

Cedar Hills Developers, Inc. v. Township of Wyckoff,
No. 89-5391 (D.N.J. 12-11-90)
P-H Prentice Hall Fair Housing Fair Lending Reporter, [¶ 15,675]

[Court enjoins enforcement of township's senior citizen residential cluster development ordinance against a developer and finds the developer free to comply with the Fair Housing Act's prohibition against discrimination on the basis of familial states. The developer must comply with the Fair Housing Act and may choose whether to do so by seeking the exemption for "housing for older persons" or by marketing to the public without discrimination.]

NOT FOR PUBLICATION
OPINION AND ORDER

Nicholas H. Politan, U.S. District Judge

This is a declaratory judgment action instituted on December 28, 1989 by Cedar Hills Developers, Inc. ("Cedar Hills"), against the Township of Wyckoff ("Wyckoff"). The United States Department of Housing and Urban Development ("HUD") is also participating as a party plaintiff.[fn1] The Court has jurisdiction over this action under 28 U.S.C. § 1345 and 42 U.S.C. § 3613.

This case presents a variety of issues concerning the impact of recent amendments to the Fair Housing Act of 1968. Specifically, the Court must resolve the following questions:

- (1) How the amendments apply to a preexisting senior citizen development community with an age restriction lower than that proscribed in the amendments; and
- (2) Whether Wyckoff can enforce an amended senior citizen zoning ordinance against the Cedar Hills community.

Plaintiff, Cedar Hills, is a builder who owns approximately 35 acres of land in Wyckoff. In 1983 the property was zoned by the Township as R-25. This classification allowed the construction of single family homes on lots with a minimum of 25,000 square feet. In 1983 and in 1986, at the request of Cedar Hills, Wyckoff rezoned the property as R-15. This classification allows the construction of single family homes on lots of 15,000 square feet. It also allows the developer the option to construct a "senior citizen residential cluster development." The housing density of such a project is, obviously, significantly greater than ordinarily permitted under either R-25 or R-15.

In 1986 Wyckoff's zoning code defined "senior citizen housing" as:

Housing intended exclusively for persons fifty-two (52) years of age or older and the spouses of such persons; when necessary for the care of persons fifty-two years of age or older, one (1) person, other than a spouse, under fifty-two (52) years of age is permitted in each household.

Cedar Hills chose to develop the 35 acres as a seniors community. Consequently, the Master Deed filed with the Bergen County Clerk's Office, as well as the projects promotional materials, all indicate that Cedar Hills was age restricted. The Public Offering statement prominently states that "THIS IS AN AGE RESTRICTED COMMUNITY." As originally conceived, Cedar Hills was to contain 98 units in 26 buildings, built in 5 separate phases or sections. Two of the phases have not been completed. At this time approximately 30 of the units are occupied.

On September 13, 1988, Congress amended the Fair Housing Act of 1968, 42 U.S.C. § 3601, et seq. The amendments became effective on March 12, 1989. They prohibit, in part, discrimination based on "familial status".[fn2] 42 U.S.C. § 3604 (a) (Supp. 1989). Familial status is defined in §§ 802 (k), 42 U.S.C. § 3602 (K), as "one or more individuals (who have not attained the age of 18 years) being domiciled with —

- (1) a parent or another person having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.[fn3]

There are certain exceptions to this prohibition. Most importantly, the Act exempts housing for "older persons." The act provides:

- (2) As used in this section, "housing for older persons" means housing —

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(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons; . . . or

(B) intended for, and solely occupied by, persons 62 years of age or older; or

(C) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:

(i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

(ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

(iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

42 U.S.C. § 3607 (2) and (3),

Wyckoff immediately recognized the conflict between these amendments and its own Senior Citizen zoning classification. On November 21, 1989 Wyckoff marked Section 186-6 of its zoning ordinance to redefine "Senior Citizen Housing". The revised ordinance provides:

(A) Housing intended for at least one person 55 years of age or older. No persons 18 years of age or younger shall be permitted to occupy such housing. New occupants of such residential units shall meet the age requirements of this Chapter. Notwithstanding the aforementioned requirements, up to 20% of the units in a Senior Citizens Residential Cluster Development may be occupied by persons, under age 55 but over age 18, provided:

(1) at least one person occupying each unit is 46 years of age or older and such person is the surviving spouse of a person 55 years of age or older who previously occupied the unit; or

(2) such person has inherited ownership of the unit; or

(3) such person violates the present age requirements of this Chapter, however, such person originally complied with the age requirements of this Chapter as it existed at the time of that person's original occupancy of the unit.

