Massachusetts Analysis of Impediments to Fair Housing: Fiscal Zoning and the "Childproofing" of a Community

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In its 2013 Analysis of Impediments,[2] Massachusetts should more fully address the issue of the failure of communities to "affirmatively further fair housing" through land use and zoning decisions. The MA-2013-AI cites the new HUD Disparate Impact Rule, which adds a new paragraph to the HUD regulations and which prohibits "[e]nacting or implementing land-use rules, ordinances, policies or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings."[3] As the MA-2013-AI indicates, while the new HUD regulation facially applies to "land-use rules, ordinances, policies or procedures," "it is not clear to what extent this prohibition would address individual land use decisions."[4]

One question that should be addressed in the MA-2013-AI is whether and/or when a <u>*series*</u> of "individual land use decisions" represents such a pattern or practice by a local government that it evidences a "policy or procedure" whether or not that "policy or procedure" has been explicitly committed to paper.

FAIR HOUSING CHOICE FOR FAMILIES WITH CHILDREN AND "FISCAL ZONING"

A discussion of a local government's right to seek to "childproof" its community, by formal or informal policy, and as a part of zoning based on fiscal considerations, is presented below.

In the eyes of many courts, even setting fair housing considerations aside, making zoning decisions so as to minimize the fiscal impact of population growth on a community is *per se* invalid from a zoning perspective. Consider, for example, the case of *Oakwood at Madison v.*

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[2] Department of Housing and Community Development (September 2013), *Draft Massachusetts Analysis of Impediments to Fair Housing Choice: Access to Opportunity in the Commonwealth* (hereafter, MA-2013-AI).
[3] MA-2013-AI, at 242.
[4] MA-2013-AI, at 242.

Township of Oakwood, 117 N.J.Super. 11, 283 A.2d 353 (New Jersey 1971). In *Oakwood*, the local government decided it wanted to curb population growth significantly in order to stabilize the tax rate. In seeking to do this, the Township adopted a zoning bylaw that restricted multifamily buildings to about 500 to 700 additional units, none of which could have three bedrooms or more. Under the zoning bylaw, two bedroom units were limited to 20% of the total units in any apartment development.

The New Jersey court invalidated the zoning bylaw. According to the Court, "Fiscal zoning *per se* is irrelevant to the statutory purposes of zoning. " 283 A.2d at 357. The *Oakwood* court cited Pennsylvania precedent. The *Oakwood* court quoted the Pennsylvania court's decision in *National Land and Investment v. Kohn*, 419 Pa. 504, 215 A.2d 597 (Penn. 1965), which noted:

> Four acre zoning represents Easttown's position that it does not desire to accommodate those who are pressing for admittance to the township unless such admittance will not create any additional burdens upon governmental functions and services. The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid.

215 A.2d at 612.

The impropriety of seeking to control tax burdens by limiting the number of housing units with more than one bedroom was discussed in detail in *Southern Burlington County NAACP v. Mt. Laurel Township*, 67 N.J. 151, 336 A.2d 713 (NJ 1975). Mt. Laurel township had limited housing development to single family homes on minimum lot sizes of 20,000 square feet. The Court noted:

> There cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on property (Mount Laurel is not a high tax municipality) and that the policy was carried out without regard for non-fiscal considerations with respect to people, either within or without its boundaries. This conclusion is demonstrated not only by what was done and what happened, as we have related, but also by innumerable direct statements of municipal officials at public meetings over the years which are found in the exhibits. The trial court referred to a number of them. (citation omitted). No official testified to the contrary.

336 A.2d at 723. The court noted:

> Mount Laurel has allowed some multi-family housing by agreement in planned unit developments, but only for the relatively affluent and of no benefit to low and moderate income families. And even here, the contractual agreements between municipality and developer sharply limit the number of apartments having more than one bedroom. While the township's PUD ordinance has been repealed, we mention the subject of bedroom restriction because, assuming the overall validity of the PUD technique, the measure could be reenacted and the subject is of importance generally. The design of such limitations is obviously to restrict the number of families in the municipality having school age children and thereby keep down local education costs. Such restrictions are so clearly contrary to the general welfare as not to require further discussion. (notes omitted).

