

# Recent Developments in Challenges to Residency Preferences

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Selection criteria play a crucial role for families applying for federal housing programs. A slight change in the selection policies of a public housing authority (PHA) could mean the difference between an eligible family receiving housing assistance within a few months of applying versus years. This article examines a recent resurgence in litigation concerning residency preferences—a type of selection criteria used primarily by public housing authorities and localities in administering the Section 8 Housing Choice Voucher program (but which can also be used in other programs), whereby preference is given to applicants who live or work in the same jurisdictions. The litigation centers on the issue of residency preferences disproportionately denying a chance at assisted housing to families of color. It should be noted that a PHA's use of a residency preference in itself may not adversely impact minority applicants, particularly in areas that boast significant racial and ethnic diversity. However, given certain circumstances, residency preferences can also become a barrier for minority families seeking to move into communities with very small minority populations. The lawsuits highlighted in this article demonstrate how the use of residency preferences in predominantly white areas prevents individuals and families of color from obtaining vouchers (or other affordable housing) from these housing authorities and localities.

## Background on Residency Preferences

A public housing authority, private landlord or local government can use residency preferences in the admissions process by giving priority to applicants who live or work within a certain geographic area. Under regulations of the Department of Housing and Urban Development (HUD), a PHA is permitted to adopt residency preferences that give priority to applicants living or working within the PHA's jurisdiction.<sup>1</sup> Residency requirements, however, are prohibited.<sup>2</sup> In practice, such preferences could cause a "resident" applicant to be placed higher on a waitlist than a "nonresident" applicant.

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<sup>1</sup>See 24 C.F.R. § 5.655(c)(1)(i) (2000) (no residency requirements in project-based Section 8 housing, but residency preferences permissible); 24 C.F.R. § 960.206(b)(1)(i) (2001) (same for public housing); 24 C.F.R. § 982.207(b)(1)(i) (2000) (same for voucher program).

<sup>2</sup>*Id.*

PHAs seeking to adopt residency preferences must reference them in their PHA plans submitted to HUD for approval.<sup>3</sup> Furthermore, durational residency preferences that require that a person be a resident of a jurisdiction for a specified period of time are prohibited.<sup>4</sup> If a PHA decides to institute a residency preference, the preference must be given to a person employed or hired in the jurisdiction as if that person had actually resided in the jurisdiction.<sup>5</sup> The coverage area of a residency preference cannot be smaller than a county or municipality.<sup>6</sup> Furthermore, residency preferences must be consistent with civil rights laws and cannot delay or otherwise deny admission based on “the race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family.”<sup>7</sup>

Since many applicants for subsidized housing are individuals and families of color, instituting such preferences in predominantly white communities can raise civil rights concerns. In some cases, these jurisdictions may attempt to use residency preferences to prevent families of color from moving into their areas by restricting access to subsidized housing. A residency preference could disparately impact families of color simply because they do not live or work in the area. Lawsuits challenging residency preferences have included both intentional and unintentional claims of discrimination brought under the Fair Housing Act, the Equal Protection Clause, the Civil Rights Act of 1964, and related state civil rights statutes.<sup>8</sup>

## Prior Case History

The issue of residency preferences has been litigated over the last few decades.<sup>9</sup> However, the seminal case on the issue is *Langlois v. Abington Housing Authority*, decided in 2002.<sup>10</sup> In *Langlois*, four women of color and the Massa-

chusetts Coalition for the Homeless brought a class action lawsuit against eight Massachusetts PHAs located in majority-white, low-poverty communities.<sup>11</sup> The plaintiffs alleged that the PHAs discriminated against minorities by having residency preferences within the predominantly white communities and further failed in their obligation to affirmatively further fair housing for low-income minorities. The district court noted that each PHA’s residency preference raised concerns.<sup>12</sup> In particular, the court highlighted that there were substantially fewer minority residents in the communities at issue than surrounding communities or the state average.<sup>13</sup> Therefore, *any policy* extending a preference to residents of those communities would disproportionately advantage whites over non-whites in the long term and would have a disparate impact on minorities in violation of the Fair Housing Act.<sup>14</sup> Using various tests and examining statistics, the court concluded that the residency preferences had a disparate impact on nonresident minorities.<sup>15</sup> The court also held that in failing to consider the impact that adopting residency preferences would have on their communities, the PHAs did not satisfy their affirmatively furthering obligations under the Fair Housing Act.<sup>16</sup>