(B) The owners and occupants of Senior Citizen Housing shall, in the marketing of such units for sale, rental or any other form of transfer, indicate that the units are for housing persons 55 years of age or older.

(C) The aforementioned provisions are intended and shall be construed so as to comply with the Fair Housing Amendments Act of 1988, specifically the exemption for housing for "older persons."

Cedar Hills then instituted this action asking the Court to declare that Wyckoff's amended ordinance does not restrict plaintiff's right to sell all or a portion of its remaining unsold condominium units to persons under the age of 55. The Complaint also seeks to enjoin Wyckoff from refusing to issue Certificates of Occupancy based upon the age of the purchaser. Wyckoff answered and counterclaimed, essentially asking that the Court direct the plaintiff to comply with the Fair Housing Act and Wyckoff's revised "Senior Citizen Residential Cluster Development Zone Ordinance."

The arguments of Cedar Hills and the United States are straightforward and almost mathematically logical. Plaintiff asserts that Wyckoff's original senior citizen zoning classification violates the Fair Housing Acts Amendments prohibition against familial status discrimination. As such, plaintiff asserts that it has the right to choose the manner in which to comply with the Fair Housing Act, that is, either by providing housing on a nondiscriminatory basis or by qualifying for the Housing For Older Persons exemption. HUD concurs in this position, asserting that the Amended Act does not compel the developer to seek exempt status. Rather, according to HUD, it requires full compliance with the exemption criteria if Cedar Hills makes the discretionary decision to seek exempt status.^[fn4] Correspondingly, HUD argues that if Cedar Hills does not seek exempt status it must comply with the Act's prohibition of familial status discrimination.

The threshold issue before the Court concerns whether the Amended Act applies at all to a community built with a preexisting age restriction lower than that provided in the exemption section.^[fn5] The

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first place to begin this analysis is the statute. Generally, in the absence of express provision, Acts of Congress take effect when the President signs the bill. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* 885 F.2d 1149 (3d Cir. 1989). A Court is also generally required to apply the law in effect at the time it renders its decision. *Beth Israel Hosp. of Passaic v. Heckler*, 560 F. Supp. 1222 (D.N.J. 1983). In this case, the Amended Act specifically provides that it will be effective on March 12, 1989. More importantly, the Fair Housing Act provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be discriminatory housing practice under this subchapter shall to that extent be invalid."

42 U.S.C. § 3615.

There is little dispute, therefore, that the Act applies to practices, even pre-existing ones, defined to be discriminatory. There is nothing in the statute to suggest that this finding should be different because the discrimination at issue is familial rather than racial. Nor is it dispositive that the mechanism embodying the discrimination is a municipal ordinance. Courts have consistently held that the Fair Housing Acts provisions apply to municipal zoning powers. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 109 S.Ct. 276 (1988); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). Moreover, as noted by HUD, the legislative history reflects that Congress carefully considered this very issue before passing these Amendments. See Hearings before the SubComm, on Constitutional Rights of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (April 22, 29, May 6, 7, 13 and 14, 1987) ("House Hearings"), pp. 609-18; Hearings before the

Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. (March 31, April 2, 7, 9, June 9, and July 1, 1987) ("Senate Hearings") pp. 477-88. The fact that many communities, originally designed to be either adult or seniors residences, would be adversely affected by this legislation must, therefore, be viewed as an unfortunate byproduct of Congress' legitimate objective of eradicating familial status discrimination.

Indeed, the legislative history reflects Congress' intention to strike a balance between eliminating familial status discrimination with the needs of legitimate retirement communities. While the intention of the Act was "not to disrupt the lives of senior citizens or the operation of legitimate retirement communities" 134 Cong. Rec. H4605 (daily ed. June 22, 1988), Congress nevertheless recognized that these twin objectives would, in some cases, conflict. In such cases, the statute and its legislative history, indicate that the paramount goal of eradicating all activity defined as discriminatory would supersede the interests of various legitimately established retirement communities. Representative Schroeder succinctly summarized this position in the House on June 23, 1988:

The reason that we wanted facilities is if we did not have a facility requirement in there, it would be a loophole that one could drive a Mack truck through, because anytime a housing market overheated, people would instantly declare their building for seniors only or for singles only or something and shut families out.

So we wanted to be sure that it was truly a facility built for seniors with facilities that were there to service them, and not a loophole to get around serving families the minute the vacancy rate fell.