Id., at 731. The court finally noted:

> The township's principal reason in support of its zoning plan and ordinance housing provisions, advanced especially strongly at oral argument, is the fiscal one previously adverted to, *i.e.*, that by reason of New Jersey's tax structure which substantially finances municipal governmental and educational costs from taxes on local real property, every municipality may, by the exercise of the zoning power, allow only such uses and to such extent as will be beneficial to the local tax rate. In other words, the position is that any municipality may zone extensively to seek and encourage the 'good' tax ratables of industry and commerce and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise.

Id., at 731.The court then strongly rejected that notion of fiscal zoning:

> We have no hesitancy in now saying, and do so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose. While we fully recognize the increasingly heavy burden of local taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government. It cannot legitimately be accomplished by restricting types of housing through the zoning process in developing municipalities.

Id., at 731. The rejection of fiscal zoning is not surprising. The conclusion that zoning is invalid if done to limit the number of children in the housing units is commonly-accepted. *Board of Ed. of Black Horse Pike Regional School Dist. v. Gloucester Tp.*, 127 N.J.Super. 97, 316 A.2d 480 (N.J. Super. Feb. 1, 1974). The New Jersey court noted:

> Our courts have specifically held that a municipality has no right to refuse to grant approval for a building project merely because its school system would be unable to absorb the increase in students, *Midtown Properties, Inc.*, 172 A.2d 40, or that it would increase taxes, *Springfield v. Bensley*, 88 A.2d 271.

One of the leading cases in support of the conclusion that engaging in fiscal zoning to prevent families from moving into town, in an effort to minimize the cost impact to the town, is *United States of America v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974). The Eighth Circuit in *Black Jack* held that the Fair Housing statute prohibited fiscal zoning. In *Black Jack*, the United States argued that the City had denied persons housing on the basis of race, in violation of §3604(a), and had interfered with the exercise of the right to equal housing opportunity, in violation of §3617, by adopting a zoning ordinance which prohibited the construction of any new multiple-family dwellings.

The court ultimately held that the city had denied persons housing on the basis of race, in violation of §3604(a), and had interfered with the exercise of the right to equal housing opportunity, in violation of §3617, by adopting a zoning ordinance which prohibited the construction of any new multiple-family dwellings. The court held that the remedy for this violation of the Fair Housing Act is provided in §3615: ". . .any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." Id., at 1187.

While it is not necessary to establish that the discrimination prohibited under the Fair Housing Act is "intentional," evidence of a contributing intent strengthens a case based on discriminatory impacts.[5] In one Connecticut case, for example, the court found that:

> the actions and statements of the Orange Board of Selectmen, as well as other officials in Orange, are more indicative of the general attitude and motives

[5] Contrast the actions of one community in approving a proposal for senior housing. In approving a zoning bylaw providing for senior housing, the court clearly distinguished the actions of that community from the actions of a community engaging in "fiscal zoning." According to the court, ". . . the town's unimpeachable good faith has not given rise even to a suspicion that it was seeking to reap tax base benefits through multidwellings without the drain on municipal services created by families and children." *Maldini v Ambro*, 330 N.E.2d 403, 407 (NY App. 1975), *citing, Golden v. Planning Bd. of Town of Ramapo,* 30 N.Y.2d 359, 378, 334 N.Y.S.2d 138, 152, 285 N.E.2d 291, 301-302.

> exhibited by Orange in regards to Avalon Bay's affordable housing application. From the time when Avalon Bay filed its application, Orange's conduct shows a pattern of attempting to expressly prohibit the construction of the proposed affordable housing project. Remembering the failure of other municipalities in stopping affordable housing from proceeding, Orange officials made an intentional decision to fight the application.

Avalon Bay Communities v. Town of Orange, 2000 WL 226374 (Conn.Super.). The *Orange* court went on to find:

> As the evidence from the hearing shows, many of the representations made by Orange were gross exaggerations and misleading. While the evidence at the hearing showed that the number of school-age children living in the [Avalon Bay] apartments would be less than twenty, town officials estimated that as many as seventy school-age children would live there. As such, town officials conveyed a fear that a new school would have to be constructed at a substantial cost to the taxpayers.

