Real Estate Trends

HOUSING LAW

Housing Discrimination: Navigating The Landscape for Local Govt's

By Scott J. Kreppein

Local governments strive to balance competing interests as they guide the growth of their communities. As data becomes increasingly accessible and useful, particularly with interactive mapping tools, the decision-making process becomes both more informed and more susceptible to critique. While judicial review continues to give deference to discretionary judgment and local policy considerations, the availability of seemingly objective data informs the courts' analysis as to the appropriate degree of scrutiny and the sufficiency of the explanations proffered by local governments and their agencies.

Supreme Court Guidance

With respect to racial demographics and housing trends, the Supreme Court's 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015) provides important guidance for local governments and land use agencies in understanding their obligations to appropriately consider such information under the Fair Housing Act (Title VIII of the Civil Rights Act of 1968). The FHA prohibits discrimination in housing sales or rentals, or to "otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin," or "handicap." 42 U.S.C. § 3604.

Inclusive Communities arose from analysis of racial demographics in locations where housing subsidies were being granted. Like many affordable housing programs, the subsidy at issue—low-income housing tax credits—specifically encouraged or incentivized use in low-income census tracts. However, a non-profit advocacy group argued that subsidies for family housing were being disproportionately granted in areas with high minority concentrations, while senior housing subsidies were being granted primarily in majority-white areas. The government, at a minimum, was faced with the need to balance its obligations to use the funds with an area benefit as directed, with its obligations to appropriately consider and combat historically entrenched patterns of racial segregation potentially affecting those same areas.

The Supreme Court interpreted the FHA as analogous to how employment practices are analyzed under Title VII, while still acknowledging the unique role of discretionary judgment in land use and housing policy determinations. *Inclusive Communities,* 135 S.Ct., at 2525. While the employment relationship also involves "discretionary decision making based on a vast array of subjective, individualized assessments," *Engquist v. Oregon Dept. of Agriculture*, 553 US 591, 603 (2008), land use determinations are being made by "locally selected and locally responsible officials," who are charged with exercising discretion with respect to "sensitive planning decisions which affect the development of their community." *Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977).

Under a disparate impact theory, claims of discrimination can be based upon statistics without proof of discriminatory intent, with the inference drawn from the data itself being sufficient to shift the burden to the defendant to explain whether and how they gave consideration to the impact of the challenged determination upon the protected class at issue. Although confirming that this theory is equally applicable in the housing context, the Supreme Court pronounced "cautionary standards" consisting of a heightened pleading standard and a burden-shifting framework for statistically driven claims against municipalities. *Inclusive Communities*, 135 S.Ct., at 2524.

New York, and Long Island in particular, has a long and complex history with similar issues. The Supreme Court previously touched upon disparate impact liability in the housing context 30 years ago in *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.,* 488 U.S. 15 (1988), where a developer seeking to build multi-family housing in primarily-white East Northport challenged a zoning ordinance that only provided for multi-family housing in the more diverse area of Huntington Station. The court affirmed a finding that the town's explanation for the decision was facially inadequate, but did so "without endorsing the precise analysis of the Court of Appeals. *Id,* 488 U.S., at 18.

The court did not provide guidance as to when a statistical disparity is sufficient to shift the burden to the municipality, or reach the issue of whether the proper standard of scrutiny for the town's explanation was, as the U.S. Court of Appeals for the Second Circuit phrased it, whether the government had "bona fide and legitimate justifications for its action with no less discriminatory alternatives available." *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 939 (2d Cir. 1988) *affirmed* 488 U.S., at 18. (1988).

Notably, the Court of Appeals also ordered re-zoning of the parcel, but the land remains unimproved to date, and on Nov. 26, 2019 the County of Suffolk approved $2.4 million in funding to assist with the proposed 146-unit development.

Standard of Review, Burden-Shift

Following *Inclusive Communities*, courts evaluating a statistically-driven Fair Housing Act complaint based upon a municipal policy must now place the initial burden on the person or entity challenging the policy to show "robust causality" between the challenged policy and the alleged statistical disparity "at the pleading stage" so as to eliminate claims against municipalities based upon "racial disparities they did not create." *Inclusive Communities,* 135 S. Ct., at 2523. A "disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." For example, on remand in *Inclusive Communities*, the District Court dismissed the complaint under the "robust causality" pleading standard based upon failure to identify a "specific » Page 7

It is important for decision-makers to understand that "race may be considered in certain circumstances and in a proper fashion," and local governments face potential adverse consequences when they fail to consider the impact of their policies upon protected classes when appropriate or necessary.

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policy or practice," and rejected the argument that a pattern in the "exercise of discretion in a case-by-case" basis qualifies as a policy. *Inclusive Communities,* N.D. Tex. Docket No. 08-cv-0546, Dkt. No. 271 (Aug. 26, 2016).

However, if a litigant were able to sufficiently allege a law or policy with a robust causal connection to a statistical disparity, then the burden shifts to the municipality to establish an affirmative defense that is "analogous to Title VII's business necessity standard." *Inclusive Communities,* 135 S. Ct., at 2521. The court explained that "policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"

The court acknowledge that the "Title VII framework may not transfer exactly to the fair-housing context." Municipalities must have "leeway to state and explain the valid interest their policies serve," and litigants cannot "second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion. However, the court provided only limited guidance as to the degree of scrutiny or deference a government's explanation should receive, stating that "the comparison" to employment discrimination "suffices for present purposes."

A long-running debate in Williamsburg, Brooklyn, illustrates the difficulties faced by local governments in making housing and land use decisions.