The Fair Housing Act Amendments thus apply to this community and all state or local ordinances regulating it. Wyckoff's original "senior citizen residential cluster development" ordinance is inconsistent with its prohibition of familial status discrimination. As such, neither Cedar Hills nor the Township can lawfully urge its enforcement.

This conclusion does not necessarily, however, impel the result suggested by the plaintiff. The Court must first determine, given its conclusion that the Act applies, how it should be applied. The Act, and its implementing regulations, proscribe a variety of options open to a community such as Cedar Hills.^[fn6] Section 3607 (3) provides that "Housing shall not fail to meet the requirements for housing for older persons by reason of: (A) persons residing in such housing as of September 13, 1989, who do not meet the age requirements of subsections (2)(B) or (C): Provided that the new

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occupants meet the age requirements of subsection (2)(B) or (C). It further provides, in Section B, that unoccupied units must be reversed for occupancy by persons who meet the age requirements of 2 (B) and (C). These sections demonstrate that Congress did not intend to deny a Senior Citizen Community the benefit of such Housing solely because of the fortuity that certain residents do not meet the exemptions age restrictions.

The legislative history supports this conclusion.^[fn7] The most important colloquy concerning to this issue occurred between Senator DeConcini and the Bill's Senate Manager, Senator Kennedy:

Mr. DeCONCINI. Am I correct that nothing in the act is intended to impose liability or to deny elderly housing communities the exemption of the act due to the existence of a recorded age restriction in the community which is lower than the current minimum age stated in the act, when the existing age restriction was created prior to the date of enactment? This is, of course, assuming that a community meets the exemption criteria and that any pre-existing age restriction will not be enforced in a manner inconsistent with the Act.

Mr. KENNEDY. The Senator is correct. The Act is not intended to impose liability or deny elderly housing communities the exemption of the bill due to preexisting age restrictions which are lower than the current minimum age stated in the bill, and were recorded prior to enactment of the act. And as you have stated, this is contingent upon a community meeting the exemption requirements and not enforcing any pre-existing age restriction in a manner inconsistent with the Act.

Mr. DeConcini. I thank the Senator for his clarifying response.
134 Cong. Rec. S10, 549 (daily ed. Aug. 2, 1988).

Although somewhat cryptic, this testimony is consistent with this statute. It suggests, as enacted in § 3607, that an elderly community will not be denied exemption solely because of a pre-existing age restriction lower than prescribed in the Act. According to the testimony, however, such status is contingent upon the community satisfying the two other factors described by Senator DeConcini and echoed by Senator Kennedy. The Court will briefly examine these two contingencies.

First, the community must meet the exemption criteria. Although this statement appears mutually exclusive given the subject matter of the Senators' discussion, that is a community with a recorded age contrary to the exemption, it can be viewed consistent with § 3607. Such an interpretation would be that the community must meet the Act's age restriction in the future, as provided in § 3607, and, significantly, meet the other delineated exemption criteria. These are significant services and §§ 2 (c)(ii)'s percentage requirement.^[fn8] The regulations and recent decisions interpreting them support this conclusion. 24 C.F.R. § 100.304; *United States of America v. Circle K Mobile Home Park*, C.A. No. 89-1664 (United States District Court, Western District, of Washington).

The second criteria discussed by Senators DeConcini and Kennedy is that the community not enforce the pre-existing age requirement "inconsistent" with the act. While this requirement also appears logically inconsistent it too is susceptible to a reasonable interpretation. That is that in the future a community, such as Cedar Hills, has a legal obligation to comply with all the exemption requirements. For example, Cedar Hills could not amend its by-laws to permit residence by individuals 53 years of age but at the same time exclude children

under 18. Stated differently, Cedar Hills could either free the development of all restrictions or qualify for the exemption by meeting all of its requirements.[fn9]

The regulations, and other legislative history suggest, however, that there are limited exceptions to strict compliance with the "other" exemption criteria. For example, in response to inquiries from Senator Thurmond, the ever loquacious Senator Kennedy opined:

What we are basically providing is that in areas that are going to be senior citizen retirement communities those that are going to be the age of 62 or older none of these particular services are going to have to be required. But when we were talking

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about younger ages, 55 and older and under the formula in the legislation it spells out the percentage. Eighty percent of those units have to have individuals 55 or older. If that particular housing is going to be a place for retirees, particularly in some sections of our country — there has been concern in Arizona, Ronda, and other communities — we want to make sure they are going to be really a place where seniors are going to retire. At least this requirement is an additional indication they are going to be for seniors they will be providing the facilities which seniors basically enjoy and want. But it was never intended to be a requirement that additional kinds of services would be necessary in order of the to enjoy the provisions and protection of the Act.