As the Connecticut court held:

> Thus, in situations such as the present, where the plaintiff is challenging the actions of a municipality, the plaintiff can establish his prima facie case by showing that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive. . . (Citations omitted; internal quotation marks omitted.) *LeBlanc-Sternberg v. Fletcher, supra*, 67 F.3d 425.

The case of *Molino v. Mayor and Council of the Borough of Glassboro*, 116 N.J.Super. 195, 281 A.2d 401 (NJ 1971) presents a good example of how a community may seek to childproof the community absent an outright prohibition. In *Molino*, a contractor challenged the enactment of a zoning bylaw that affected his right to construct apartment units. The contractor originally proposed a 252-unit development. At first, however, he could obtain financing for only 80 units. After constructing those units, the contractor sought approval for the construction of the remaining 172 units. Rather than grant such approval, however, the town enacted a zoning bylaw which provided in relevant part that in any given garden apartment complex, at least 70 percent of all units could have no more than one bedroom. Moreover, under the bylaw, no more than 25 percent could have two bedrooms, and no more than five percent could have three bedrooms. In addition, the ordinance contained provisions increasing the minimum yard and frontage requirements, requiring certain kinds of landscaping, increasing the fireproofing requirements, and requiring a planting screen as a buffer. Two weeks after the Borough Council

enacted the ordinance, the Planning Board rejected the site plan because of non-compliance with the new ordinance.

In striking down the Glassboro actions, the court focused on the impact that the zoning ordinance had on families with children. The court said:

> The defendants during the trial admitted on several occasions that this ordinance was designed to keep children out of Glassboro, because more children require more schools and as a result higher taxes. If the issue is narrowed to the resolution of the legality of such action by a governing body, the immediate reaction is not favorable. The provisions of the ordinance must be analyzed. No less than 70 per cent of all apartments shall be one bedroom units. We know this denies occupancy by families with children. And no more than 5 per cent shall be three bedroom units. This is a minimal provision. No more than 20 percent[6] may have two bedrooms, which by design limits the family size.

The court then disapproved the ordinance in a lengthy discussion that is relevant here:

> In the name of control of density of population and the general welfare of the community, the defendants maintain that they are exercising the right to upgrade the apartment ordinance. They are urging judicial sanction be given to their efforts to avoid an increase of tax burdens.
>
> The court finds from the testimony that section one, now constructed and occupied, has 18 one bedrooms, 50 two bedrooms, and 12 three bedrooms. The defendants offered testimony that this unit has 51 school children, 44 in elementary schools and 7 in high school, and that the resulting educational cost is $36,031.40, apart from other municipal services. The tax revenue for 1971 received from this complex was $23,859.00. The officials admit a need for low income housing and have hopeful plans to meet the demand. The need has not been met.
>
> This is not a case where a decision has been made that there is no need for additional apartments or that the subject area is not adaptable to apartments. The plaintiff's application for section two included the same type of apartments as in section one, which would have been permitted under the ordinance until amended. If section two were built it would be adjacent to the present complex in section

[6] The court decision is inconsistent with this figure. At one point, it reports that the bylaw required no more than 20% of units to be two-bedroom. At another point, it reports that the bylaw required no more than 25% of units to be two-bedroom.

one. There can be no objectionable features as to the location of the section two development.

Glassboro needs housing for its own citizens. The governing body has by its legislative action approved apartments and at the named locations. It is not disputed that the conditions and circumstances prevailing require municipal efforts to accommodate by the added construction of dwelling units.

The added question is the right of Glassboro, by zoning regulations, to restrict its population to adults and the exclusion of children.

The effort to establish a well-balanced community does not contemplate the limitation of the number in a family by regulating the type of housing. The attempt to equate the cost of education to the number of children allowed in a project or a community has no relation to zoning. The governmental cost must be an official concern but not to an extent that it determines who shall live in the municipality. With all our advances in expertise, it is doubtful if the cost for educating children can ever be a profitable undertaking.

There is a right to be free from discrimination based on economic status. There is also a right to live as a family, and not be subject to a limitation on the number of members of that family in order to reside any place. Such legal barriers would offend the equal protection mandates of the Constitution.

