Fair Housing Implications of "Essential Workforce" Housing

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It is widely acknowledged that over the past several years the gap between the price of housing and the income of Florida's workforce has expanded so dramatically that many communities in Florida, especially those along the coast and in South Florida, are finding it nearly impossible to recruit and retain a segment of the workforce typically considered "essential," such as firefighters, police officers, teachers, and nurses. The governmental interest in improving housing opportunities for these and other members of the workforce considered essential to the operation of the community has resulted in a trend to provide special housing opportunities for this category of employee.

The purpose of this article is to provide guidance on the question of whether a housing program or preference for specified segments of the workforce violates fair housing laws. While not a primer in fair housing law, this article attempts to summarize principles of fair housing law in an understandable framework that affordable housing advocates and government entities can use in analyzing essential worker preferences.

I. Applying Fair Housing Principles to Housing Preferences

Any time a government, a housing provider, or any one else, gives housing preferences for a particular class of people, the preferences must be examined for to make sure they comply with the nation's fair housing laws. In general terms, if a housing preference is adopted with the intent of excluding, discouraging, or otherwise imposing different terms or conditions on a protected class, that preference cannot stand. *See* 42 U.S.C. § 3604(a), (b), (f)(1), (2) (generally prohibiting differential treatment on the basis of race, color, national origin, religion, sex, familial status and disability in housing-related transactions). A housing preference will also violate the Fair Housing Act if it has the *effect* of excluding, discouraging, or otherwise imposing different terms or conditions on a protected class without a legitimate governmental purpose. Even if there is a valid governmental purpose, the preference may still violate the Fair Housing Act if the government's goal can be achieved by other, less discriminatory means. *See,* e.g., *Huntington Branch N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (establishing standard for assessing whether

facially neutral policy or practice has a disparate impact on a protected class in violation of the Fair Housing Act).

When designing a housing program for a particular sector of the workforce, therefore, it is critically important that the requirements of the program are analyzed early on to determine whether they were adopted with the intent of excluding or otherwise discriminating against members of a protected class, or through their implementation will have a disproportionate adverse effect or impact on members of a protected group. A housing program preference that was not designed with the intent or purpose of discriminating and that does not have a disproportionate adverse *effect* on a protected group will likely withstand scrutiny under the fair housing laws. Even if the program does have a disparate impact, if it serves a valid governmental purpose that cannot be achieved by other, less discriminatory means, it may also be upheld.

In the 2006 legislative session, Florida created the Community Workforce Housing Innovation Pilot Program (CWHIP) for Florida's essential service personnel and provided a statutory requirement that all SHIP jurisdictions define essential service personnel at the local level. The new state law requires that the definition include, but not be limited to, "teachers and educators, other school district, community college, and university employees, police and fire personnel, health care personnel, skilled building trades personnel, and other job categories." See Section 420.9075, Florida Statutes.

II. Determining Whether a Housing Preference Bears a Discriminatory Intent or Purpose

Direct evidence of discriminatory intent, like an overt statement of bias or a written covenant prohibiting the sale of property to members of a particular protected group, is rarely seen today. Far more often, intentionally discriminatory acts are covert and subtle. Figuring out whether a housing preference is the product of an improper motive or purpose requires a case-by-case review. In the words of the Supreme Court, the analysis demands a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266 (1977). This inquiry may extend to a broad range of circumstances surrounding the creation and passage of the preference, including statistical evidence and the demographics of residents in the subject community; comparisons with similarly situated communities; the chronology of events leading up to the implementation of the preference; departures from usual procedures followed with similar projects; and the existence of a subjective decision-making process. *See* id. at 265-268.

What does this mean for affordable housing advocates or governmental entities hoping to attract essential workers? Each and every proposal must be examined carefully and critically to determine whether it was designed or adopted for the improper purpose of excluding minorities, families with children, or persons with disabilities. Does the program cloak an invidious policy or practice of exclusion? That is the central issue. To find the answer, advocates and those with "insider knowledge" (or those in a position to develop sources with such knowledge) must give each proposal careful scrutiny. Choosing to look the other way could result in the passage and implementation of an unlawful housing preference program.

III. Determining Whether a Housing Preference Has a Disparate Impact

Even if a housing preference is implemented with the best of motives, it may still violate fair housing laws if it has a "disparate impact" on a protected class.[1] Determining whether a housing preference has an unlawful disparate impact depends on four "critical" factors: (1) whether the preference disproportionately affects a particular protected class; (2) the degree to which the preference furthers a legitimate governmental interest; (3) any evidence showing that the preference is motivated by a discriminatory purpose; and (4) whether any challenge preference would merely require the removal of barriers to housing opportunities or would seek to require a defendant to create new housing opportunities. *See*, e.g., *Huntington*, 844 F.2d at 926.

