Fair housing case may push 'disparate impact' limits

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Burbank-- The Massachusetts Supreme Judicial Court has agreed to hear an appeal that could be a national test case probing the limits of a recent U.S. Supreme Court decision validating fair-housing claims on a "disparate impact" basis.

The case centers around the decision of the owners of the Burbank Apartments in Boston's Fenway area to stop accepting project-based Section 8 rental subsidies in 2011, when their most recent Housing Assistance Payments contract and 40-year mortgage loan regulatory agreement with the U.S. Department of Housing and Urban Development expired.

The plaintiffs — members of the Burbank Apartment Tenants Association, joined by the Massachusetts Coalition for the Homeless and Fenway Community Development Corporation — argue that the decision violates state and federal fair housing laws, as it disproportionately impacts racial minorities, the elderly, the disabled and other protected classes, while serving no legitimate business purpose. Federal subsidies would ensure the owners take in the equivalent of market rents, they claim.

The Burbank Apartments owners counter that they've played by the rules, winding down involvement in Section 8 by transitioning qualified residents to portable vouchers, and should be allowed to offer their units at market rate.

Round one in Boston Housing Court went to owners William M. and Robert M. Kargman, when Judge Jeffrey M. Winik concluded that the plaintiffs had failed to state a claim on which relief could be granted. Because the owners "complied with all substantive, procedural and notice requirements of federal and state law" and abided by the terms of the Section 8 rent subsidy program, the owners' actions "cannot as a matter of law constitute a violation of federal or state anti-discrimination laws based upon a theory of disparate impact discrimination," Winik wrote.

This finding, the judge added, was consistent with Congress' intent to allow owners to terminate their project-based Section 8 contracts after fulfilling their mortgage obligations. Congress and the Massachusetts Legislature, he noted, took steps with such mechanisms as the G.L.c. 40T process to "cushion" existing tenants from the impact of such a termination, and those specific laws trump the more general provisions of the federal Fair Housing Act and the state's anti-discrimination statute, G.L. 151B.

Both parties' request for direct appellate review was granted on May 21. The plaintiffs' brief was submitted July 27, and the defendants' brief is due Oct. 13.

Supreme Court sets stage

In their brief, the plaintiffs seek to reframe the issue: It's not whether general housing discrimination laws should take a back seat to the owners' adherence to wind-down requirements imposed by federal and state statutes. Rather, they argue, the correct question is whether Section 8 non-renewals are "categorically excluded from fair housing scrutiny." In the absence of a "clear legislative statement," the answer is no, they suggest.

As the parties were filing their appeals, the Supreme Court was grappling with similar issues in Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. The court's June 25 decision is viewed as having left the door open for housing discrimination claims based on a "disparate impact" theory. A 5-4 majority noted that "all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims," and that Congress, "aware of this unanimous precedent… made a considered judgment to retain the relevant statute," thus "accepting and ratifying" the holdings.

Still, the Supreme Court was quick to add that disparate-impact liability should be "properly limited," so as not to "undermine [the FHA's] own purpose as well as the free-market system." If use of disparate impact were "pervasive," it "would almost inexorably lead governmental or private entities to use 'numerical quotas,'" which would then raise potential equal protection issues.

The court said that plaintiffs in these cases would need to show more than just a "statistical disparity," noting that "racial imbalance does not, without more, establish a prima facie case of disparate impact." However, the court also suggested that plaintiffs could survive dismissal at an early stage with a showing that "there is 'an available alternative… practice that has less disparate impact and serves the [entity's] legitimate needs."

The Burbank Apartments plaintiffs believe they can make such a showing, pointing to the fact that remaining in the project-based Section 8 program is revenue neutral because government subsidies make up the difference between the amount renters are required to pay and the market rate.

Public policy pressures

Each side is laying claim to Congressional intent. Attorney Janet Steckel Lundberg of Krokidas & Bluestein, who said she was not authorized to discuss the case while it was pending, noted in her DAR application that her clients' non-renewal of their Section 8 contract "was not only fully authorized under Appellees' financing and subsidy contracts with HUD, it was also pursuant to a carefully crafted federal statutory scheme… to encourage, but not mandate, continued owner participation in affordable housing finance and subsidy programs."

