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DOCKET NO. 05-0437

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Richard Thompson, et al.,

Petitioner,

- v -

City of Dreams Zoning Commission,

Respondent.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES SUPREME COURT

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Please limit your arguments to the enclosed Questions Presented. You may rephrase the questions as long as the rephrasing does not change the essence of the issues posed. It is imperative that you carefully review the rules governing this year's competition. There has been significant revision of the rules since last year.

## **THE PROBLEM**

On May 18, 2004 Respondent, the City of Dreams Zoning Commission, adopted a new Chapter 25 to the Zoning Regulations for the City of Dreams. Chapter 25 purports to establish an inclusionary zoning program that will “require certain types of new and rehabilitated residential developments to set aside a portion of their gross floor area for the provisions of units to be sold or rented to moderate-income and, in some instances, low-income households at prices and rents to be determined by the City.” While the language of Chapter 25 describes the inclusionary zoning program as designed to benefit low-income residents, the Petitioner class sees it as a discriminatory means of preventing wealth accrual among minorities.

Richard Thompson is a 35 year-old African-American father of twin daughters, Amira and Amina. Before his wife Celia succumbed to breast cancer in late 2003, Thompson acted as a stay-at-home father while Celia worked as a secretary. After Celia’s death, Thompson sought employment and eventually landed a job as a night time parking lot guard at We Watch Over Security. Much of Thompson’s income was used to cover child care expenses for his daughters. Despite working overtime, Thompson could not afford to keep the apartment he and his late wife rented.

While speaking with a coworker one night, Thompson learned of the Inclusionary Zoning Act. Thompson’s earnings were slightly less than 50 percent (50%) of the Annual Median Income for the City of Dreams. Seeing the inclusionary zoning program as an opportunity to make a better life for his daughters, Thompson applied for consideration. His application was accepted, and on June 30, 2004, Thompson and his daughters moved into a new development pursuant to the City of Dreams Inclusionary Zoning Act.

Thompson learned that the Inclusionary Zoning Act provides for a control period in perpetuity, with no chance for homeowners to gain wealth creation on resale. After reading more on the subject, Thompson learned that the City of Dreams is the only

jurisdiction in the United States with a control period in perpetuity. Thompson visited a community legal clinic because he “didn’t think that seemed quite right.” The staff attorneys at the legal clinic agreed.

Eventually, Thompson filed suit against the Zoning Commission in federal District Court, representing a class of African-American potential homeowners who, according to the Complaint, “have been harmed by and who will be harmed by the unfair terms, privileges, and conditions of homeownership under Inclusionary zoning units in the City of Dreams” in violation of the Fair Housing Act. Specifically, Thompson claims that: (1) the Zoning Commission violated federal law when they enacted legislation that would prevent Plaintiffs from receiving the full terms, conditions and privileges of homeownership, which are statutorily mandated; (2) the Zoning Commission’s acts and omissions had or will have a discriminatory effect on Plaintiffs; and (3) the Zoning Commission’s acts and omissions were motivated by discriminatory intent.

After losing at the District and Circuit Court levels, Thompson appeals to the United States Supreme Court, where certiorari has been granted on two questions:

1. Whether Chapter 25 of the Zoning Regulations for the City of Dreams violates Title VIII of the Fair Housing Act of 1968, 42 U.S.C. § 3604(b).
2. Whether Chapter 25 of the Zoning Regulations for the City of Dreams violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

## Zoning Commission

The duties of the Zoning Commission are set forth in City of Dreams Statute § 6-641.03. First, the Commission prepares, adopts and amends the City Map when there are project conflicts with existing regulations. Second, the Commission is responsible for regulating the text of the Zoning Regulations and for regulating the use of air rights development in public spaces. Finally, the Commission is responsible for regulating requests for multi-purpose projects.

The Zoning Commission is an independent, five-member, quasi-judicial body in the City of Dreams, deriving its authority under CD ST. § 6-641.01. The members of the Commission are:

1. George T. Poole, Chairman
2. Eduardo Gomez
3. Cynthia Johnson
4. Dr. Angela Shabazz
5. Herman Kryzewski

On November 23, 2002, The Initiative for Inclusionary Zoning Mandates (“IIZM”), a body of non-profit, public, and private entities, proposed that the City of Dreams adopt an Inclusionary Zoning program. The IIZM filed the necessary petition with the Zoning Commission to initiate the process, and on April 26, 2003, the C.D. Office of Planning (“OP”) filed a Notice of Public Hearing to consider the IIZM proposal. While the OP disagreed with the IIZM proposal on several issues, neither IIZM nor OP initially provided for a perpetual control period. The IIZM proposed a control period of twenty (20) years, while the OP proposed a control period of fifteen (15) years.

