3617.²⁴

A Section 3617 claim might thus be advanced in an environmental justice case challenging a permit for an undesirable land use or rezoning

of an area to allow for the siting of undesirable land uses, where those actions interfered with efforts to provide a neighborhood predominantly made up of people of color with adequate housing opportunities. Alternatively, Section 3617 claims might be available, for example, to oppose neighbors who favored siting of a waste incinerator instead of housing.

III. Section 1982 claims

42 U.S.C. Section 1982 guarantees all citizens "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real or personal property." This law is narrower than the FHA claims discussed above in that it is limited only to cases of racial and ethnic discrimination. In addition, the potential utility of Section 1982 is limited for the prospective environmental justice plaintiff because violations of the statute's strict standing requirements, and because it requires proof of discriminatory intent.²⁵ However, it is much broader than the FHA in that it applies not only to residential realty, but also to commercial realty and personalty. Thus, for instance, claims might be available under Section 1982 for people of color residing in a heavily industrialized area where personal or real property was damaged from excessive particles or dust, if one demonstrated that white neighborhoods were not similarly disadvantaged.²⁶ Central to a Section 1982 claim, it must be emphasized, is a showing that people of color have been intentionally discriminated against in their efforts to secure contract or property rights. For example, if a street closing "severely restricted access to black homes," preventing African-Americans from using their property, Section 1982 would be violated.²⁷ Thus, "a siting that lowered neighboring property values, or that restricted 'access' to neighboring homes by making them unsafe would come within the purview of Section 1982."²⁸

A Section 1982 claim was allowed to proceed in a case where the plaintiffs alleged that the selection of locations for public housing projects intentionally perpetuated segregated housing patterns.²⁹ Another claim, in which an African-American plaintiff alleging a Section 1982 violation on the grounds that his second mortgage application was rejected because of mortgage redlining was allowed to proceed,³⁰ as were allegations that municipal redevelopment plans would destroy historically African-American neighborhoods.³¹

What all of these cases teach the environmental justice advocate is that, so long as plaintiffs can demonstrate an intention to disadvantage the property and contract rights of people of color, they may prevail under Section 1982.

IV. Conclusion

The late Ralph Santiago Abascal's suggestion that environmental justice advocates use federal property protection statutes—and especially Title VIII—remains as provocative and untested as when he made it in 1995. However, environmental justice lawyers should not hesitate to contemplate the use of such claims, particularly in the context of a more broad-based community development effort that seeks to avoid the disproportionate location of noxious, undesirable land uses in communities of color.

NOTES

- 1 22 ENVTL L. REP. (Envtl. L. Inst.) 20,357 (Cal App. Dep't Super. Ct. 1991).
- 2 42 U.S.C. Secs. 3601–3631 (1998).
- 3 Ralph Santiago Abascal, *Tools for Combating Environmental Injustice in the 'Hood: Title VIII of the Civil Rights Act of 1968*, 29 CLEARINGHOUSE REVIEW 345 (1995).
- 4 To this end, poverty lawyers serving communities of color would do well to consult an issue of *Clearinghouse Review* largely devoted to housing advocacy. In combination with Abascal's article, *id.*, the issue offers useful perspectives. *Consolidated Plan and Community Development Block Grant Advocacy*, 32 CLEARINGHOUSE REVIEW 171–215 (1998).
- 5 For comprehensive treatment of many of the questions raised in property rights litigation, readers should look at one or both of the following treatises: Robert G. Schwemm, HOUSING DISCRIMINATION: LAW AND LITIGATION (Clark Boardman 1990 & 1997 Supp.); James A. Kushner, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION (McGraw Hill 2d ed. 1995 & West Supp. 1998). See also Florence Wagman Roisman and Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts*, 24 CLEARINGHOUSE REVIEW 312 (1990); THE FAIR HOUSING ACT AFTER TWENTY YEARS (Robert G. Schwemm, ed., Yale Law School, 1989).
- 6 *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288-90 (7th Cir. 1977), *cert. denied* 434 U.S. 1025, 54 L.Ed.2d 772, 98 S.Ct. 752 (1978) (Title VIII violation found where a zoning decision had discriminatory effect).
- 7 *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1209 (7th Cir. 1984)[citing *Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir. 1982) (discriminatory rental decisions).]
- 8 See, e.g. *Southend*, *supra* note 7 at 1210 (county's holding of properties by tax deed and subsequent failure to maintain them not "other actions" covered by Section 3604(a)); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 187-190 (7th Cir. 1982) [neighbors motivated by racial discrimination who bought property specifically so that it could not be bought by others violated 3604(a).] But see *Michigan Protection and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 344-345 (6th Cir. 1994) [neighbors who bought a house so that mentally disabled individuals could not live there demonstrated "normal economic competition" and did not vio-