281 A.2d at 405.

FISCAL LAND USE DECISIONS – A CASE STUDY FROM BELMONT

In 2005, AP Cambridge Partners II, LLC (a/k/a, O'Neill Properties) (hereafter "O'Neill" or "Developer") submitted an application with the Belmont Zoning Board of Appeals ("ZBA"), the local Belmont permitting authority for Chapter 40B comprehensive permits, seeking a comprehensive permit pursuant to Chapter 40B for a housing development consisting of 299 units more or less at Acorn Park (hereafter "Acorn Park development"). The 299 units consisted of the following distribution of units by number of bedrooms under the initial comprehensive permit application:

- No (0) units (0%) with "0" bedrooms ("studio");
- 159 units (53%) with one bedroom;
- 116 units (39%) with two bedrooms;
- 24 units (8%) with three bedrooms; and

- No (0) units with four or more bedrooms.

Chapter 40B provides that any consideration of a comprehensive permit application shall provide an opportunity for any local board or commission to comment on the application. In its written comments on the O'Neill comprehensive permit application, the Belmont Housing Trust, Inc. sought a higher proportion of three-bedroom units. According to the Housing Trust's written comments, the high proportion of one-bedroom units was inconsistent with the Town's local housing needs identified in Belmont's own Consolidated Plan as filed with the U.S. Department of Housing and Urban Development (HUD) as a condition of receiving federal housing dollars. Belmont receives federal dollars through the Home Investment Partnership Program (HOME) as a member of the West Metropolitan HOME Consortium. According to the Trust's comments on the O'Neill comprehensive permit application:

> The proposed Development as it is currently before the ZBA is inconsistent with the Town of Belmont's affordable housing plans in the extent to which it excludes family renters through a design that excludes two and three bedroom units.
>
> * * *
>
> The Town of Belmont has a strong policy that affordable housing should be made available to families irrespective of household size. Section 6.10.1 of the inclusionary zoning bylaw states quite explicitly that: "the purpose of this by-law is to encourage the expansion and upgrade of the Town's affordable housing stock, in order to provide for a full range of housing choices for households of all incomes, ages ***and sizes***. . ." (emphasis added).

The Housing Trust's comments noted:

> The affordable housing needs in Belmont have been identified in the Consolidated Plan introduced in the Trust's comments above. While large related households (5 or more persons) comprised only 6.8% of all Belmont households in 2000, they had a high incidence of housing problems, particularly the 93 families (47 renters and 46 homeowners) with incomes at or below 80% of median. Of these, 34 had incomes at or below 50% of median, including 12 renters and 22 owners. Almost all were paying over 30% of their income for housing and 10 of the homeowners were paying more than half their income for housing.

The Housing Trust's comments concluded:

> In sum, the Belmont Housing Trust recommends that additional affordable three bedroom units be added to the Development.[7] At a ***minimum***, the mix of three bedroom units among the affordable units must reflect the mix of three bedroom units among the market rate units. It would, however, be reasonable to have the 15 additional affordable units provided at pricing between 50% and 80% of AMI be the additional three bedroom units. The Housing Trust requests the ZBA to engage a peer reviewer to review the mix of bedroom unit sizes among the affordable housing unit in relation to the economics of the Development and a market analysis for three bedroom affordable housing units in Belmont. If needed, the recommended peer review could help develop a specific proposal for additional affordable three-bedroom units.[8]

The Town did not address the concerns expressed about the mix of unit sizes in the proposed development and the failure to meet the Town's identified housing needs. The Final Decision (issued February 16, 2007) approved a development of 299 units, consisting of 20 studio units, 156 one-bedroom units, 107 two-bedroom units, and 16 three-bedroom units (Final Decision, at para. 17). The Final Decision issued no "findings" with respect to the consistency of the development with local housing plans submitted by the Town to HUD. Nor did the Final Decision issue findings with respect to the discriminatory impacts of the development documented by the Housing Trust in its comments on the original proposal, as well as in its comments on the proposed conditions.

