Community Preferences and Residency Preferences: Civil Rights Considerations

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• Residency requirements
  • A requirement that a person live in a community, usually for a specified time period, in order to receive benefits. HUD-funded public housing agencies and Section 8 programs may not apply a residency requirement based on length of residency or of work history in a jurisdiction.

• Residency preferences or local preferences
  • According to HUD, at least, this is a preference for admission of persons who reside in a specific geographic area that is no smaller than a county or a municipality. See e.g. 24 CFR 960.206, 24 CFR 982.207 regarding Section 8 and public housing programs.

• Community preferences or anti-displacement preferences
  • No established definition. Jurisdictions or developers give preference in right to return to a number or percentage of new or rehabbed units based on past residency in a neighborhood. Past residency may include personal past residency or residency of an ancestor or family member. Likely to be focused for justification on rapidly gentrifying areas and the need to prevent or remediate displacement or maintain community organizational structure.
The application of any of these principles is subject to constitutional principles and civil rights laws:

- The Constitutional right to travel is generally considered to prohibit residency requirements as a condition of receipt of governmental benefits.

Offering a preference in housing is subject to all civil rights obligations regardless of what it is called, including:

- The Fair Housing Act’s prohibitions against discrimination based on race, national origin, religion, familial status…..
- The Fair Housing Act’s requirement that programs relating to housing and urban development take actions that affirmatively further fair housing
- Other civil rights laws including Title VI of the 1964 Civil Rights Act and Section 504 of the 1973 Rehabilitation Act for federally funded entities
  - Section 504 authorizes small preferences for persons with disabilities in housing for people who need accessible features; these preferences may exceed 5% and 2%; advisable to cap them at 15-20% of units
• Whether the purpose of a preference is to exclude people by preferring current residents or to include people who would otherwise be lost to the neighborhood is **irrelevant** to the civil rights analysis.

• In the world of civil rights, although there are still intentional discrimination cases, intentional discrimination can also be inferred from actions or circumstances and unintentional discrimination can be found from evidence of the effect of the actions.

• Intent is not required to find unlawful discrimination.
• Whether a preference is operationalized as a result of city, state or even neighborhood policy or by a private developer does not make a significant difference to the analysis.

• The Fair Housing Act applies regardless of funding source or the type of actor involved in the action.

• If the action is discriminatory, all actors will be potentially liable.
Exclusionary preferences

- Comer et al. v. Cisneros, 37 F. 3rd 775 (2nd Cir. 1994), challenge to local residency preference as preferring local white residents over black residents seeking to move from Buffalo to suburbs

- Langlois et al. v. Abington Housing Authority, 207 F.3rd 43 (1st Cir. 2000).
  - District court granted a preliminary injunction prohibiting use of residency preferences in the distribution of vouchers until there was a plan to ensure that use of the preference did not violate a statutory requirement to reserve 75% of the vouchers for very low income families, finding that the preference policy had a discriminatory impact based on race. Court of appeals upholds the finding of discriminatory impact but remands the case to examine whether there was a legitimate and substantial justification for the preference.
  - Court also points out that the delay in getting housing for persons not benefitting from a preference may amount to a denial of the housing
Exclusionary preferences

• Langlois: On remand, the District Court observes that all of the communities have significantly lower percentages than nearby urban areas, concluding that any policy that facially favors local residents will likely disproportionately favor whites over minorities. *Langlois v. Abington Housing Authority*, 234 F. Supp.2d 33, 62 (D. Mass. 2002)

• Court found that the preferences had a discriminatory impact, were not statutorily or otherwise justified and that there were several alternatives that were less discriminatory, including using partial or regional preferences to avoid discriminatory outcomes.