Similar to other applications of qualified immunity, officials will not be liable for the exercise of discretionary judgement under circumstances where it was objectively reasonable for them to believe that they had not violated a clearly established constitutional or statutory right, but cannot assert this defense if they did not engage in an appropriate or mandated decision-making process in the first instance. *Compare Crowley v. Board of Zoning Appeals of Incorporated Village of Southampton*, 872 FSupp. 1171, 1173 (E.D.N.Y.,1995) *with Haddock v. City of New York*, 75 N.Y.2d 478 (1990). Local governments and agencies face "special dangers" when forced to explicitly consider race and similar issues when discussing an otherwise facially neutral law or policy. *Inclusive Communities,* 135 S. Ct., at 2525. While the *Inclusive Communities* decision did not "inject racial considerations into every housing decision," it is important for decision-makers to understand that "race may be considered in certain circumstances and in a proper fashion," and local governments face potential adverse consequences when they fail to consider the impact of their policies upon protected classes when appropriate or necessary. *Inclusive Communities,* 135 S. Ct., at 2525.

While these types of policy decisions are highly discretionary, both the New York State Court of Appeals and the U.S. Supreme Court have made clear that, even under the most deferential standards of review, courts will be constrained to find determinations arbitrary unless they are adequately explained. *See Knight v. Amelkin*, 68 N.Y.2d 975 (1986); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019). Counties, towns, cities, and villages, and their agencies, are generally required to exercise their land use powers in accordance with a "comprehensive" or "well considered plan," *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131 (1988), and to make decisions with "reasonable consideration" of various factors related to "safety… health and general welfare," which may include, among other things, "avoid[ing] undue concentrations of population" while "conserving the value of buildings and encouraging the most appropriate use of land." See, e.g., Town Law § 263

While *Inclusive Communities* was pending, an appeal was also pending in the Second Circuit relating, in part, to the standard of review and burden-shifting framework that the Supreme Court had previously declined to review in *Huntington Branch*. In *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016), the Court of Appeals found that its prior decisions had been abrogated by intervening regulatory guidance relied upon in *Inclusive Communities*, and thus remanded to the District Court for reconsideration. On remand, the District Court found that once the burden shifts to the municipality, it must show that the "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant," but then, "unlike in *Huntington Branch*, the burden shifts back to the plaintiff to prove that the defendant's 'substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." *MHANY Management, Inc. v. County of Nassau*, 2017 WL 4174787, *3 (E.D.N.Y., 2017) *citing* 24 C.F.R. § 100.500(c).

Thus, if a sufficient causal connection can be drawn between a policy and statistical disparity, the burden shifts to the municipality to explain its reasoning; if a sufficient explanation is given, the burden shifts back to the plaintiff to prove that there was a better alternative.

A long-running debate in Williamsburg, Brooklyn, illustrates the difficulties faced by local governments in making housing and land use decisions. For years, communities groups have advocated conflicting views on how to address the area's need for affordable housing, with some arguing that there is a need for low-rise multi-bedroom apartments, and others arguing that there is a need for larger buildings with a higher proportion of smaller units. Either approach potentially impacts the availability of housing for one or more protected classes, as well as other legitimate interests of a range of interested parties.

Eight years ago, the New York County Supreme Court invalidated a proposed zoning ordinance for the area, finding that there "can be no compliance with the Fair Housing Act where defendants never analyzed the impact of the community preference." *Broadway Triangle Community Coalition v. Bloomberg*, 35 Misc.3d 167 (N.Y. County, 2011). After further consideration and some modifications, the ordinance was then challenged again, and the same court cited *Inclusive Communities* in defining the other end of the spectrum on how much analysis is needed, finding that "the City is not required to conduct a racial impact study whenever it rezones property," explaining that disparate impact fair housing claims are "subtle and more complex" than other types of discrimination, and that the *Inclusive Communities* court repeatedly used the word "'consider, not 'study,' much less 'conduct a study.'" *Churches United for Fair Housing, Inc., v. DeBlasio*, 2018 N.Y. Slip Op 31865, *42 and *47 (N.Y. County, 2018).

Aside from the considerations mandated by the Fair Housing Act and similar legislation, local government decision-makers also need to give consideration to heightened responsibilities that may be imposed through participation in certain state or federal programs. Federal HUD program recipients, for example, are required to certify that they will "affirmatively further fair housing," which generally means taking "meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination." *See* 24 C.F.R. 5.150. Although this requirement is derived from an interpretation of the Fair Housing Act, it also has implications under the False Claims Act, Title VI (discrimination in the administration of federal funding), as well as regulatory and administrative consequences. *See, e.g. Westchester v. United States HUD*, 802 F.3d 413 (2d Cir. 2015).

Conclusion

In sum, to comply with their fair housing obligations, local governments and their agencies must, where appropriate, engage in a reasoned analysis regarding the potential impact of their actions upon protected classes. In the first instance, the analysis consists of whether the action will have a foreseeable disparate impact on housing availability for one or more protected classes. If so, then the municipality needs to determine what information and steps are necessary to make a reasoned decision. Then, after considering appropriate information (including weighing available options that may have a less discriminatory effect), the municipal decision-makers must account for the legitimate non-discriminatory basis for their determination in a context-appropriate manner. Each step in the analysis involves the exercise of discretion. Courts are reluctant to interfere with the reasoned good faith judgment of local officials, but will be constrained to find such actions arbitrary in the absence of an appropriate analysis having taken place in the first instance.