The Town of Belmont has struggled with conforming its concerns over the fiscal impacts of adding families with children to the community to the specific requirements of federal and state fair housing laws. Belmont specifically addressed the issue of discrimination against households with children in the Analysis of Impediments the Town filed with the U.S. Department of Housing and Urban Development (HUD). Filing an "Analysis of Impediments" is required by federal law as a precondition to receiving federal funds, as Belmont does. Belmont's most recent Analysis of Impediments at the time stated in relevant part:

> **Impediment #2:** Belmont's local decisionmaking on such issues as zoning is frequently driven by an explicit desire *not* to provide additional housing opportunities for families with children. This desire is based on an understandable concern about the additional financial responsibility associated

[7] While it is likely that there is a need for market rate three bedroom units as well, the mix of market rate units is beyond the purview of the Belmont Housing Trust. (This footnote appeared as Footnote 26 in the Trust's Comments to the ZBA.)

[8] The failure to provide at least an equal percentage of three bedroom units among the market rate and affordable units, however, would appear to be a sufficient violation of Fair Housing laws to merit challenge via complaint to the Massachusetts Commission Against Discrimination (MCAD). (This footnote appeared as Footnote 27 in the Trust's Comments to the ZBA.)

> with incorporating additional children into the school system. Nonetheless, whether it comes in local decisionmaking to promote senior housing rather than family housing, housing for empty nesters rather than family housing, or commercial development rather than residential development, discrimination against families with children is still intentional discrimination.

Despite the inconsistency of the Town's own Consolidated Plan, along with the inconsistency of the Town's own Analysis of Impediments, the Town continued to seek to influence O'Neill to minimize the number of housing units that could serve households with children. By December 2006, O'Neill had agreed to ***increase*** the number of affordable "studio" (no bedroom) units in the proposed development, from zero (0) studio units to three studio units. As a trade-off, the developer decreased the number of affordable three bedroom units by two (from five to three) and decreased the number of affordable two-bedroom units by one (from 23 to 22).

In addition, in December 2006, the developer added 17 studio (0-bedroom) units to the market rate units in the proposed development (moving from 0 to 17). This was offset by a substantial decrease in the number of three-bedroom market rate units (from 19 to 13), a decrease in the number of two-bedroom units (from 93 to 85), and a slight decrease in the number of one-bedroom units (from 127 to 124).

As can be seen, the Acorn Park developer responded to local resistance to new family housing by significantly decreasing the number of three-bedroom units in the development. While three bedroom units represented only 8% of the total number of units with which to begin, that number was reduced to 5%. In addition, while the number of two-bedroom units was 39% with which to begin, the number was reduced to 36%. During the ZBA hearing process, the developer added 20 "studio" (0-bedroom) units. At the same time, he reduced the number of *affordable* three-bedroom units by 40% (from five to three) and reduced the number of market-rate three-bedroom units by 31.6% (from 19 to 13). There was an overall reduction in the number of three-bedroom units by 33% (from 24 to 16). In contrast, there was virtually no reduction in the number of one-bedroom units (1.9%), even though one-bedroom units represented more than half of the total number of units (159 of 299) with which to begin.

The O'Neill spokesperson orally acknowledged on at least two occasions at Belmont ZBA hearings on the proposed comprehensive permit that the additional number of studio units was in response to local pressure to minimize the number of families with children that would place students in the Belmont school system and, purportedly, impose additional fiscal costs on the Town.[9] Other evidence of this pressure existed as well.

[9] While each ZBA hearing is electronically recorded, each hearing is not automatically transcribed.

- First, an October 22, 2003 memo from the Acorn Park Development Team to Tim Higgins, then the Senior Planner for the Town of Belmont stated: "Although the proposed condominiums are fairly large, e.g., 1,500 - 1,600 square feet, *the Developer has agreed to bedroom restrictions that will effectively reduce the attractiveness of these units to family households*." (emphasis added). This statement affirmatively acknowledges both (1) that there was an explicit "agreement" to "bedroom restrictions" and, (2) that this agreement was reached knowing of the disparate adverse impact it would have on "family households." Indeed, in the next paragraph, the memo to the Town's Senior Planner notes that "the absence of three-bedroom units almost always reduces the number of school children in a multi-family development and the O'Neill Properties proposal is restricted to one- and two-bedroom homes."[10]