However, the court did not find that the PHAs’ application procedures, which included notice of a residency preference and logistical barriers to applications, had a substantial disparate impact on minorities in violation of the Fair Housing Act.<sup>17</sup> According to the court, the statistical data presented did not illustrate, to the court’s satisfaction, the extent of the disparate impact.<sup>18</sup> Without being able to determine the degree of disparate impact, the court could not find a Fair Housing Act violation regarding the application procedures.<sup>19</sup>

## Recent Developments

Since *Langlois* was decided in late 2002, a few cases have challenged the use of residency preferences. In these lawsuits, the plaintiffs claimed that the use of the preferences in the predominantly white jurisdictions effectively barred minority families from obtaining affordable hous-

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*Vouchers Violate the Fair Housing Act*, 33 HOUS. L. BULL. 55, 62 (2003). It is worth noting that the First Circuit had previously affirmed a preliminary injunction issued by the district court preventing five PHAs from issuing vouchers with the residency preference in effect. See *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 47 (1st Cir. 2000).

<sup>11</sup>*Langlois*, 234 F. Supp. 2d at 37. The eight communities in which the defendant PHAs were located included Abington, Avon, Bridgewater, Halifax, Holbrook, Middleborough, Pembroke and Rockland. *Id.* at 37 n.1. Abington, Halifax, and Holbrook had stopped administering the voucher program before the date of the opinion. *Id.*

<sup>12</sup>*Id.* at 56.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 57, 62.

<sup>15</sup>*Id.* at 62-64.

<sup>16</sup>*Id.* at 78.

<sup>17</sup>*Id.* at 66.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

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<sup>3</sup>42 U.S.C.A. § 1437c-1(d)(3) (West 2012) (requiring any preferences be included in PHA plan); see also 42 U.S.C.A. §§ 1437d(c)(5)(A), 1437f(d)(1)(A), & 1437f(o)(6)(ii) (West 2012).

<sup>4</sup>See 24 C.F.R. § 5.655(c)(1)(v) (2000) (project-based Section 8 program); 24 C.F.R. § 960.206(b)(1)(iv) (2001) (public housing program); 24 C.F.R. § 982.207(b)(1)(iv) (2000) (voucher program).

<sup>5</sup>See 24 C.F.R. § 5.655(c)(1)(vi) (2000) (project-based Section 8 program); 24 C.F.R. § 960.206(b)(1)(v) (2001) (public housing program); 24 C.F.R. § 982.207(b)(1)(v) (2000) (voucher program).

<sup>6</sup>See 24 C.F.R. § 960.206(b)(ii) (2001) (public housing program); 24 C.F.R. § 982.207(b)(ii) (2000) (voucher program).

<sup>7</sup>24 C.F.R. § 5.655(c)(1)(iv) (2000) (no discrimination in project-based Section 8 program); see also 24 C.F.R. § 960.206(b)(1)(i), (iii) (2001) (public housing policies must state that the use of a residency preference will not be discriminatory).

<sup>8</sup>See, e.g., *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 44 n.14 (D. Mass. 2002); *Fayerweather v. Town of Narragansett Hous. Auth.*, 848 F. Supp. 19, 21 (D.R.I. 1994) (discussing Equal Protection Clause claim); *United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716 (S.D. Ala. 1980) (Fair Housing Act claim).

<sup>9</sup>See, e.g., *Furtick v. Medford Housing Authority*, 963 F. Supp. 64 (D. Mass. 1997) (no standing for family that received voucher from another housing authority, even though residency preference delayed family obtaining housing); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994).