Between July 25, 2003 and May 18, 2004, the OP and the Zoning Commission were allowed to raise questions in nine public hearings. Though several topics were discussed, testimony during the public hearings focused on the negative effects of a longer control period.

## Excerpts from Zoning Commission Public Hearings

November 5, 2003

**Chairman Poole:** I don't think the Commission is seeing the big picture here. We're focusing too much on the minor details. I say we go with the perpetual control period or whatever we can get away with. Any windfall developers receive does not justify only temporary affordability.

**Commissioner Shabazz:** Chairman, I think this might have some negative implications and the only way I'll agree to perpetuity is if I can receive some assurances that we can cure the negative impact.

**Chairman Poole:** This Commission doesn't have to do anything about the control period ending. It makes the whole thing a lot simpler in terms of buyouts and all that kind of stuff.

**Commissioner Shabazz:** But Chairman, the testimony given here tonight indicates that low-income buyers will potentially have zero opportunity for wealth creation if we make the control period go into perpetuity. I thought the purpose of the program was to help them out. This seems to hurt them in the long run.

**Chairman Poole:** Eh, maybe this will teach them to work harder on their jobs. If they perform well on the job, I'm sure they'll be rewarded with pay increases. That should be enough to help them save money and eventually buy a house at market rate. Even with the perpetual control period, the poor guy can resell, get his sack of money, and everybody goes on their merry way.

January 24, 2004

**Chairman Poole:** Ok folks, this hearing is called to order. First on tonight's agenda, we have a Census Bureau analyst here to discuss some statistics. Agent Blackburn, you may begin.

**Agent Blackburn:** Thank you, Chairman. I was asked to come here to describe the racial backdrop of this proposed inclusionary zoning program. Feel free to chime in with any questions you may have. According to the 2000 U.S. Census, 12.9% of all persons in the United States are African-American. Yet, in the City of Dreams, 61.3% of all residents are African-American.

**Commissioner Johnson:** Agent Blackburn, if I may. Are you saying the African-American population percentage in the City of Dreams is almost 5 times the national African-American population percentage?

**Agent Blackburn:** Give or take a few percent, yes.

**Chairman Poole:** Oh, I thought they were all in jail.

**Commissioner Johnson:** Excuse me?

**Chairman Poole:** I mean, I thought I'd read somewhere that there were more Blacks in jail than in open society. Maybe that was just the men.

**Commissioner Johnson:** Agent Blackburn, please continue.

**Agent Blackburn:** Thank you. Statistics also show that African-Americans make up a disproportionate number of those who fall into the low-income resident class, as defined by the Inclusionary Zoning Act. In the City of Dreams, 19.1% of the population is living below the poverty line. Of this group, 78% are African-American. That's just individuals. If we look at families, 87.5% of families below the poverty line are African-

Americans.

**Commissioner Johnson:** So, this program will probably have a much greater impact on African-Americans than other races?

**Agent Blackburn:** Well, just looking at the numbers, 78% of the people who qualify for the program are African-American, so they'll likely be the ones who are most affected by it. That would be my educated guess.

**Chairman Poole:** And how long have you been with the Bureau?

**Agent Blackburn:** I've been an analyst for 35 years. I've been Lead Analyst for 20 of those years. I've traveled all around the country analyzing this very sort of demographic data for much of that time.

**Commissioner Johnson:** Thank you, Agent Blackburn. We appreciate you for sharing your expertise and time.

May 18, 2004

**Chairman Poole:** We are preparing to vote on adopting Chapter 25 to the City of Dreams Zoning Regulations, also known as the Inclusionary Zoning Act, which includes a perpetual control period. OK, this will be a roll-call vote. Say “Yea” if you are in favor of its adoption or “Nay” if you are not in favor of its adoption when your name is called. Commissioner Gomez.

**Commissioner Gomez:** Yea

**Chairman Poole:** Commissioner Gomez’s vote is “Yea.” Commissioner Johnson.

**Commissioner Johnson:** Nay

**Chairman Poole:** Commissioner Johnson’s vote is “Nay.” Commissioner Shabazz.

**Commissioner Shabazz:** Nay

**Chairman Poole:** Commissioner Shabazz’s vote is “Nay.” Commissioner Kryzewski.

**Commissioner Kryzewski:** Yea

**Chairman Poole:** The vote count stands at two Yeas and two Nays. My vote is “Yea.” This statute is accepted.

**Commissioner Shabazz:** I’d like to go on the record as saying I believe this statute will have a negative impact on African-Americans in the City of Dreams.