So we have granted the Secretary the ability to issue the kind of regulations that would take that into consideration. Specifically, the Secretary may provide in the regulations that it is impractical to provide facilities and services, and the exemption may nevertheless be available in those unusual circumstances where housing without such facilities and services will provide important housing opportunities for older persons.

The regulations in fact provide that under certain circumstances the requirement of significant services will be waved. These regulations read in part:

(a) The provisions regarding familial status shall not apply to housing intended and operated for occupancy by at least one person 55 years of age or older per unit, Provided that the housing satisfies the requirements of § 1000.304 (b)(1); or (b)(2)

(2) It is not practicable to provide significant facilities and services designed to meet the physical or social needs of older persons and the housing facility is necessary to provide important housing opportunities for older persons. In order to satisfy this paragraph (b)(2) of this section the owner or manager of the housing facility must demonstrate through credible and objective evidence that the provision of significant facilities and services designed to meet the physical or social needs of older persons would result in depriving older persons in the relevant geographic area of needed and desired housing.
24 C.F.R. § 100.304 (April 1, 1990 edition).

It is thus apparent that in certain limited cases a development with a pre existing age restriction lower than provided in the Act, and devoid of "significant" services, could, nevertheless, qualify for the older persons exemption. The paradox of this case is that the developer does not seek to qualify for the exemption. Ordinarily, the developer would be the defendant and would bear the burden of establishing that the project is exempt housing under the Act. See 24 C.F.R. § 1000.304. This burden is consistent "with the general rule that one who claims the benefits of an exemption carries the burden of proving his entitlement to it." Circle K, Slip Op. at 9 (citing, *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967); *United States v. An Article of Device*, 731 F.2d 1253, 1262 (7th Cir. 1984), cert. denied. 469 U.S. 882 (1984)). The dispositive issue in the case thus becomes, given the preemption of the original ordinance, whether the Township can force the developer to comply with the amended ordinance by meeting the regulatory exemption or the statutory exemption? The Court finds that under the statutory scheme of the Fair Housing Act, the Township cannot.[fn10]

When Congress passed this law it carefully considered its effect on previously established "seniors" communities. It recognized that, unfortunately, the interests and legitimate desires of all seniors could not always be reconciled with the similarly persuasive interests of families with children. Congress intended that in such cases the latter interest would supersede the former. More importantly, Congress most clearly provided that in order to qualify for the Housing for Older person exemption the community would have to demonstrate its entitlement to the exemption. The regulations carefully echo this requirement and similarly place the affirmative burden of proof on the party seeking the exemption. See 24 C.F.R. § 100.304 (" . . . the owner or manager of the

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housing facility must demonstrate through credible and objective evidence. These provisions demonstrate that the discretionary decision concerning the communities method of compliance must rest with the owner. In this case, the owner made the decision to comply by selling its units on a wholly non discriminatory basis. Under the law, that decision must be respected.

Common sense supports this conclusion. Cedar Hills agreed to build a community to comply with Wyckoff's original zoning ordinance. It did not agree to build a community that would comply with the Housing For Older Person exemption of the Fair Housing Act. In fact, as presently structured the community simply fails to meet that exemption and Wyckoff cannot lawfully force it into compliance. To do so would vest Wyckoff with a power the Constitution vested in the hands of Congress and would, moreover, place a financial burden upon the plaintiff that it neither contractually undertook nor is statutorily required to shoulder.

The Court recognizes the persuasive and important corollary to this conclusion. Wyckoff can legitimately argue that the plaintiff would never have been allowed to build at an increased density absent its pledge to build a seniors community in accordance with the original zoning law. The Township can legitimately assert that a myriad of objectives and plans have been thwarted, time wasted and the Township's sovereignty subverted. But while it is true that the Fair Housing Act divested Wyckoff of an important part of its judgment

and ability to control this particular development, this result must be viewed more as a by-product of our federal system of government than as a windfall to this plaintiff. The fact is that Cedar Hills did not write this law or urge its passage. It is simply the unintended beneficiary of Congress' commendable objective of eliminating discrimination against families with children. The plaintiffs gain, if it must be viewed as such, can not be divorced from its context.

Similarly, the Court's decision cannot be divorced from its context. Just as the Township has an obligation and civic duty to plan for its future, this Court's obligation is to apply the law and the constitution uniformly. When discharging that duty it is not always possible merge the interests of equity and law. This fact, however, is representative of the strength of the process rather than its weakness. For just as the Township, when thwarted in its planning function cannot turn its back on its duty, this Court can not modify its constitutional functions according to the subjective difficulties of any one case. To do so would make immutable principles of law, essential to our system of government, subject to the prejudices and partisan concerns of the individual.