<sup>10</sup>234 F. Supp. 2d at 33. For a more detailed analysis of the case and its procedural history, see NHLP, *Local Residency Preferences for Section 8*

ing in those communities. Additionally, the Department of Justice (DOJ) conducted a two-year investigation into whether one town's policy of granting certain residents and town employees priority in obtaining affordable housing was racially discriminatory.

### **Vargas v. Smithtown**

In December 2007, African-American and Hispanic individuals who had applied for vouchers from Smithtown, New York, filed a class action lawsuit against the town challenging a residency preference policy under the Equal Protection Clause, Fair Housing Act and related civil rights statutes. At the time of the complaint, Smithtown's white population comprised over 93% of the municipality's total population.<sup>20</sup> The claimants argued that by limiting eligibility to individuals who lived in Smithtown, which was predominantly white, the preference had a discriminatory impact on African-American and Hispanic individuals. In addition, the claimants contended that in practice, Smithtown administered the preference as a requirement, in contravention of HUD regulations.<sup>21</sup> Furthermore, the plaintiffs claimed that Smithtown violated its Affirmative Marketing Plan by arbitrarily reopening the waitlist when there were spikes in the number of minority applicants<sup>22</sup> and by advertising the availability of waitlist slots in media less likely to have minority readership.<sup>23</sup> The complaint noted that in 1997, HUD's Office of Fair Housing and Equal Opportunity wrote a letter to Smithtown expressing concern over the potential negative impact that the residency preference in the Section 8 program could have on minorities.<sup>24</sup> However, the residency preference remained in effect despite HUD's concern.

In August 2009, the district court approved the parties' stipulation of settlement and consent decree.<sup>25</sup> In the stipulation, the parties agreed to certify the class,<sup>26</sup> and the town consented to pay \$925,000 to settle the claims.<sup>27</sup> Additionally, Smithtown agreed to market vouchers without regard to residency status and to remove any references to a residency preference on the voucher program applica-

tion form.<sup>28</sup> Furthermore, Smithtown had to give voucher priority to the named plaintiffs as well as class members who had previously been passed over for a voucher.<sup>29</sup> The decree also mandated that Smithtown provide its employees who administered the voucher program fair housing training.<sup>30</sup> Notably, this settlement did not require Smithtown to eliminate its residency preference. However, the town had to take steps to ensure that the residency preference did not have the effect of discriminatorily excluding minorities from voucher eligibility.<sup>31</sup>

### **DOJ Investigation in Darien, Connecticut**

In May 2010, DOJ's Civil Rights Division initiated an investigation of Darien, Connecticut, over concerns that the town's zoning regulations included several residency preferences that could have had the effect of discriminating against minorities.<sup>32</sup> Darien has a very small minority community, as white residents comprise over 94% of the town's total population.<sup>33</sup> The town had adopted zoning regulations requiring certain developers to build affordable, below-market housing units for sale or rent whereby individuals within six so-called "priority populations" would have the opportunity to obtain this affordable housing before the general public.<sup>34</sup> The six "priority populations" included residents who provided volunteer emergency services; employees of the town of Darien or the Darien school system; residents who worked in Darien; town residents; nonresidents who worked in the town; and former residents who had previously lived in the town for at least one year.<sup>35</sup> In its letter to Darien announcing the initiation of its investigation, DOJ expressed particular interest in the rationale behind adopting the preferences for priority populations.<sup>36</sup> The town's planning and zoning commission voted in fall 2010 to remove the priority population provision from the zoning regulations, thus ending the residency prefer-

<sup>20</sup>See Compl., *Vargas v. Town of Smithtown*, No. 07cv05202, at 3 (E.D.N.Y. Dec. 13, 2007).

<sup>21</sup>See *id.*

<sup>22</sup>See *id.* at 14-15.

<sup>23</sup>See *id.* at 15.

<sup>24</sup>See *id.* at 13-14.

<sup>25</sup>See Consent Decree, *Vargas v. Town of Smithtown*, No. 07cv05202 (E.D.N.Y. Mar. 4, 2009); see also Press Release, Lawyers' Committee for Civil Rights Under Law, Court Approves \$925,000 Settlement in Housing Discrimination Case Reached Between the Lawyers' Committee and the Town of Smithtown in March, available at [www.lawyerscommittee.org/newsroom/press\\_releases?id=0043](http://www.lawyerscommittee.org/newsroom/press_releases?id=0043).