**Chairman Poole:** Duly noted. The statute is still accepted. If there is no other business, this meeting is adjourned.

## **Inclusionary Zoning**

Inclusionary zoning is designed to place low and moderate-income residents in housing that may not normally be affordable. Inclusionary zoning works by mandating real estate developers and contractors to incorporate into their development plans a number of units reserved for low-moderate income homebuyers. In return for their compliance, developers are granted a license to build at a greater density than otherwise would be permitted under applicable zoning restrictions. For example, where applicable zoning restrictions may limit a development to 50 units, an inclusionary zoning program may allow the development to be increased to 75 units, provided that 10 of these extra 25 units are reserved for low and moderate income buyers.

All inclusionary zoning ordinances, by their very nature, effectively grant low-income buyers a form of public subsidy. Most such programs condition participation upon a so-called control period, during which the homeowner either may not resell the unit, or must pay back into the inclusionary zoning program a percentage of any fair-market profit on resale. To strike a balance between long-term affordability and wealth-creation for low-income participants, most inclusionary zoning programs use a control period of between 10 and 30 years to maintain affordability, prevent “flipping,” and allow low-income residents to realize some of the benefits of homeownership. Thus, an inclusionary zoning homeowner who resells the home at the conclusion of the control period may be able to achieve some meaningful wealth-creation.

Of the many jurisdictions across the country with inclusionary zoning programs, only the City of Dreams’s program has a perpetual control period.

Title 11 of the City of Dreams Zoning Regulations (11 ZRCD) is amended by adding a new Chapter 25 to read as follows:

CHAPTER 25            INCLUSIONARY ZONING

- 2500            General Provisions
- 2501            Definitions

**2500            GENERAL PROVISIONS**

2500.1            This Chapter establishes an Inclusionary Zoning Program that furthers the Housing Element of the Comprehensive Plan by increasing the amount and expanding the geographic distribution of adequate, affordable housing available to current and future residents.

2500.2            It is the intent of the Zoning Commission to promulgate only such regulations as are necessary to establish the minimum obligations of property owners applying for building permits or certificates of occupancy under an Inclusionary Zoning Program. All other aspects of the program, including the setting of maximum purchase prices and rents, the minimum sizes of the units, the selection and obligations of eligible households, and the establishment of enforcement mechanisms such as covenants and certifications shall be as determined by the Council and Mayor of the City of Dreams.

2500.3            The most important general purposes of the Inclusionary Zoning Program include the following:

- (a)            To utilize the skills and abilities of private developers to produce quality affordable housing;
- (b)            To leverage private development, combined where appropriate with zoning density increases, to produce affordable housing throughout the City of Dreams;
- (c)            To mitigate the impact of market-rate residential development on the availability and cost of housing available and affordable to low- and moderate-income households;
- (d)            To increase the production of affordable housing units throughout the City of Dreams to meet existing and anticipated housing and employment needs;
- (e)            To provide for a full range of housing choices throughout the City of Dreams for households of all incomes, sizes, and age

ranges to preserve diversity and to ensure the benefits of economic integration for the residents of the City of Dreams;

- (f) To stabilize the overall burden of housing costs on low- and moderate-income households;
- (g) To create a stock of housing that will be affordable to low- and moderate-income residents over a long term; and
- (h) To make homeownership opportunities available to low- and moderate-income residents.

## 2501 DEFINITIONS

2501.1 When used in the Chapter, the following terms and phrases shall have the meanings ascribed:

**The Act** – Inclusionary Zoning Act. References to the Act include any Mayor’s Order, agency rule, or other administrative issuance promulgated pursuant to that legislation.

**Eligible household**- one or more persons certified by the Mayor as being a low- or moderate-income household pursuant to the Act.

**Inclusionary unit** – a unit set aside for sale or rental to an eligible low- and moderate-income household as required by this Chapter or by order of the Board of Zoning Adjustment.

**Low-income household** – a household of one or more individuals with a total annual income adjusted for household size equal to less than fifty percent (50%) of the Area Median Income (“AMI”) as certified by the Mayor pursuant to the Act.

**Mayor** – the Mayor of the City of Dreams, the Director of the agency or agencies delegated the authority to implement the Act, or the agency official or officials re-delegated such authority.

**Moderate-income household**- a household of one or more individuals with a total annual income adjusted for household size equal to between fifty percent (50%) and eighty percent (80%) of the Area Median Income (“AMI”) as certified by the Mayor pursuant to the Act.