- Second, the Board of Selectmen's meeting from December 20, 2005, under a discussion of "Status of Uplands 40B Application," reported that "the Board also noted that the number of 1-bedroom units has been increased from previous proposals and that this is a positive development." The next paragraph is just as, if not even more, important in setting the policy context: "Selectman Firenze noted that the development had previously planned an office building, and then a 179-unit senior condo development which ran into difficulties in the planning process and led to this 40B proposal. He suggested that the earlier proposal may seem to have some favorable aspects compared to this one and the Board should not rule out encouraging the developer to move back in this direction. The units would be more expensive, generating the same revenue for the Town, *but putting less of a burden on the schools and other Town services*." (emphasis added). The minutes continue then to say "Selectman Firenze pointed out that if the Board tries to work with the developer and not create an adversarial relationship, it could get the most favorable development."[11]

The policy articulated in the documents above translated into action by other components of the Town government. For example, a letter from the School Department to the Zoning Board of Appeals, dated February 8, 2006, asserted that the 299-unit development would generate two (2) students per each multi-bedroom housing unit. The School Department letter asserted not merely that there would be *children*, but that the Town of Belmont "could expect 280 *school-age children*" from a 299-unit development. The School Department told the ZBA that "the cost of educating the projected number of school-age children from the Residences at Acorn Park would be approximately $2.0 to $2.6M for 2007-08, plus an additional $102,590 for transportation."

[10] While the O'Neill proposal eventually became a 299 unit rental development, rather than a condo development, the stated "agreement" would set the tone for future action by the developer and certainly articulated the intent behind such an agreement.

[11] In considering what might be viewed as "the most favorable development," remember that the December minutes had just two paragraphs before indicated that the Board considered an increase in the number of 1-bedroom units to be "a positive development."

The School Department finally argued that these costs would escalate at 4.5% per year for the education costs and 3.0% for busing."[12]

WHEN DO INDIVIDUAL DECISIONS BECOME A "POLICY OR PROCEDURE"?

In January 2012, Smith Legacy Partners filed an application for a mixed use development in the Town of Belmont ("Cushing Village"). The Smith-Legacy application proposed the construction of, among other things, 142 apartments consisting of one and two-bedroom units spread over three buildings. The original proposal was for 58% of the units to be one-bedroom units with the remaining 42% to be two-bedroom units.

As with the Acorn Park development, Belmont balked at the notion of allowing additional family housing to be developed in the community in the Cushing Village development. The Belmont Planning Board expressed concern about the fiscal impact that the size of the development, and the mix of units, would have on the Town. Of particular concern was the addition of school-age children to the Belmont Public Schools. At its October 9, 2012 public hearing, the Planning Board requested additional documentation from the developer on the number of school-age children that would be generated by the development.

Despite the ultimate down-sizing of the development, primarily to minimize the visual impacts on abutting property owners, the Planning Board refused to accept the fiscal impact analysis by the developer and continued to question the "fiscal impact" that Cushing Village would impose on the Town. As recently as March 12, 2013, the Planning Board released its own data projecting that the 115 units in the Cushing Village development would generate between 35 and 41 school-age children[13] each of whom would impose a "Long Run Variable Cost" on the Town of $10,911. The Planning Board analysis was explicitly disputed by the developer, both in terms

[12] I cite these school department figures because the courts have previously held that such exaggerated claims can be found to be the basis of intentional discrimination:

> As the evidence from the hearing shows, many of the representations made by Orange were gross exaggerations and misleading. While the evidence at the hearing showed that the number of school-age children living in the Avalonbay apartments would be less than twenty, town officials estimated that as many as seventy school-age children would live there. As such, town officials conveyed a fear that a new school would have to be constructed at a substantial cost to the taxpayers.

As the Connecticut court held:

> Thus, in situations such as the present, where the plaintiff is challenging the actions of a municipality, the plaintiff can establish his prima facie case by showing that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive. . .

Avalon Bay Communities v. Town of Orange, 2000 WL 226374 (Conn.Super.) (citations omitted; internal quotation marks omitted).

