

LOCALS
ONLY

LOCAL PREFERENCE POLICIES UNDER THE FAIR HOUSING ACT

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OUR GOALS FOR THIS PANEL

1. Summarize the applicable law
2. Highlight the guidance on how to do the statistical analysis
3. Give you some practical tools to respond when this conversation comes up in your community

HYPOTHETICAL STORY IN A COLORADO CITY: “LOCALS ONLY” AS A CONDITION OF ZONING

- Affordable developer seeks zoning approval at a public hearing in a predominantly white community.
- Public testifies about lack of affordable housing for current residents, as well as the displacement often caused by new development.
- City Council “asks” the developer to commit to a leasing preference for tenants who live or work locally as a condition of zoning approval.
- Desperate to get approval to keep the project alive and not lose the investment to date, developer agrees on the fly that she will only rent to locals.

LAWSUIT OVER ZONING CONDITION

- Three Hispanic families from adjacent town who want to apply to live in new project file suit against developer and City, asking court to enjoin the local residency requirement.
- They say the Fair Housing Act has been violated because the “locals only” rule results in a disparate impact on a protected class and/or perpetuates segregation.
- Judge agrees they have standing, they’ve made a prima facie case, and they’re entitled to a preliminary injunction.
- To avoid more litigation and bad press, the City decides not to appeal, and amends its zoning approval by striking the local residency requirement.

WHAT ABOUT A CONDITION OF LOCAL FUNDING?

- Developer needs funds to build the project, as restricted rents limit the project's borrowing capacity and return to equity investors. She applies to the City.
- Because the City's funds come from City residents, the City wants to impose condition on funding approval that the developer implement a local preference. But it knows it is under the microscope and must comply with the Fair Housing Act.
- **What should the City and the developer do?**

10 QUESTIONS BEFORE YOU ADOPT A PREFERENCE

1. What sections of the Fair Housing Act apply?
2. Are there applicable HUD regulations?
3. What guidance is there from the courts on local preferences?
4. Why is a local preference necessary to achieve a valid interest?
5. Is there no way to serve the interest with a policy that has a less discriminatory effect?
6. What is the relevant demographic data for protected classes?
7. How do the results of data analysis inform the preference?
8. Who will review the preference? What is their input?
9. How will the local preference mesh with other legal tenant selection policies in the project?
10. Are you confident you can implement the policy in a legal manner?

STEP 1: WHICH PART OF FAIR HOUSING ACT APPLIES?

“it shall be unlawful--

- To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin...
- To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(a), (c). See also (b) and (d).

WHO CAN ENFORCE THE FAIR HOUSING ACT?

- HUD Secretary
- U.S. Attorney General
- Private persons – “Standing under the Fair Housing Act is as broad as permitted by Article III of the Constitution.”
- See *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (minority applicants for assistance under suburban housing program, who were ineligible for local preference because they lived in city, had standing to challenge local preference under FHA, where they alleged that local preference had disparate impact on minority residents of city, that they were members of class harmed thereby and were being denied benefits accorded under FHA because of application of local preference, and that they applied for and were denied housing).

THEORIES OF LIABILITY UNDER THE FAIR HOUSING ACT

- Disparate treatment (aka intentional or facial discrimination)
 - The challenged policy must be neither discriminatory on its face nor applied in a discriminatory manner – these situations present claims of intentional discrimination.
 - Plaintiff must establish that the defendant had a discriminatory intent or motive.
- Disparate effect (aka “disparate impact”)
 - Challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.
 - Can be proven by showing an adverse impact on a particular group or minority or harm to the community generally by the perpetuation of segregation.

