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The Community Preference Policy: An Unnecessary Barrier to Minorities' Housing Rights

by Robert G. Schwemm | November 2015

Housing restrictions that discriminate against “outsiders” in favor of local residents have, as Commissioner Cestero recognizes, long been a concern of civil rights advocates. The first successful challenge based on the federal Fair Housing Act (“FHA”) to such a local-preference rule—imposed by an all-white suburb of Mobile, Alabama – dates back to 1980. (1)

Local preferences imposed by predominantly white communities in racially diverse areas may reflect intentional discrimination. (2) But even if they do not, such preferences invite FHA disparate-impact claims, a long-recognized method of establishing liability that was recently endorsed by the Supreme Court in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015).

The Court’s decision in *Inclusive Communities* establishes a three-step method of analyzing claims alleging that a policy violates the FHA because it has a disparate impact on a racial minority or other protected class: 1. the plaintiff must first prove that the defendant’s challenged policy causes greater harm to the protected class than to others; 2. if the plaintiff meets this burden, the defendant must prove that its policy is necessary to achieve a valid interest; and, 3. if the defendant satisfies this burden, the plaintiff can still win by showing that the

defendant's interest could be served by an alternative policy with a less discriminatory effect. This is a fair system. It's not designed to displace valid governmental policies, but only, as the Court stated in *Inclusive Communities*, to remove "artificial, arbitrary, and unnecessary barriers [that] function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."

Satisfying Step One is usually easy for plaintiffs challenging a local-resident preference in a community that is less diverse than the surrounding area. As Judge Gertner wrote in an influential 2002 decision ruling against local preferences by Boston-area suburbs, there is an "overarching intuitive principle here: where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants, a selection process that favors its residents cannot but work a disparate impact on minorities." (3)

Thus, a disparate-impact challenge to a local-preference policy generally centers on Steps Two and Three. New York's Community Preference policy provides a classic example of how this analysis would work.

Justifications for Local-Preference Rules

The key to a defendant's proving that its challenged policy is necessary to achieve a valid interest is that its justification "must be supported by evidence and may not be hypothetical or speculative." (4) Commissioner Cestero notes that the City's community-preference policy was originally adopted in the 1980s "in response to demands from low-income residents who insisted on their right to be able to stay put and to benefit from the redevelopment" in their neighborhoods. Today, the same policy is defended on different grounds—that is, as a way of helping to "maintain stable, diverse neighborhoods in the face of continuing gentrification and housing price increases." The policy, Cestero says, builds a sense of community in gentrifying neighborhoods. "To rebuild the fabric of a neighborhood, it is essential to start with the people who are there, to recognize the claims of those who want to stay and to participate in that redevelopment."

Two interests are identified here: 1. to protect local residents from being forced out of their neighborhoods by gentrification; and, 2. to maintain the stability and "fabric" of those neighborhoods, a process in which keeping local residents is allegedly essential. The first does not so much identify a legitimate interest as engage in circular reasoning; that is, the City's justification for wanting to give an advantage to a certain group is that it wants to help that group.

Again, the 2002 *Langlois* opinion is on point. Judge Gertner there concluded that the defendants could not simply cite the goal of wanting "to make it easier for their residents to keep living in their communities," because this basically just reflects "the very definition of residency preferences. If I accepted these as legitimate justifications, residency preferences in and of themselves would forever justify the disparate impacts that they cause." Rather, she held: "defendants must set forth the reasons why they want the preferences. And it is the reasons that must be legitimate. [Defendants] must offer a record of local conditions and needs that suggests why the residency preferences are necessary, [such as] a fire in the community has left an abnormally high number of residents homeless [or] economic factors have hit the community especially hard—a plant closing, for example."

This brings us to New York's second justification—maintaining the stability of its neighborhoods. Stability is undeniably a legitimate interest. But can New York prove that this interest is "supported by evidence" and "not hypothetical or speculative," as the HUD regulation requires? There are two problems here. One is that the policy

has been in place for decades, and its original justification has now changed.

Second and more importantly, the City has yet to produce any tangible evidence that favoring local residents is needed to maintain stable neighborhoods. (Self-serving statements by residents who've been given preferences over outsiders will hardly suffice.) This lack of evidence is particularly damning here, because New York, having used this policy for over 25 years, should by now have studied it and developed methods for evaluating its effectiveness.

Even if the City could produce such evidence, the real question would be whether its policy is necessary for stable neighborhoods. And this question could only be answered by comparing the stability of New York's neighborhoods with that of other cities' neighborhoods where resident-preferences are not used. In the absence of objective supporting evidence, the City's "stable neighborhood" defense is the very essence of a "hypothetical or speculative" justification.

Less Discriminatory Alternatives

Even if local housing authorities were to prevail at the justification stage, the plaintiff might prove that a less discriminatory alternative could serve their interests. Let's consider alternative policies that New York and other cities might adopt to foster neighborhood stability.

One alternative would be to narrow the "size" of the local preferences (e.g., by reducing the portion of locally favored applicants from, say, New York's current 50% to 25%; or by allowing the policy to continue in certain neighborhoods but not others that, say, have other stability-enhancing factors in place). Courts have looked favorably on such a "tempered approach [that] would still help support local residents in their efforts to maintain their residencies in the defendant communities, while at the same time keeping the strategy from running afoul of the fair housing requirement of no disparate impact."

Another possibility would be to replace a total preference for current residents by giving them a "plus" and allowing outsiders to compete with other "pluses" that demonstrate their commitment to the target neighborhood. The analogy here would be to affirmative action cases where race may be counted as a "plus" but not as the totally determinative factor.

Finally, cities like New York might consider alternative policies that have proved successful in other municipalities with substantial experience in fostering stable and racially diverse neighborhoods. There are numerous examples, one of the most famous of which – Oak Park, Illinois – has been engaged in this process for decades. Commissioner Cestero argues that "New York City differs from most of the rest of the United States" in certain ways. Perhaps so. But has the City actually studied other places with an eye towards what might be usable in New York? Or is it so parochial that it won't even consider trying to learn from anywhere outside New York?

Conclusion

The Fair Housing Act is legitimately concerned with local-resident preferences, particularly those whose justifications are old or not well considered. Unless proponents of such policies show a greater willingness than New York has yet done to confront the real difficulties posed by these policies, they must expect that their efforts to discriminate in favor of local residents over outsiders will be seen as the kind of "artificial, arbitrary, and

unnecessary barrier” to minorities’ housing rights that the FHA rightly condemns.

Endnotes

(1) *United States v. Housing Auth. of Chickasaw*, 504 F. Supp. 716 (S.D. Ala. 1980)

(2) For a recent example from Long Island, see *United States v. Town of Oyster Bay*, 66 F. Supp.3d 285 (E.D. N.Y. 2014).

(3) *Langlois v. Abington Housing Authority*, 234 F. Supp.2d 33, 62 (D. Mass. 2002)

(4) 24 C.F.R. &§ 100.500(b)(2) HUD’s Discriminatory-Effect Regulation



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More in Discussion 17: Community Preferences and Fair Housing



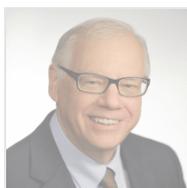
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