A. Examining The Disproportionate Effect of A Housing Preference

The disproportionate effect of a housing preference may be determined by comparing the percentage of minorities[2] among those who qualify for the preference to the percentage of minorities among those who would have, in the absence of the preference, sought the new housing. For example, suppose a locality funds the construction of housing just for firefighters and police officers. If minorities constitute 10% of firefighters and police officers in the area, but 30% of the total population that would have pursued new housing, then the preference would disproportionately exclude minorities.[3]

Similarly, a housing preference for "local" essential workers, which the Florida statute encourages, may also have a disparate impact. A preference for locals necessarily helps maintain existing racial demographics and likely perpetuates existing patterns of residential segregation. As described by a Massachusetts District Court in the context of residency preferences in Section 8 voucher distribution plans: "where a community has a smaller proportion of minority residents than does the larger geographic area from which it draws applicants to its Section 8 program, a selection process that favors its residents cannot but work a disparate impact on minorities." *Langlois v. Abington Housing Authority*, 234 F.Supp. 2d 33, 62 (D.Mass. 2002).

The disparate impact of a preference for local essential personnel is exacerbated where the locality has a history of excluding minorities from available housing or has excluded minorities from particular types of employment. Evidence of such exclusionary practices would make the preference even more suspect. On the other hand, the absence of such practices, coupled with evidence that the locality had historically encouraged efforts to make housing available to minority residents and taken proactive measures to integrate the workforce, might serve to mitigate any adverse effect caused by a preference for local essential workers.

B. Testing Governmental Justifications For Housing Preferences that Have A Disparate Impact

If it is established that a housing preference has a disproportionate effect on a protected class, the governmental purpose for the preference must be examined. Such an analysis must consider whether the preference has a "'manifest relationship' to legitimate non-discriminatory policy objectives and 'is justifiable on the ground it is necessary to the attainment of these objectives.'" *Charleston Hous. Auth. v. United States Dep't of Agric.*, 419 F.3d 729, 741 (8th Cir. 2005). The legitimacy of keeping essential workers close to home has not been directly tested in the courts, but it certainly seems reasonable on its face and is likely a justification that courts would find legitimate. *See, e.g., Thomas v. Texas Dept. of Criminal Justice*, 220 F.3d 389, 391 (5th Cir. 2000) (suggesting approval of a housing policy that "states that the residential housing is made available to insure the immediate availability of essential personnel in times of emergency."). As a general matter, it is hard to argue with the notion that it is a benefit to have doctors, firefighters, police officers, and other emergency personnel living close to the people they would serve in a time of true emergency. On the other hand, it is worth noting that some courts have expressed skepticism over the more general justifications for housing preferences for existing residents. *Langlois*, 234 F.Supp. 2d at 62 (D.Mass. 2002) (concluding that "the desire to make it easier to keep living in communities was insufficient justification for local preferences.").

Conclusion

There is no quick and easy way to determine whether an affordable housing program that provides a preference to a sector of the workforce violates fair housing laws. The facts and circumstances surrounding the development and implementation of each program are different. Each situation requires careful and searching review. The touchstone for any program, however, is the same: one must examine both the intent underlying the program or preference, and its effect on members of protected groups. In the absence of evidence of discriminatory intent and effect, the preference will likely withstand scrutiny; where evidence of discriminatory intent exists, it likely will not. Programs with a disproportionate adverse effect on a protected group require further review. The existence of an adverse effect does not, in and of itself, render the program invalid. That determination rests on whether the preference is justified by a valid governmental purpose; and whether there are no less discriminatory means available to accomplish that purpose. If the answer to both of these inquiries is "yes," the preference will likely survive a fair housing challenge notwithstanding its adverse effect on a protected group.

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1 It is important to recall when considering housing preferences, like those encouraged in Florida, that economic status is not a protected class. Merely showing a disproportionate effect on the poor is not sufficient to condemn a preference under the fair housing laws. However, a preference that targets an economic class where minorities are under represented, may indeed have an impact both on minorities.

2 Here we assume that the disparate impact challenge to a housing preference would be based on the disproportionate effect on minorities, but a housing preference that had a disproportionate effect on families with children, persons with disabilities, or another protected class would be analyzed under the same standard.

3 Courts have not precisely described what constitutes a significant discriminatory effect sufficient to support a disparate impact claim under the Fair Housing Act. However, a "disparity ratio" of 1.2 (e.g., 40% of persons in the affected population are minorities while minorities only make up 32% of the general population) is likely to be found sufficient to establish a sufficient discriminatory effect. See, e.g., Langlois v. Abington Hous. Auth., 207 F.3d 43, 50 (1st Cir. 2000) (citing approval of "four-fifths" rule used in disparate impact employment cases); see also Smith v. Town of Clarkton, N.C., 682 F. 2d 1055, 1065 (4th Cir. 1982) (finding that the statistical picture left "no doubt" that the termination of a low-income housing project had a disparate impact on the basis of race, African Americans comprised approximately 40% of the county's population and 69% of African American families were presumptively eligible for low-income housing); Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988) (finding a disparate impact based on evidence that two-thirds of the persons affected by the challenged act were minorities and therefore that the act had twice the rate of adverse impact on minorities than it had on whites).