• Court also finds that the preferences fail to affirmatively further fair housing
Exclusionary preferences

“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.”
Exclusionary preferences

• **HUD v. Dubuque, Iowa**, HUD settlement under Title VI, local preference for residents of Dubuque and residents of Iowa had the effect of a residency requirement and excluded applicants based on race. Settlement available at: [https://archives.hud.gov/news/2014/pr14-034.cfm](https://archives.hud.gov/news/2014/pr14-034.cfm)

• **Broadway Triangle Community Coalition et al., v. Michael Bloomberg, et al., 2011 35 Misc 3d 167 (NY Sup. 2011)**, local residency preference in primarily Jewish community has strong disparate impact based on race and would perpetuate segregation.
  - "A claim is stated under the Fair Housing Act when the municipality creates a land development plan or zoning classification which discriminates, even though the plan is effectuated by private developers"

• **Fair Housing Justice Center, Inc. v. Town of Eastchester, No. 7:16-cv-09038 (JSM)**, impact on access to Housing Choice Voucher program of residency preference for seniors based on length of residency and then to relatives of current or former residents, resulting in significant differences in waiting time for units
Exclusionary preferences

• Winfield et al v. City of New York, No. 1:2015cv05236 (S.D. N.Y. 2016) Denial of Motion to Dismiss
  • Local preference in NYC:
    • Community preference since 1988: Preference to residents of a community district where new affordable housing was built. First preference was 30% of units, increased in 2002 to 50%. Additional preference for persons with mobility impairments (5%), municipal employees (5%) and persons with auditory or visual impairments (2%)
  • Intent: Court found that allegations of intentional discrimination survived a motion to dismiss because of claims that the preference was designed to preserve existing racial or ethnic demographics, failed to examine effect on housing segregation, magnitude of the effect of the policy, local history of enacting discriminatory policies, and that the claimed purpose of the preference was to protect long-term residents, it was available regardless of how long the applicant has lived in the community.
Exclusionary preferences

• Impact: Court found that allegation of discriminatory impact also survived the motion to discuss because of claims that applicants most likely to be selected would be white, and there was a causal link between such a policy and the perpetuation of segregation by race in those communities.
Inclusionary preferences

• Preferences designed to protect against displacement, protect neighborhood stability, provide reparations?

• They are subject to the same standards and the same concerns as exclusionary preferences

• Intent may be positive and proactive but same analysis will apply
Potential injury from preferences

• Preferences that go too far:
  • Delay or effective denial for non-preferred applicants because of impact of preference—potential discrimination based on race or national origin
  • Perpetuation of existing segregation; siting housing in locations which lack opportunity

• However, preferences can be upheld when as applied they don’t over-exclude or over-include and where they operate so they don’t perpetuate segregation or cause undue delays or unintended and too broad exclusions
Analytics for proposed preferences

• Identify any evidence of discriminatory intent, including facts from which intent can be inferred
  • Smoking gun intent including code words (“we want to benefit black residents,” opposition to “Section 8”), and even “keep the neighborhood from changing”) Avoid racial or ethnic descriptors.
  • History of discrimination of the type that would be challenged—for example if a particular neighborhood had historically been established as an area of racial segregation, implementing a preference that would keep the neighborhood segregated could be challenged as discriminatory
  • Changing procedural or substantive rules to institute the preference
  • Legislative history of the consideration of the preference from both supporters and opponents
  • Evidence of past or present community opposition from which unlawful motivation can be found
• Impact of the action
• Analyze the effect of a preference on patterns of segregation by race/national origin to ensure that a preference does not continue or increase segregation. Do your math.

• Analyze the effect of a preference on current or likely application patterns to ensure that a preference does not disproportionately exclude a group protected against discrimination. Do your math.

• Consider alternatives, such as inclusionary zoning with deeply affordable units and a built in preference to replace lost affordable units. Build replacement units before demolishing units.

• Consider the non-discriminatory justifications
• Do not adopt a preference that amounts to a residency requirement or one that establishes a quota or absolute preference. Develop a process about what to do if the number of applicants on a preference list drop or preference units cannot be filled.

• Consider partial preferences combined with affirmative marketing of the remaining units to reach out to people least likely to apply for or be eligible for the preference.

• Be sure to have a substantial, legitimate and non discriminatory justification for any preference.
  • Typical justifications
    • Prevent resegregation
    • Prevent displacement
    • Support neighborhood cohesion and continuance
    • Support local initiatives and businesses
Resources


• Hart, Catherine, Community Preference in New York City, 47 Seton Hall Lev. 881 (April 2017) Available at: https://scholarship.shu.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/ &httpsredir=1&article=1602&context=shlr
• The Furman Center: The Dream Revisited, Community Preferences and Fair Housing, Discussion 17. Available at: http://furmancenter.org/research/iri/discussions/community-preferences-and-fair-housing