FACTORS THAT INDICATE DISPARATE TREATMENT

- “Intent to discriminate may be established in a number of ways. Although evidence of a disparate impact alone is not sufficient to show an intent to discriminate, such impact may be an important starting point.”
- “Other relevant factors that can lead to an inference of intentional discrimination are the (i) historical background; (ii) the specific sequence of events leading up to the challenged decision, such as zoning changes for a given site enacted upon the decision maker’s learning of plans for the construction there of integrated housing; (iii) contemporary statements by members of the decision-making body; or (iv) departures from the normal procedural sequence.”
- “[The party] who discriminates is unlikely to leave a ‘smoking gun’... A victim of discrimination is therefore seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence.”

DISPARATE TREATMENT: EXAMPLES

Oyster Bay's "Next Generation" and "Golden Age" local preferences

- U.S. alleged town engaged in a pattern or practice of discrimination against African Americans through the use of these two programs.
- Density bonus if developers gave first priority for affordable housing to locals and their children.
- Allegations: Less than 1% of town's African American residents were eligible for affordable housing under the programs. White residents comprised more than 90% of the eligible pool. Virtually all of the housing units developed under the programs were purchased by white individuals.
- Town supervisor expressed his desire to "keep our children here, keep the generations flowing in the Town."
- Held: given the statistical disparities, allegations regarding town's affordable housing programs were sufficient to state claim for intentional discrimination under the FHA.

United States v. Town of Oyster Bay, 66 F. Supp. 3d 285 (E.D.N.Y. 2014).

See also *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493 (9th Cir.), cert. denied, 137 S. Ct. 295 (2016).

THE U.S. SUPREME COURT ON DISPARATE IMPACT

From the 2015 *Inclusive Communities* decision holding that disparate-impact claims are cognizable under the FHA:

- FHA “mandates the removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies”
- FHA “must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system”
- FHA is “not an instrument to force housing authorities to reorder their priorities; rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation”
- FHA not intended to cause defendants to be liable for racial disparities they did not create. Nor do we want racial quotas.

DISPARATE IMPACT: EXAMPLES

- Screening used by landlords to limit units based on applicants' source of income, citizenship status, prior criminal record, or other criteria that have a negative impact on minorities
- Exclusionary zoning and other land-use restrictions that limit housing proposals of particular value to racial minorities or people with disabilities
- Mortgage practices that result in less favorable treatment of minorities and minorities areas
- Home-insurance standards that result in minorities being treated less favorably
- Occupancy restrictions that disproportionately harm families with children
- **Residency preferences and similar techniques used by housing officials and private landlords to favor people with local ties over “outsiders”**

“SEGREGATIVE EFFECT” CLAIMS

- Unlike disparate-impact claims, segregative-effect claims may challenge a particular action or decision of the defendant *as well as* an across-the-board policy or practice. (Per *ICP*, a “one-time decision may not be a policy at all” for disparate-impact purposes.)
- A fair housing plaintiff may present evidence supporting both types of discriminatory-effect claims in a single case.
- Same three-step analysis under the HUD regulation.
- See *Discriminatory effect cases: Violations without a prohibited intent—Perpetuation-of-segregation claims*, HOUSING DISCRIMINATION LAW AND LITIGATION § 10:7 (citing cases).

PENALTIES FOR VIOLATIONS OF THE FHA

Determined on a case-by-case basis with relief tailored in each instance to the needs of the particular case

- Injunctions; restraining orders; consent decrees
- Penalties and fines
- Awards of attorney fees and costs
- Damages – actual, emotional distress, punitive

Consider also:

- Damaging press
- Default under partnership or loan agreements
- Impact on ability to get project funding in future

See 42 U.S.C.A. §§ 3610-3614; 24 C.F.R. § 100.7.

STEP 2: WHAT ARE THE APPLICABLE HUD REGS?

See 2013 HUD regulations prohibiting discriminatory effect at 24 C.F.R. § 100.500.

“Liability may be established under the Fair Housing Act based on a practice’s **discriminatory effect**, ...even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a **legally sufficient justification...**”

WHEN IS THERE “DISCRIMINATORY EFFECT”?