[13] The Planning Board assumed that all school-age children would enter the Belmont Public Schools.

of the number of children (Smith-Legacy estimated 12 school-age children) and in terms of the cost per student (Smith-Legacy estimated a long-run variable cost of $8,417 per student).

The inclusion of a "long-run variable cost" analysis in the Planning Board's consideration places a disproportionate burden on housing developments that would provide family housing in Belmont. Of the projected $534,903 "costs" to be imposed on the Town from the Cushing Village development, for example, more than 71% ($381,885) was attributed to the long-run variable cost of adding students to the school district. The resulting "net fiscal impact" to the Town made the Cushing Village development proposal less desirable in the eyes of the Planning Board.

While like the Acorn Park development, the Planning Board decision regarding Cushing Village was a single "land use decision," the concerns expressed by Town officials resulted in pressure on the developer to reduce the number of units that would be available for family housing. The continuing concerns expressed by Belmont's public officials, along with the pressure both direct and indirect to minimize the development of family housing, though manifested in individual land use decisions, have been repeated to the extent that they evidence a pattern or practice that should evidence a "policy or procedure" under HUD's new Fair Housing regulation. The MA-2013-AI should address how a documented set of repeated decisions can be used to demonstrate a discriminatory local land use "policy or procedure" in such a fashion.

SUMMARY AND CONCLUSION

It is difficult to see how a fiscal impact analysis such as that used by the Belmont Planning Board can be justified under HUD's new "policies and procedures" Fair Housing regulation. On the one hand, the inclusion of a fiscal impact analysis, particularly one that includes of a long-run variable cost analysis for additional school-age children, will always work to the detriment of approving family housing in a community. According to the MA-2013-AI, under HUD's Final Rule, if "a housing practice caused/will cause a discriminatory effect on a group of persons or a community. . .based on a protected class. . .the burden shifts to the respondent/defendant to prove that the discriminatory effect is still lawful due to a 'legally sufficient justification.'"[14] The MA-2013-AI goes on to state, however, that "under the Final Rule, a legally sufficient justification requires the challenged practice to be 'necessary to achieve one or more substantial, legitimate, nondiscriminatory interests' of the respondent or defendant."[15] Finally, the MA-2013-AI states that "[t]he justification must also be supported by evidence and not hypothetical or speculative."[16]

[14] MA-2013-AI, at 241.
[15] MA-2013-AI, at 241.
[16] MA-2013-AI, at 241.

Such a burden cannot be met for a fiscal impact analysis that negatively reviews housing developments based on long-run variable costs for purposes of applying a "fiscal impact analysis" for school-age children associated with individual land-use decisions. Consider:

- Family housing is a protected class under the federal Fair Housing Act.

- Minimizing fiscal impacts to a community is not a "substantial, legitimate, nondiscriminatory interest" of a local community for purposes of making land-use decisions.[17]

- A "long- run variable cost" analysis will always be "hypothetical or speculative," both in terms of: (1) the number of school-age children generated by any given development; and (2) the long-run variable cost per student; and (3) the percent or proportion of school-age children that would attend local public schools.

Based on the above discussion, I offer two recommendations for the MA-2013-AI:

- First, I recommend that one question that should be addressed in the MA-2013-AI is whether and/or when a series of "individual land use decisions" represents such a pattern or practice by a local government that it evidences a "policy or procedure" for purposes of Fair Housing choice, whether or not that "policy or procedure" has been explicitly committed to paper; and

- Second, I recommend that the MA-2013-AI should explicitly recognize the use of a fiscal impact analysis, particularly one applying a long run variable cost analysis to the number of school age children, is a land use "policy or procedure" that represents an affirmative, substantial impediment to Fair Housing choice for a protected class.

[17] The New Jersey courts have held, as discussed above: "The effort to establish a well-balanced community does not contemplate the limitation of the number in a family by regulating the type of housing. The attempt to equate the cost of education to the number of children allowed in a project or a community has no relation to zoning. The governmental cost must be an official concern but not to an extent that it determines who shall live in the municipality. With all our advances in expertise, it is doubtful if the cost for educating children can ever be a profitable undertaking."