<sup>26</sup>The parties stipulated that class membership would include all African-American and Hispanic individuals who applied for a Section 8 voucher in Smithtown but did not receive one because of the residency preference in 2002 or 2006. See Consent Decree, *Vargas*, No. 07cv05202, at 7.

<sup>27</sup>See *id.* at 14.

<sup>28</sup>See *id.* at 12.

<sup>29</sup>See *id.* at 16-17.

<sup>30</sup>See *id.* at 8.

<sup>31</sup>See *id.* at 13 (noting that at each reopening of the waitlist for vouchers, defendant must ensure that residency preference is not discriminatory in effect).

<sup>32</sup>See Letter from Steven H. Rosenbaum, Housing and Civil Enforcement Section Chief, to David Campbell, Darien First Selectman (May 4, 2010), available at <http://darien.patch.com/articles/justice-department-investigating-dariens-inclusionary-zoning-regulations#pdf-1680940>; Lisa Prevost, *A Fair-Housing Inquiry in Darien*, N.Y. TIMES, Oct. 8, 2010, available at [www.nytimes.com/2010/10/10/realestate/10wcz0.html](http://www.nytimes.com/2010/10/10/realestate/10wcz0.html).

<sup>33</sup>See U.S. Census Bureau, Profile of General Population and Housing Characteristics: 2010 Demographic Profile Data for Darien CDP, Connecticut.

<sup>34</sup>Prevost, *supra* note 32; see also John Davisson, *Justice Department Investigating Darien's Inclusionary Zoning Regs*, DARIEN PATCH, Sept. 14, 2010, available at <http://darien.patch.com/articles/justice-department-investigating-dariens-inclusionary-zoning-regulations#pdf-1680941> (includes PDF copy of original inclusionary zoning ordinance).

<sup>35</sup>See *id.*

<sup>36</sup>See Letter from Rosenbaum to Campbell, *supra* note 32.

ence.<sup>37</sup> After a two-year investigation, DOJ notified Darien in August 2012 that the investigation had been closed and no further action would be taken.<sup>38</sup>

### **Fair Housing Justice Center v. Yorktown**

In December 2010, the Fair Housing Justice Center challenged Yorktown, New York's use of a residency preference in administering its Section 8 voucher program.<sup>39</sup> Like Smithtown, Yorktown was predominantly white, with whites then occupying over 90% of the town's housing units.<sup>40</sup> The hierarchy of the residency preference was (1) elderly or disabled Yorktown residents; (2) families who resided in Yorktown and paid more than 50% of income in rent; (3) veterans (or their surviving spouses) living or working in Yorktown; (4) elderly or disabled persons living outside of Yorktown; (5) veterans (or their surviving spouses) who resided outside of Yorktown; (6) other persons who either worked or lived in Yorktown; and (7) all other persons.<sup>41</sup> Yorktown also reserved the right to accept Section 8 applications from Yorktown residents even when the waitlist was closed.<sup>42</sup> The complaint stated that at the time the lawsuit was filed, nonresidents had an estimated wait of eight to 15 years to receive a voucher; by comparison, an elderly or disabled person who resided in Yorktown had an estimated waiting period of only six months.<sup>43</sup> Fair Housing Justice Center testers confirmed that Yorktown had a practice of actively discouraging nonresidents from applying to the Section 8 program and would often direct testers posing as nonresidents to apply for vouchers elsewhere.<sup>44</sup> The complaint also described how Yorktown took actions to ensure that its waitlist had sufficient numbers of residents so that the town would not have to distribute vouchers to nonresidents, who were more likely to be persons of color.<sup>45</sup> The plaintiffs alleged violations of the Fair Housing Act, including Yorktown's failure to affirmatively further fair housing.<sup>46</sup>