“A practice has a discriminatory effect where it actually or predictably results in a **disparate impact** on a group of persons or creates, increases, reinforces, or **perpetuates segregated housing patterns** because of race, color, religion, sex, handicap, familial status, or national origin.”

24 C.F.R. § 100.500(a).

WHAT IS A “LEGALLY SUFFICIENT JUSTIFICATION”?

- (1) Legally sufficient justification exists where challenged practice:
 - (i) Is necessary to achieve one or more **substantial, legitimate, nondiscriminatory interests...**; and
 - (ii) Those interests could not be served by another practice that has a **less discriminatory effect**.
- (2) A legally sufficient justification **must be supported by evidence** and may not be hypothetical or speculative.

24 C.F.R. § 100.500(b).

WHO HAS THE BURDEN OF PROOF? IT SHIFTS.

- (1) The party alleging discrimination has the burden of proving that a **challenged practice caused or predictably will cause a discriminatory effect;**
- (2) Once the plaintiff satisfies their burden of proof, the defendant has the burden of proving that the challenged practice is **necessary to achieve one or more substantial, legitimate, nondiscriminatory interests;**
- (3) If the defendant satisfies its burden of proof, the plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a **less discriminatory effect.**

24 C.F.R. § 100.500(c).

ANY OTHER APPLICABLE HUD REGULATIONS?

- 24 C.F.R. § 5.655 – Residency preferences in Section 8 project-based assistance programs
- 24 C.F.R. Part 100 – Discriminatory Conduct Under the FHA (including Subpart E – Housing for Older Persons Act)
- 24 C.F.R. Part 107—Nondiscrimination and Equal Opportunity in Housing Under Executive Order 11063
- Multifamily Occupancy Handbook preferences approved by HUD (PBV, 811, 202, etc.)

STEP 3: HOW DO COURTS TREAT LOCAL PREFERENCES?

- No 10th Cir. or Colorado case law directly on point
- Courts elsewhere generally view them with suspicion.

THE COURTS ON LOCAL PREFERENCES: PRE-ICP

- *United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716 (S.D. Ala. 1980) (PHA's requirement that residents be local citizens violated FHA due to its segregative effect)
- *Langlois v. Abington Housing Authority*, D.Mass.2002, 234 F.Supp.2d 33 (racial minority, lower-income women established a prima facie case that PHA's residency preferences for Section 8 housing worked a disparate impact on racial minorities; very fact of residency preferences resulted in fewer application submissions from nonresident minorities)
- *Fair Hous. Justice Ctr. v. Edgewater Park Owners Coop., Inc.*, 2012 WL 762323 (S.D.N.Y. Mar. 9, 2012) (upholding impact-based challenge to cooperative's rule requiring purchasers to obtain three references from existing shareholders)
- *U.S. v. Town of Oyster Bay*, 66 F. Supp. 3d 285 (E.D. N.Y. 2014) (upholding intent-based challenge to all-white town's local-residency preferences for affordable housing, thus avoiding need to rule on impact claim)

THE COURTS ON LOCAL PREFERENCES: PRE-ICP

The “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.” *Langlois*.

THE COURTS ON LOCAL PREFERENCES: POST-ICP

Winfield v. City of New York, 2016 WL 6208564 (S.D.N.Y. Oct. 24, 2016).

- NYC adopted a community preference policy “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.*
- Whenever NYC facilitated housing creation, it required the developer give a preference for 50% of the affordable units to applicants who currently lived in the district in which the development was located.
- African-American residents sued, claiming the policy violated the FHA by perpetuating racial segregation and intentionally discriminating against and causing a disparate impact amongst racial minorities. They alleged the preference diminished their chance to compete for affordable housing opportunities in “neighborhoods of opportunity” relative to the chances of existing residents of such districts, which were mostly white.

* See Robert G. Schwemm, *The Community Preference Policy: An Unnecessary Barrier to Minorities' Housing Rights* (2015).

