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Affordable Housing Alert

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Settlement of New York City Fair Housing case leaves legality of local preferences unresolved

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The settlement of a long-pending legal case challenging "community preferences" in New York City leaves more affordable housing questions unresolved.

What's the Impact

- The settlement leaves unresolved an important question: whether local resident preferences are allowed under the Fair Housing Act.
- As is often the case in tough fair housing cases, this case involved a clash of two competing values—developing more affordable housing and diminishing segregation in NYC's housing stock.
- Both the city and the plaintiffs acknowledge that the city has not produced sufficient housing to meet regional affordable housing needs.

Overview of *Noel v. City of New York*

Developers, local government officials, and others concerned with urban housing issues have been awaiting—with some trepidation—the outcome of the *Noel v. City of New York* litigation, which challenged the legality of "neighborhood preferences" that, according to the plaintiffs,

reinforced existing patterns of discrimination in New York City. The good news for the litigants is that the long-running case was settled. The bad news for everyone else is that the settlement leaves unresolved an important question: whether such preferences—which many cities have eyed to make the development of affordable housing more acceptable to local communities—are allowed under the Fair Housing Act (FHAct).

The thorniest issues in fair housing often arise when two competing and commendable goals clash. The *Noel* case is no exception: In *Noel*, the plaintiffs alleged that policies adopted by the city to promote development of affordable housing—specifically, establishing preferences or set-asides for up to 50% of the units in new affordable housing developments for residents of the neighborhoods in which those units were developed—perpetuated patterns of segregation in the city. The plaintiffs asserted in their complaint that the preferences made it more difficult for minorities and persons in other protected classes to move from segregated neighborhoods to more diverse parts of the city and, therefore, had a discriminatory effect.

The city, on the other hand, argued that the preferences were not on their face discriminatory and were necessary to protect residents from the effects of gentrification (by giving them first crack at new affordable units near their current homes) and by diminishing opposition to creating new affordable housing.

After many years of litigation, the case was nearing trial. Last week, however, the litigants reached a settlement of the case that resolved the issue between them. Specifically, the parties agreed that:

- The city will reduce the current 50% set aside, which dates back to Mayor Michael Bloomberg's administration, to 20% in April this year and then drop to 15% beginning on May 1, 2029.
- The local preference will only be applicable to the first occupancy of a unit and will not apply to developments where the sole obligation for affordable housing is the 421-a program and developments resulting from the purchase and land-purchase and leaseback program unless otherwise required by New York State law.

Impact of the New Policies

The arguments raised by both the plaintiffs against and the city in support of the original policies, respectively, provide two different lenses for considering the possible impacts of the new policy.

On the one hand, and as argued by the plaintiffs, there is strong evidence that the city remains segregated, and setting aside units for existing nearby residents makes it difficult for some residents to find new affordable housing outside of their own neighborhoods. The preferences, they claim, greatly reduce the ability of residents of segregated neighborhoods to move to less segregated neighborhoods. Sharp cuts in the percentage of units covered by the set-aside may promote change in the racial makeup of some highly segregated neighborhoods, thus promoting the city's goal of integration.

But the city and several city officials also have a point that the preference has promoted the development of new affordable housing and overcome "NIMBY-ism" by assuring residents of each community district that at least some units in new affordable housing developments will be made available to them or their neighbors. Further, it can be argued that, to the extent that the preference promotes development of new housing, at least some of that housing would be available to residents from other neighborhoods. Under this reasoning, without the preference, fewer units of affordable housing would be built, resulting in fewer opportunities for new affordable housing anywhere in the city.

There is also a valid concern that without the preference, new affordable housing would likely be developed in areas where it exists already and where barriers may be lower, which likely would just increase the racial and ethnic concentration in existing segregated neighborhoods.

While we can speculate about what may or may not have happened without the preference, both the city and the plaintiffs acknowledge the city has not produced sufficient housing to meet regional affordable housing needs, exacerbating the affordability crisis and reducing opportunities for residential mobility. A judicial resolution of the *Noel* case certainly would have provided government officials, developers, and other housing advocates around the country with guidance about how to reconcile development policies that promote new affordable housing and the FHAct's goal of ending segregation based on protected classes.

Presumably, the upshot is that at least in New York City, to the extent they are built, new affordable housing units will be more widely available regardless of where the potential renters live in the city. The open questions are how difficult will it be to get local residents to support projects in areas where the need for affordable housing is very high and how much new affordable housing actually will be built.

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