

AFFORDABLE HOUSING

MUNICIPAL RIGHTS AND RESPONSIBILITIES

SHELBURNE PLANNING COMMISSION &
SELECTBOARD – NOVEMBER 19, 2015

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AFFORDABLE HOUSING – SESSION GOALS

- ▶ Regulatory Framework Summary
- ▶ Overview of Your Roles as Municipal Officials Toward Affordable Housing
- ▶ Best Practices for Public Discussion of Affordable Housing Policies
- ▶ General Discussion, Rather Than Specific Properties

AFFORDABLE HOUSING – HEAVILY REGULATED BY FEDERAL LAW, VERMONT LAW, AND CONTRACTS

- ▶ Federal Fair Housing Act
- ▶ Vermont Zoning Law
- ▶ Vermont Public Accommodations Law
- ▶ Community Development Block Grant Agreements

FAIR HOUSING ACT

- ▶ Part of our Federal Civil Rights Act – adopted in 1968
- ▶ “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”
- ▶ 42 U.S.C. § 3601.

FAIR HOUSING ACT

- ▶ Protects against Discriminatory Intent and Disparate Impact
- ▶ Discriminatory Municipal Practice examples:
 - ▶ Decisions based on race, sex, religion, national origin, color, disability, or familial status of residents or potential residents
 - ▶ Decisions based on neighbors' fears a dwelling would be occupied by members of protected classes

FAIR HOUSING ACT

- ▶ **Discriminatory Intent – Examples:**
- ▶ Zoning ordinances that treat affordable housing, supportive housing, or group homes for people with disabilities differently than other similar uses
- ▶ Enforcing an ordinance more strictly against housing occupied by members of protected classes

FAIR HOUSING ACT

- ▶ **Discriminatory Intent Examples:**
- ▶ Requiring neighbor notification or a public hearing only for development of affordable housing or group homes, but not other types of residential development
- ▶ Refusing to allow an exception to a setback requirement as a reasonable accommodation for a disabled resident who must build a wheelchair ramp to access a home.

FAIR HOUSING ACT

- ▶ **Discriminatory Intent Examples:**
- ▶ Spacing requirements on group homes for persons with disabilities.
- ▶ Requiring additional studies or procedural steps, or unnecessarily delaying decision making when considering a development that may be occupied by members of the protected classes

FAIR HOUSING ACT

- ▶ **Discriminatory Intent – How Would a Plaintiff Prove It?**
- ▶ “Smoking gun” evidence of discriminatory intent, such as statements by the decision maker to the effect of “We don’t want an influx of black/poor/handicapped people”
- ▶ Indirect, circumstantial evidence – departures from normal procedure, statistical disparities, or sequences of events which indicate some discriminatory motive

FAIR HOUSING ACT

- ▶ **Disparate Impact (effect):** Where a facially neutral ordinance has a disparate impact, or causes disproportional harm, to a protected group
- ▶ **Examples:**
 - ▶ Prohibitions on multifamily housing, mobile homes, maximum number of unrelated adults in a household, IF the regulation has a disproportionate impact on minorities, families with children, or people with disabilities
 - ▶ Density or design requirements that make residential development prohibitively expensive

FAIR HOUSING ACT

- ▶ **Disparate Impact – how would a plaintiff prove it?**
- ▶ Apparently neutral decision has disproportionate effect on a protected class
- ▶ Not favored by our present U.S. Supreme Court
- ▶ Statistical evidence – a component
- ▶ How strong is the disproportionate effect? Was there any discriminatory intent? What is the defendant's interest in taking action? What does the plaintiff seek?
- ▶ “Disparate impact liability mandates only the removal of artificial, arbitrary, and unnecessary barriers”

AFFORDABLE HOUSING – REASONABLE ACCOMMODATIONS

- ▶ What is a reasonable accommodation?
- ▶ Borrowed from Americans with Disabilities Act
- ▶ Requires a municipality to accommodate handicapped individuals:
 - ▶ Permit reasonable physical modifications of certain premises
 - ▶ To make reasonable accommodations in housing rules and policies
 - ▶ To include certain accessibility features in the design and construction of new multifamily dwellings (mostly impacts developers)