THE COURTS ON LOCAL PREFERENCES: POST-ICP

Winfield (cont'd)

- City countered that “community districts throughout the City with large black and Hispanic populations want this...preference” and that a fair housing analysis should always “account” for and “allow” for local “nuance, culture, and character.”
- Held: NYC’s motion to dismiss the FHA claims denied. Court found: “Factual allegations support plausibly the inference that the Community Preference Policy would operate to perpetuate residential segregation by...giving a preference to local white applicants for housing in already disproportionately white community districts that have higher income levels and higher levels of services and benefits than community districts in which the existing residents are predominantly minority group members.”

HUD ON LOCAL PREFERENCES: POST-ICP

- **San Francisco** wanted to implement a local preference to “preserve the possibility of low-income people of color staying in a community where they wanted to stay in the face of strong market forces” ... “without creating a disparate impact upon any particular group”
- As part of reviewing the Affirmative Fair Housing Marketing Plan, HUD rejected the preference because “it could limit equal access to housing and perpetuate segregation inconsistent with the Civil Rights related program requirement of the HUD multifamily occupancy handbook”
- End result: “HUD can support an ‘anti-displacement’ preference for 40 percent of the units, where residents from throughout the city are eligible for the preferences and where race is not considered in the selection process.”
- See Tim Iglesias, *Threading the Needle of Fair Housing Law in A Gentrifying City with A Legacy of Discrimination*, 27 J. Affordable Housing & Community Dev. L. 51 (2018).

DISPARATE IMPACT: THE “PRIMA FACIE” CASE

- **First** – plaintiff must identify a specific neutral policy or practice used by the defendant to limit housing opportunities
 - Because disparate-impact claims challenge only general policies, this theory is not appropriate for claims based on a defendant’s single act or decision.
- **Second** – if a facially neutral policy is identified, plaintiff must present **statistical evidence** showing that this policy has a greater impact on protected class members than on others
- **Third** – plaintiff must show that statistical disparities were **actually caused by policy being challenged**
 - Landlord denies unit to the plaintiff based on its policy of refusing to rent to tenants who use government vouchers or have too many people in their household? Yes, causation. Private developer decides to construct a new building in one location rather than another? No, probably can’t show causation.

DISPARATE IMPACT: STATISTICAL GUIDELINES

- No single mathematical test for evaluating this proof, just a few guidelines
- Statistical evidence must involve appropriate comparable groups
- Statistical comparison should focus on the relative percentages of protected class members versus non-protected class members affected by the defendant's policy, as opposed to the absolute numbers of the groups affected
- Disparity in relative impact on the two groups must be sizeable; FHA prohibits only practices with "significant" discriminatory effects

DISPARATE IMPACT: STATISTICAL GUIDELINES (CONT'D)

- Some courts use the **rejection rate** – if a housing policy results in rejection of 30 out of the 50 black applicants (60%) and 40 out of the 100 white applicants (40%), the rejection ratio for blacks vs. whites would be 60%/40% or 1.50, which, being over 1.25, would be high enough to satisfy plaintiff's burden of showing a significant disparate impact against blacks
- Determining which segment of the population to focus on depends on nature of particular policy being challenged
 - In an eviction case, the affected group would be the current tenants in the defendant's building
 - landlord's screening policy ("no voucher-holders") would affect all applicants to the defendant's apartments – sometimes called "applicant flow" – and perhaps even the entire local housing market

DISPARATE IMPACT: STATISTICAL ANALYSIS (CONT'D)

- Even when the overall affected group is broadly defined, courts generally prefer the most local data available
- If “applicant flow” statistics are not available, then area population figures may be used, at least if these two measures appear to be related
- If local data are not available, national statistics may be used

STEP 4: WHY IS A LOCAL PREFERENCE NECESSARY TO ACHIEVE A SUBSTANTIAL, LEGITIMATE, NONDISCRIMINATORY INTEREST?