It is also important to note the legitimate and articulately expressed concerns of the Cedar Hills' homeowners. The Court recognizes their positions, their hopes and the fact that their plans to live out their lives among older citizens have been thwarted. The Court also recognizes their frustration with a government that far too often acts without fully considering the ultimate ramifications of its actions. But perhaps this controversy must be resolved by recognizing that a government is merely an assemblage of people, subject to the full range of flaws and imperfections that effect all mortals. To ask that government be perfect is to ask the impossible. It is to live in fantasy. Life is often unjust and filled with uncertainty. We must comprehend this fact and recognize that within a democracy it is often necessary for the few to sacrifice for the benefit of the whole. Such is the case here.

Accordingly, the Wyckoff and its officers, agents, employees, and attorneys are hereby:

1. PERMANENTLY ENJOINED from taking any and all action to enforce its Revised Senior Citizen Residential Cluster Development Ordinance against the Cedar Hills development.

2. PERMANENTLY ENJOINED from making any statement or representation to any person that the Cedar Hills' community is an age restricted community.

3. It is further declared that the Cedar Hills development is freed of any and all age restrictions and is free to market its units in compliance with the Fair Housing Act.

SO ORDERED:

[fn1] On March 20, 1990 Wyckoff filed a Third Party Complaint against the Department of Housing and Urban Development. On April 9, 1990 HUD moved to dismiss the Third Party Complaint and participate as Amicus Curiae. Thereafter, the parties, including HUD, engaged in extensive settlement discussions. when these efforts failed HUD was granted the right so file a Complaint in intervention as a party plaintiff.

[fn2] Cedar Hills' units were on the market prior to this effective date.

[fn3] The Act also makes it unlawful to "interfere with any person in the exercise or enjoyment of . . . any right granted or protected by §§ 3603, 3604, 3605 or 3606 of this Title." 42 U.S.C. § 3616.

[fn4] HUD's position on this question foreshadows the ultimate question in the case: Who is to decide how Cedar Hills should comply with the Fair Housing Act — the developer or the Township?

[fn5] Although The Township has abandoned its intention to enforce the original ordinance it is, nevertheless, important to resolve this threshold issue.

[fn6] there is no dispute that Cedar Hills was designed as a legitimate Senior's Community. The fact that Cedar Hills' 1987 Offering Statement states that the developer intended to "request the Township of Wyckoff to revise the present zoning ordinance to reduce the minimum age [of occupancy] to forty-six (46) does not alter this conclusion. The developer may have intended to make such an application. There is nothing before the Court, however, to indicate that such a request would have been granted or even seriously considered. The fact remains that Cedar Hills was built as a "senior citizen residential cluster development."

[fn7] While recognizing that reliance on legislative history in divining the intent of Congress is a step to be taken cautiously, Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 25 (1976), the Court also recognizes that the statements of a Bill's sponsor, in certain cases, should be examined and is entitled to certain weight. See Ernst and Ernst v. Hochfelder, 425 U.S. 185 (1976). In this case, Kennedy was the Bill's Senate Manager and his statements are, accordingly, entitled to some weight.

[fn8] This section provides, in part. "that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit."

[fn9] It is for this reason that the various resolution alternatives briefed by the parties are ultimately unworkable. Congress definitely envisioned the very problem before this Court and provided specific alternatives. Those alternatives do not permit the ad hoc. measures suggested during settlement discussions.

[fn10] Cedar Hills suggests that Wyckoff cannot enforce the revised ordinance against it because the condominium development qualifies, under state law, as a prior non-conforming use. The courts holding, under Federal law, renders it unnecessary to address this state law

issue in depth. For the record, the court notes that Plaintiffs non conforming use argument is logically infirm. This is so because the developer seeks so benefit from the non-conforming use statute by avoiding the very use they argue it protects. Logic suggests that the party advancing a non-conforming use position would ask the court to allow the use to continue. In this case, Cedar Hills asserts that it has a vested right under state law to operate under the original zoning ordinance and a simultaneous obligation to comply with the Federal Act. The two positions are fundamentally inconsistent. This is so for she simple reason that the moment the Act became law, Wycoff's Senior Citizen Zoning Ordinance was rendered an illegal discriminatory restriction. Under the supremacy clause Cedar Hills had an obligation to comply with the Act.