The parties entered into a consent decree in February 2012.<sup>47</sup> There, Yorktown agreed to end its use of residency preferences and to pay the Fair Housing Justice Center \$165,000.<sup>48</sup> The decree also required training for various town housing officials and employees of Yorktown's Sec-

tion 8 office.<sup>49</sup> In addition, Yorktown has to "affirmatively market its Section 8 Program" to nonresident minority individuals.<sup>50</sup> The town further is required to provide persons interviewing for Section 8 eligibility information about Yorktown's amenities, fair housing laws, and how applicants can file housing discrimination complaints.<sup>51</sup> The decree also required Yorktown to close its waitlist within 30 days of the decree and begin distributing vouchers, with first priority going to nonresidents in high poverty areas who had spent the most time on the waitlist.<sup>52</sup>

### **Broadway Triangle Community Coalition v. Bloomberg**

Initially filed in 2009, the *Broadway Triangle*<sup>53</sup> litigation involves the proposed construction of affordable housing in a specific area of Brooklyn called the Broadway Triangle, and demonstrates how "community preferences" within a larger city can also perpetuate segregation. Plaintiffs, comprised of various community organizations and individuals, allege that the proposed construction of affordable housing in the majority-white Community District 1 (Williamsburg-Greenpoint neighborhood) instead of the majority-minority Community District 3 (Bedford-Stuyvesant) violates the Fair Housing Act<sup>54</sup> and perpetuates existing segregation. Thus, Plaintiffs sought a preliminary injunction (after previously obtaining a temporary restraining order) to stop development of the proposed affordable housing in Community District 1 pending the outcome of the litigation.

According to Census data, the population of Community District 1 is only 5.5% African American, whereas the population of Community District 3 is 77% African American.<sup>55</sup> New York City asserted that no barriers are excluding African Americans from moving to Community District 1, and that the discrepancies between Community Districts 1 and 3 are simply the result of a preference among African Americans not to live in Community District 1.<sup>56</sup> The residents and former residents of Community District 1 would receive a "community preference" for 50% of the affordable housing planned for construction in Community District 1,<sup>57</sup> essentially ensuring that the new housing constructed in Community District 1 would largely exclude African Americans, while disproportionately benefitting white members of a religious and ethnic community that prefers to live in the area.

<sup>37</sup>See Susan Shultz, *Department of Justice Closes Case on Darien, Two Years Later*, DARIEN TIMES, Aug. 31, 2012, available at [www.darientimes.com/8307/department-of-justice-closes-case-on-darien-two-years-later/](http://www.darientimes.com/8307/department-of-justice-closes-case-on-darien-two-years-later/).

<sup>38</sup>See *id.*

<sup>39</sup>See Compl., *Fair Hous. Justice Center v. Town of Yorktown*, No. 10cv9337, at 1 (S.D.N.Y. Dec. 15, 2010).

<sup>40</sup>See *id.* at 6.

<sup>41</sup>See *id.* at 7-8.

<sup>42</sup>See *id.* at 8.

<sup>43</sup>See *id.*

<sup>44</sup>See *id.* at 9-12.

<sup>45</sup>See *id.* at 12.

<sup>46</sup>See *id.* at 19-20.

<sup>47</sup>See Consent Decree, *Fair Hous. Justice Center v. Town of Yorktown*, No. 10cv9337 (S.D.N.Y. Feb. 27, 2012).

<sup>48</sup>See *id.* at 12.

<sup>49</sup>See *id.* at 4-5.

<sup>50</sup>*Id.* at 6.

<sup>51</sup>See *id.* at 7-8.

<sup>52</sup>See *id.* at 8.

<sup>53</sup>*Broadway Triangle Community Coalition v. Bloomberg*, 941 N.Y.S.2d 831 (N.Y. Sup. Ct. 2011).

<sup>54</sup>Plaintiffs made additional claims under the Equal Protection Clause and various civil right statutes. However, the preliminary injunction order discussed here only analyzes the Fair Housing Act claim. See *Broadway Triangle*, 941 N.Y.S.2d at 834 n.5.

<sup>55</sup>See *Broadway Triangle*, 941 N.Y.S.2d at 833.

<sup>56</sup>See *id.* at 833-34.