- Outside the “locals only” context, classic example of legitimate interest is health and safety (traffic, wastewater)
- As to local preference:
 - Recent disaster or large plant closing has left many homeless
 - Need for emergency service workers in a remote area to live close to the likely site of emergencies
 - Slowing displacement of existing residents – see recent “anti-displacement” preference approved for San Francisco

STEP 5: IS THERE NO WAY TO SERVE THE INTEREST WITH A POLICY THAT HAS A LESS DISCRIMINATORY EFFECT?

- *Huntington* example: Town's rationale for refusing to allow multifamily housing outside of a predominantly black urban renewal area—claiming this policy would encourage developers to invest in this depressed area—was discounted; court found that alternative means, such as tax incentives, would be a more effective and less discriminatory way to achieve this goal.
- Consider targeted outreach to vulnerable populations least likely to hear about the chance to live in the project – coordinating with local service providers and community groups to get the word out about the project

STEP 6: WHAT IS THE RELEVANT DEMOGRAPHIC DATA FOR PROTECTED CLASSES?

- Demographic data from the U.S. Census American Community Survey
 - Advantages:
 - Available at no cost and easy to obtain
 - Samples determined by Census Bureau and statistically significant within a margin of error
 - Disadvantages:
 - Data lag current market by 1-2 years
 - Small area data only available in 5-year sample
 - Data may not be representative of current situation
- Alternative: data produced by local demographer or Public Use Microsample (PUMS) data or special Census tables
- Public housing authority data on residents and voucher holders—and households on wait lists—v. demographics of residents in the likely applicant market
- Home Mortgage Disclosure Act (HMDA) data: Used in *Avenue 6E* case to determine if homebuyers would be different if smaller lots and more affordable homes were made available. Data were used to determine the “pool of likely applicants” for homes in affordable price ranges v. moderate to high price ranges.

STEP 7: HOW DO THE RESULTS OF DATA ANALYSIS INFORM THE LOCAL PREFERENCE?

No single, agreed upon test of disparity applied by courts.

Guideline is to ask:

1. Who lives in this community now?
2. Who lives in the market area (or who is on a PHA wait list)? Market area can be defined by workers, families attending schools, residents in surrounding communities.
3. Who would benefit by the preference policy? Who is the pool of likely applicants and beneficiaries?
4. How do these beneficiaries differ, if at all, from the market area?
5. Is this difference meaningful? A variety of statistical measures of variance can be used. Best practice would be to apply several to examine differences.

STEP 8: WHO WILL REVIEW THE LOCAL PREFERENCE? WHAT IS THEIR INPUT?

- Does HUD approve preference policies?
 - Yes, if the program/project is subject to the Multifamily Occupancy Handbook.
 - Otherwise, no, HUD does not directly approve.
 - But HUD may see it as part of its review of the developer's Affirmative Fair Housing Marketing Plan, or based on a complaint.
- Does CHFA or CDOH approve preference policies?
 - Not formally. They generally defer to HUD and the State to enforce. But they don't like to see these in applications.

STEP 9: HOW WILL LOCAL PREFERENCE MESH WITH OTHER TENANT SELECTION POLICIES?

- Preferences allowed by the FHA itself – 42 U.S.C. § 3607
 - Housing for Older Persons Act
 - Preference for members of religious organization (so long as membership is not restricted on account of race, color, or national origin)
- Preference for disaster victims due to, e.g., CDBG-DR funding
- Preferences mentioned in 26 U.S.C. § 42(g)(9)
 - Special needs; Federal or state program or policy that supports housing for a certain group; Artistic or literary activities
- Residency preferences in Section 8 project-based assistance programs – 24 C.F.R. § 5.655
- Multifamily Occupancy Handbook preferences approved by HUD (PBV, 811, 202, etc.)

STEP 10: ARE YOU CONFIDENT YOU CAN IMPLEMENT THE POLICY IN A LEGAL MANNER?