"This carefully structured statutory scheme contemplates and affirms at every turn that Congress intended that participants in the federally subsidized mortgage and rental subsidy programs that applied to Appellees were permitted at some point to end that participation, and then instituted a managed process for that termination and the transitioning of participants to alternate subsidy protections created by Congress for that purpose," the application states.

The plaintiffs' brief counters that Congress "well understood that mobile vouchers were not an adequate substitute for project-based subsidies," quoting from testimony during a U.S. Senate Committee hearing on the "Section 8 Opt-Out Crisis" stating that these vouchers often provide families with "little choice in their rental decisions, leaving them often in low-income and very low-income neighborhoods and living in substandard housing."

Not everyone agrees that mobile vouchers are less desirable. Certain voucher holders, particularly younger ones, may prefer the mobile version, said Kurt A. James, chairman of the Affordable Housing and Community Development practice group at Rackemann, Sawyer & Brewster. "It's not really clear cut that project-based subsidies are always better," he said.

Jeffrey W. Sacks is a community development attorney with Nixon Peabody, which is working on an amicus brief to file with the SJC on behalf of the Greater Boston Real Estate Board. In Sacks' view, Winik's opinion was well reasoned, particularly in its discussion of the G.L.c. 40T process, which was negotiated in the Legislature with members of the legal services community at the table. Now, said Sacks, members of the same community are attempting to make an "end run" around that legislation.

James, too, points to the rigorous process under G.L.c. 40T, under which the Department of Housing and Community Development would likely have refused to terminate the Burbank Apartments affordability restrictions had it detected an improper motive.

"I'm not sure I see discrimination [in the owners'] decision," he said.

But the plaintiffs and their supporters believe something irreplaceable is at stake in this litigation.

One of the goals behind fair housing laws is to allow people of color access to the suburbs and safer, more integrated areas of greater Boston like the Fenway, said Jay D. Rose, head of the housing unit at Greater Boston Legal Services, which is handling the plaintiffs' appeal. If complexes like Burbank Apartments convert to market rates, the lost opportunities will fall disproportionately on people of color "because of the relationship between race, income and poverty," he said.

"Once these units are gone, they are gone forever," Rose said, noting that it has been several decades since either the federal or state government has funded new project-based affordable housing.

Richard Giordano, community organizing director of the Fenway Community Development Corporation, said the case is "hugely important to the community and the neighborhood," noting the hundreds of units have already been lost to investors.

"Families here are under siege," he said.

Potential fallout

While the SJC's decision will specifically affect one 173-unit complex in Boston's Fenway, its ripple effects may be felt throughout the state, because the issue of owners looking to shed expiring affordability restrictions is not going away.

Giordano points to a database maintained by the Community Economic Development Assistance Corporation, which as of July 2015 showed that Massachusetts is at risk of losing nearly 20,000 additional subsidized units by December 31, 2019, after having previously lost more than 16,000 units through prepayments and rent subsidy contract terminations.

"It's just a time bomb waiting to go off," Giordano said.

Rose noted Boston placed third (behind Atlanta and San Francisco) in a recent ranking by the Brookings Institute of the highest levels of income inequality among U.S. cities.

In the post-foreclosure world, many sections of greater Boston have gentrified, with rents doubling and tripling, he said. And families are the ones being squeezed out, according to Kelly Turley, director of legislative advocacy of the Massachusetts Coalition for the Homeless. She points to 2014 and 2015 census figures showing a 5.6-percent annual increase in homelessness and a 25-percent increase in the number of families experiencing homelessness.

"Countless households have plunged into housing instability," she said in an emailed statement. "In Boston and across the Commonwealth, as the rents are at record levels and vacancy rates remain negligible, we need to do all we can to stem the tide by preserving existing affordable housing for families and individuals."

For the other side, however, the case is about a simple principle: A deal is a deal, and the state and federal governments should have to live up to their end, no matter how compelling the reasons to do otherwise.

As the Kargmans note in their DAR application, "[t]he Appellees… have now endured nine years of litigation over the issues presented in this appeal, after completing 40 years of participation in federal subsidized housing programs that contemplated that their participation in those programs would at some point end."