<sup>57</sup>See *id.* at 837.

The court found that “the community preference only serves to perpetuate segregation in the Broadway Triangle.”<sup>58</sup> An expert who testified at the preliminary injunction stage concluded that the Community 1 preference would result in African Americans representing only 3% of unit occupants.<sup>59</sup> If the community preference extended to include Community 3, the expert testified, African Americans would represent 31% of the affordable housing residents.<sup>60</sup> The defendants conceded that they did not consider the potential discriminatory effects of the community preference.<sup>61</sup> The court found, citing *Langlois*, that the city’s failure to contemplate these effects necessitates a finding of non-compliance with the Fair Housing Act.<sup>62</sup> Taking this and other factors into consideration, the court granted plaintiffs’ preliminary injunction on the grounds that they would prevail on their Fair Housing Act claims, and that the irreparable harm of discrimination would occur without the injunction.<sup>63</sup> The court also found that defendants had failed to establish that their actions “are furthered by legitimate interests” that cannot be achieved through “lesser, non-discriminatory alternatives.”<sup>64</sup> Thus, construction of the Community 1 housing at issue is enjoined, and the litigation continues.

#### ***Carter v. Housing Authority of Winchester***

In August 2012, the Connecticut Fair Housing Center and an individual claimant challenged certain practices by Winchester, Connecticut’s PHA that essentially created a de facto residency requirement in the Section 8 voucher program.<sup>65</sup> The Town of Winchester is majority white, with African Americans and Hispanics occupying fewer than 5% of the housing units there.<sup>66</sup> The Winchester Housing Authority (WHA) administers the Section 8 program within Winchester and 16 nearby communities, which together form the so-called “Rental Assistance Alliance.” Like the Town of Winchester, the other Alliance communities have very low minority populations.<sup>67</sup>

The individual plaintiff is Crystal Carter, an African-American woman who attempted to apply to WHA’s Section 8 program, but was denied an application even though the program’s waitlist had been accepting applicants. In refusing to take her application, WHA allegedly told Ms. Carter that she was ineligible because she did not reside within the Alliance.<sup>68</sup> Furthermore, according to the complaint, WHA told Ms. Carter that Winchester

lacked access to a bus line, had no employment opportunities, and was located in the “woods.”<sup>69</sup> In addition, WHA suggested that Ms. Carter submit applications in other communities within the state but outside of the Alliance. The recommended communities all had larger minority populations than Winchester or other Alliance communities.<sup>70</sup> The Connecticut Fair Housing Center conducted subsequent testing, which confirmed that WHA had a policy of refusing to send applications to persons residing outside of the Alliance communities.<sup>71</sup> The claimants alleged that such a practice functioned as a de facto residency requirement in violation of the Fair Housing Act by discriminating against African Americans and Hispanics and ensuring that applicants were almost exclusively white. In January 2013, the court denied the PHA’s motion for judgment on the pleadings, without prejudice, pending ongoing settlement discussions. As of press time, the electronic court docket did not indicate that a settlement had been reached by the parties. The *Bulletin* will include future updates about this case.

### **Conclusion**

Residency preferences remain an important issue for fair housing advocates, as these preferences can be used as a means of systematically excluding minorities from moving into areas with predominantly white populations. Thus, advocates should be interested in the outcome of current and future cases involving residency preferences. ■

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<sup>58</sup>*Id.*

<sup>59</sup>*See id.*

<sup>60</sup>*See id.*

<sup>61</sup>*See id.* at 838.

<sup>62</sup>*See id.*

<sup>63</sup>*See id.* at 839.

<sup>64</sup>*Id.*

<sup>65</sup>*See* Compl., *Carter v. Hous. Auth. of the Town of Winchester*, No. 12cv01108 (D. Conn. Aug. 1, 2012).

<sup>66</sup>*See id.* at 2-3.

<sup>67</sup>*See id.* at 3.

<sup>68</sup>*See id.*

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<sup>69</sup>*See id.*

<sup>70</sup>*See id.* at 3-4.

<sup>71</sup>*See id.* at 12-13.