RECAP: 10 QUESTIONS BEFORE YOU PREFERENCE

1. What sections of the Fair Housing Act apply?
2. What are the applicable HUD regulations?
3. What guidance is there from the courts on local preferences?
4. Why is a local preference necessary to achieve a valid interest?
5. Is there no way to serve the interest with a policy that has a less discriminatory effect?
6. What is the relevant demographic data for protected classes?
7. How do the results of data analysis inform the preference?
8. Who will review the preference? What is their input?
9. How will the local preference mesh with other legal tenant selection policies in the project?
10. Are you confident you can implement the policy in a legal manner?

HUD/FHEO PERSPECTIVE ON LOCAL PREFERENCES



LOCAL PREFERENCES ARE TRAPS FOR THE UNWARY



- Residency preferences prohibited if based on discriminatory intent, or disproportionately exclude protected classes from housing. Legally risky for other reasons than the FHA – fundamental right to travel, Equal Protection.

Practical challenges – delay permitting and/or funding approvals; slow down lease-up; complicate life for property and asset management.

IF YOU CAN'T AVOID NEGOTIATING A LOCAL PREFERENCE, SOME PRACTICE POINTERS.

- Make sure there is not another way to address the concern that does not involve a preference – several sources available – how badly do you need local funds to make the project work?
- Run the statistical analysis before you adopt the policy.
- Design the policy with demographic analysis in mind.
- Make the preferenced class as large as possible – live or work locally; job offer to work locally; training for a local job; family member who lives or works locally.
- Define “local” as broadly as possible.
- Define local employer as broadly as possible (not just one).

IF YOU CAN'T AVOID A LOCAL PREFERENCE, SOME PRACTICE POINTERS (CONT'D).

- Don't apply the preference to the entire pool of tenants – consider “every other applicant.”
- Don't apply the preference to all units in the project.
- Limit how long the preference remains in place – e.g., initial lease-up only, or LIHTC compliance period only.
- Subordinate the local preference to other more justifiable preferences (e.g., based on disaster recovery funding, Housing for Older Persons Act).
- Ensure the various ways to qualify as a “local” have equal weight in determining order on the waiting list.

IF YOU CAN'T AVOID A LOCAL PREFERENCE, SOME PRACTICE POINTERS (CONT'D).

- Do not require a minimum duration of local residency to qualify for the preference.
- Ensure it's clear that qualifying as a local doesn't mean you don't still have to qualify under LIHTC rules, tax-exempt bond rules, and any other funding-driven restrictions.
- Include a clause that allows for modification or cancellation should a court, a regulator, or a funder require (although will this immunize developer/City from early actions, even if policy dropped or modified later?)
- Work with HUD/FHEO early on.
- Caveat that the policy is subject to the FHA and related laws.

ADDITIONAL RESOURCES ON LOCAL PREFERENCES

- HUD Region VIII FHEO:
<https://www.hud.gov/states/shared/working/r8/fheo>
- Robert G. Schwemm, HOUSING DISCRIMINATION LAW AND LITIGATION § 10:6, *Discriminatory effect cases: Violations without a prohibited intent—Disparate-impact claims* (July 2018 update).
- Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. Legis. & Pub. Pol'y 709 (2017).
- Robert G. Schwemm, Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases after Inclusive Communities*, 19 N.Y.U. J. Legis. & Pub. Pol'y 685 (2016).
- Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 Colum. L. Rev. Sidebar 106, 126 (2015).



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BACKUP SLIDES



EXEMPTIONS FROM THE FAIR HOUSING ACT

- FHA covers most — but not all — housing
- Generally does not apply to:
 - owner-occupied buildings with no more than four units (“Mrs. Murphy exemption”);
 - housing operated by organizations and private clubs that limit occupancy to members;
 - reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling;
 - Tenant selection policies that operate to deny an applicant who has been convicted of the illegal manufacture or distribution of a controlled substance
 - discrimination based on familial status under a tenant selection plan that discriminates *in favor of* older persons