AFFORDABLE HOUSING –VERMONT LAW

- ▶ Vermont Law – Primarily Zoning
- ▶ 24 V.S.A. § 4302(c)(11) (Promotes availability of fair housing)
- ▶ 24 V.S.A. § 4412(1) (Requires towns to plan for affordable housing)
- ▶ 24 V.S.A. § 4453 (Penalties for failure to accommodate affordable housing)
- ▶ 9 V.S.A. § 4503 (Public Accommodations Act)

AFFORDABLE HOUSING – VERMONT ZONING LAW

- ▶ Promotes appropriate development of all lands, to encourage public safety, prosperity, comfort, efficiency, promote agricultural and forest resources, balanced against private property rights.
- ▶ Specific goals of 24 V.S.A. Ch. 117:
- ▶ “In addition, this chapter shall be used to further the following specific goals”:
- ▶ “To ensure the availability of safe and affordable housing for all Vermonters”
- ▶ 24 V.S.A. § 4302(c)(11)

AFFORDABLE HOUSING – VERMONT ZONING LAW

- ▶ 24 V.S.A. § 4412(1)
- ▶ “Required provisions and prohibited effects”:
- ▶ “Notwithstanding any existing bylaw, the following land development provisions shall apply in every municipality:
- ▶ (1) Equal treatment of housing and required provisions for affordable housing.
- ▶ (A) No bylaw nor its application by an appropriate municipal panel under this chapter shall have the effect of excluding housing that meets the needs of the population as determined in the housing element of its municipal plan as required under subdivision 4382(a)(10) of this title or the effect of discriminating in the permitting of housing as specified in 9 V.S.A. § 4503.

AFFORDABLE HOUSING – VERMONT ZONING LAW

- ▶ **24 V.S.A. § 4412(1)** – “Housing Element of the Municipal Plan” – Town Plan must:
 - ▶ “include a recommended program for addressing low and moderate income persons’ housing....”
 - ▶ “The program should account for permitted accessory dwelling units, as defined in subdivision 4412(1)(E) of this title, which provide affordable housing.”

AFFORDABLE HOUSING – VERMONT ZONING LAW

- ▶ 24 V.S.A. § 4412(1) - “The effect of discriminating in the permitting of housing” means:
- ▶ “To discriminate in land use decisions or in the permitting of housing because of race, sex, sexual orientation, gender identity, age, marital status, religious creed, color, national origin, disability, the presence of one or more minor children, income, or because of the receipt of public assistance, except as otherwise provided by law.” 9 V.S.A. § 4503(12).

AFFORDABLE HOUSING – VERMONT ZONING LAW

- ▶ 24 V.S.A. § 4412(1)
- ▶ “....no bylaw shall have the effect of excluding mobile homes, modular housing, or prefabricated housing....”
- ▶ Can regulate individual sites within preexisting mobile home parks
- ▶ “Distances between structures and other standards as necessary to ensure public health, safety, and welfare, provided the standards do not have the effect of prohibiting the replacement of mobile homes on existing lots.” 24 V.S.A. § 4412(1)(B)

AFFORDABLE HOUSING – VERMONT

ZONING LAW

- ▶ 24 V.S.A. § 4412(1)
- ▶ “No bylaw shall have the effect of excluding mobile home parks, as defined in 10 V.S.A. chapter 153, from the municipality.” 24 V.S.A. § 4412(1)(C)
- ▶ “Bylaws shall designate appropriate districts and reasonable regulations for multiunit or multifamily dwellings. No bylaw shall have the effect of excluding these multiunit or multifamily dwellings from the municipality.” 24 V.S.A. § 4412(1)(D)
- ▶ EXCEPTION: “Except as provided in subdivisions 4414(1)(E) and (F) of this title....”