- late 3604(a).]
- 9 *Coalition of Bedford-Stuyvesant Block Association, Inc. v. Cuomo*, 651 F. Supp. 1202, 1208 & n.2 (E.D..N.Y. 1987).
 - 10 *Jackson v. Okaloosa County*, 21 F.3d 1532, 1543-1544 (11th Cir. 1994).
 - 11 In other words, the FHA would be used to combat arguments like those advanced in Vicki Been with Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1 (1997); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 *YALE L.J.* 1383 (1994).
 - 12 *Laramore v. Illinois Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D.Ill. 1989)(challenging construction of baseball park in racial minority neighborhood).
 - 13 *See, e.g., Southend, supra* note 7 at 1210. Interestingly, the *Laramore* court, *supra* note 12, favorably cited *Southend*, but did not explore the apparent contradiction between adopting a narrow reading of the section's language and *Southend's* suggestion that 3604(b) protects "intangible" property interests.
 - 14 *Southend, supra* note 7 at 1210 (citing *Mackey v. Nationwide Insurance Cos.*, 724 F.2d 419, 423-424 (4th Cir. 1984).
 - 15 *See, e.g., McDiarmid v. Economy Fire and Casualty Co.*, 604 F. Supp. 105, 107-108 (S.D. Ohio 1984); *Oak Ridge Care Center, Inc., v. Racine County, Wisconsin*, 896 F. Supp. 867, 874-875 (E.D. Wisc. 1995) (contesting denial of operating permit for rehabilitation treatment facility); *Southend, supra* note 7 at 1209-1210.
 - 16 24 C.F.R. Section 100.65(b)(4). *See also* HUD Preamble I, 53 *Fed. Reg.* 45001 (Nov. 7, 1988). Environmental justice advocates are well advised to study HUD regulations, which tend to support a much more expansive reading of the FHA than does much case law.
 - 17 482 F. Supp. 673, 678 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir.1986).
 - 18 *Id.* at 679-680.
 - 19 *Puglisi v. Underhill Park Taxpayer Assoc.*, 947 F. Supp. 673, 696 (S.D.N.Y. 1996). *Contrast* Schwemm, *HOUSING DISCRIMINATION, supra* note 5 at Section 13.4(3)(a) n. 93.
 - 20 *See.e.g. Clifton Terrace Associates, Ltd. v. United Technologies Corp.*, 728 F. Supp. 24, 29 (D.D.C. 1990), *aff'd* 929 F. 2d 714 (D.C.Cir. 1991).
 - 21 *Babin, supra* note 8 at 346-348.
 - 22 *See, e.g. Ohana v. 180 Prospect Park Realty Corp.*, 996 F. Supp. 238 (E.D.N.Y 1988).
 - 23 *People Helpers Foundation, Inc. v. City of Richmond*, 781 F. Supp 1132 (E.D. Va. 1992), 789 F. Supp.725 (E.D. Va. 1992) and 12 F.3d 1321 (4th Cir. 1993)(setting aside injunctive and monetary relief on appeal).
 - 24 *United States v. City of Parma, Ohio*, 494 F. Supp. 1049, 1100 (N.D. Ohio 1980), *aff'd in part, rev'd in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S. Ct. 1972, 72 L. Ed. 2d 441 (1982).
 - 25 *See* Schwemm, *HOUSING DISCRIMINATION, supra* note 5 at Section 27.4 and 27.5. Schwemm notes, however, that the Supreme Court has not foreclosed the possibility that a discriminatory effects standard may apply in Section 1982 cases.
 - 26 It is easy to imagine the possibility of such claims given the increasing concern about excessive air pollution in poor people of color neighborhoods. *See, e.g.,*

Adam Nossiter, *Asthma Common and on Rise in Crowded South Bronx*, N.Y. TIMES, Sept. 5, 1995, at A1, col. 1 (exploring possible connection between high asthma rates and incinerator emissions); Hugh Hamilton, *Uptown Eco-Blues: Environmental Woes in Harlem*, THE CITY SUN, at A5-A7 (June 5-11, 1991) (asthma and particulates).

- 27 *City of Memphis v. Greene*. 451 U.S. 100 (1981) (finding that there was no such restriction).
- 28 Vicki Been, *Environmental Justice and Equity Issues*, in ZONING AND LAND USE CONTROLS Sec. 25D-05[2] (Patrick Rohan, ed., Matthew Bender 1995).
- 29 *Jackson*, *supra* note 10 at 1542.
- 30 *Evans v. First Federal Savings Bank of Indiana*, 669 F. Supp. 915, 919-920 (N.D. Ind. 1987).
- 31 *Houston v. City of Cocoa*, 2 Fair Hous.-Fair Lending (P-H) Para. 15,625 (M.D. Fla., Dec. 22, 1989).

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35 YEARS AGO IN GUILD PRACTITIONER

"WE NEED JIMMY HIGGINS. ...I believe in Jimmy Higgins. I don't know how many of you come from trade union backgrounds. I don't know how many have heard of Jimmy Higgins. In a union, he's the man who passes out the leaflets at six o'clock in the morning at the factory gate or puts up the chairs before the meeting and takes them down afterwards. In the Lawyers Guild, I think the Jimmy Higginses are the ones who draft pleadings even when they can't sign their names to them, who spend time in the library, who write memos and briefs, who keep track of the subscribers to the Guild Practitioner, who attend Guild chapter board meetings, who raise funds and do all of the things that nobody enjoys doing. The name is Jimmy Higgins, and I think we will always need many Jimmy Higginses. There will never be enough to do these things which are not normally considered important or statusful."

ANN FAGAN GINGER, in an article entitled "How Woman's Work is Sometimes Done", in Volume 24, No. 4 (Fall 1965).