AFFORDABLE HOUSING – VERMONT ZONING LAW

- ▶ **24 V.S.A. Sec. 4414(1)** exemption is for (E) (Design Review Districts) and (F) (Historic Districts)
- ▶ Design Review Districts – any area containing structures of historical, architectural, or cultural merit....
- ▶ Historic Districts and Landmarks – areas which include structures and areas of historic or architectural significance....
- ▶ Both are exempt from requirements to accommodate affordable housing in regulations

AFFORDABLE HOUSING – VERMONT ZONING LAW – PENALTIES FOR VIOLATIONS

- ▶ **24 V.S.A. § 4453.** Challenges to housing provisions in bylaws
- ▶ “The Attorney General or a designee shall investigate when there is a complaint that a bylaw or its manner of administration violates....”
“....equal treatment of housing and adequate provision of affordable housing....”
- ▶ Attorney General may file an action to challenge the validity of the bylaw or its manner of administration

AFFORDABLE HOUSING – VERMONT ZONING LAW– PENALTIES FOR VIOLATIONS

- ▶ Municipality has burden of proof to establish that challenged bylaw or its “manner of administration” does not violate 24 V.S.A. Sec. 4412(1) (above)
- ▶ If Court determines bylaw or its administration is in violation, municipality may correct the violation
- ▶ If violation continues, Court shall order municipality to grant all requested permits and certificates of occupancy for housing relating to the area of continuing violation
- ▶ Injunctive relief only, no monetary penalties

AFFORDABLE HOUSING – VERMONT PUBLIC ACCOMMODATIONS ACT

- ▶ Vermont Public Accommodations Statute
- ▶ Incorporates Federal Fair Housing Act standards
- ▶ Effectively creates state-level penalties that state agencies can pursue in addition to federal agencies
- ▶ Can be directed at municipalities for improper administration of zoning authority
- ▶ Ex: refusal to issue approval/permit in violation of VPAA, taking improper enforcement action

VERMONT ZONING ACT – AFFORDABLE HOUSING– CASE LAW

- ▶ *Barbara Ernst and Barbara Supeno v. Town of Addison, et al.* (presently pending in U.S. District Court for District of Vermont)
- ▶ Plaintiffs allege:
 - ▶ An openly gay couple who live in Addison, Vermont
 - ▶ Sexual orientation discrimination under 9 V.S.A. § 4503
 - ▶ Town improperly cited them for violation of Town’s fence height regulation, forcing them to hire an attorney to defend themselves
 - ▶ Town and a Selectboard member tried to prevent Ms. Supeno and her brother from obtaining a certificate of occupancy for a house they were building by finding imaginary building code violations, forcing them to hire an attorney to obtain the certificate.

VERMONT ZONING LAW ON AFFORDABLE HOUSING – CASE LAW

- ▶ Plaintiffs allege:
 - ▶ Town improperly issued building permits to neighbors for construction that threatened to impact value of Plaintiffs' property, and did not notify plaintiffs prior to issuance of permits, and they incurred significant legal expenses challenging the permits in Environmental Court
 - ▶ Town and Selectboard member “harmed their rights to privacy, peace, and quiet enjoyment of their property”; “created and fostered extremely hostile environment that caused them to feel unsafe”; caused them financial harm.... and eventually forced them into bankruptcy”

FEDERAL COMMUNITY DEVELOPMENT BLOCK GRANTS

- ▶ Purpose of CDBG Program:
- ▶ Provide grants “to smaller units of general local government that develop and preserve decent affordable housing, to provide services to the most vulnerable in our communities, and to create and retain jobs.”
- ▶ Any Vermont municipality that wishes to be eligible for federal block grant funding through the U.S. Department of Housing and Urban Development (HUD) is required to “...certify that it *affirmatively furthers fair housing.*”

AFFORDABLE HOUSING – CDBG GRANTS

- ▶ Contain fair housing commitments
- ▶ “Subrecipient agrees to comply with”:
 - ▶ Civil Rights Act – various sections
 - ▶ Housing and Community Development Act
 - ▶ Rehabilitation Act
 - ▶ Americans with Disabilities Act
 - ▶ Numerous executive orders
 - ▶ Subrecipient also must impose a covenant running with the land prior to any sale, to prohibit all discrimination in sale lease, or rental of the property
- ▶ United States can sue to recover for failure to comply

AFFORDABLE HOUSING – CLOSING THOUGHTS

- ▶ Our role: advise town officials on ways to avoid liability to the Town
- ▶ We can't guarantee an outcome on these questions
- ▶ We give educated recommendations, also known as “legal advice”
- ▶ Questions: direct them to Town Manager, we can follow up