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Why aren't fair housing laws used to build housing here?

By Joel Quick

Fair housing laws have been in the news as a potential means of building more housing. They are not used for that purpose in Massachusetts.

For example, a review of thousands of published zoning appeal cases revealed almost no claims under the federal or state fair housing acts. If people were asking for relief under these laws, you would expect to see those claims in court.

In neighboring New York, the federal Fair Housing Act has been used on occasion for decades to seek rezoning or variances so residential development can proceed. It is not clear why fair housing changes to zoning are not sought here, especially when a development proposal is headed toward litigation.

This article offers an explanation for why fair housing laws have not been used to build housing in Massachusetts and identifies tools that attorneys and developers can use to change that state of affairs.

The crisis

There have been "housing crisis" discussions at the state level for decades. The crisis is that there is too little housing, and, relatedly, housing costs too much. Even the current economic downturn has yet to slow average housing price increases.

However, as we are now being reminded, the cost of housing becomes a real problem in a down market. It is annoying to have a job and not be able to buy a house. It is crushing to be suddenly unemployed and need to pay slightly softening rents. As recent news articles have reported, those being crushed by that particular situation in Massachusetts are disproportionately non-white.

There is general agreement that a main impediment to constructing housing is local zoning. Gov. Charlie Baker's approach to the crisis is a housing choice bill, first introduced a few years ago, that makes it easier to re-zone areas for multi-family development (it has not passed as of this writing).

The Legislature decided long ago that the best way to create affordable housing is to circumvent zoning. Under G.L.c. 40B, developers that include enough affordable housing units in a proposal can obtain all local permits in a single process free from many zoning strictures.

To use 40B, the development must be in a municipality with a threshold lack of affordable housing. Chapter 40B is quite helpful to residential developers but does not fit some circumstances and can't be used in some places.

Residential developers in Massachusetts quickly realize that significant housing developments, including 40B projects, may draw local opposition and litigation. If a project remains lucrative, even years-long zoning disputes can be tolerable.

Local constraints on housing production can increase demand, driving up local housing prices, and, coincidentally, making court battles to build "unwanted" development worth every penny.

So one result of the housing shortage

is that there is no shortage of litigation over housing development. Given the volume of cases and the value of housing, it is a little surprising that a powerful legal tool for obtaining zoning exemptions remains unutilized.

The federal and state fair housing acts are in place not only to prevent discrimination in housing, but to prevent the perpetuation of housing segregation. See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 540 (2015) ("the [federal Fair Housing Act] aims to ensure that [government] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."); Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107, 122 (2016) (noting that the goal of the state and federal fair housing acts is to stop actions that discriminate or perpetuate segregation).

The Supreme Court decided decades ago that zoning regulation (or the failure to change a zoning regulation) can violate the federal Fair Housing Act if it perpetuates segregation. See Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P., 488 U.S. 15 (1988).

As explored further, the state fair housing law may provide an independent basis for altering or striking zoning regulation.

Misconceptions, difficult discussions

One reason the fair housing acts may not be used more often to avoid or change zoning is that there might be a misconception that proof of intentional discrimination is required. Both the U.S. Supreme Court and the Supreme Judicial Court decided a few years ago in succession that showing a "disparate impact" is adequate to bring a fair housing claim. See Inclusive Communities, 576 U.S. 519; Burbank Apartments, 474 Mass. 107. "A disparate impact analysis examines a facially-neutral policy or practice, such as a […] zoning law, for its differential impact or effect on a particular group. […] A prima facie case is established by showing that the challenged practice of the defendant actually or predictably results in […] discrimination; in other words that it has a discriminatory effect. […] The plaintiff need not show that the decision complained of was made with discriminatory intent." Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 933-934 (2d Cir.) (1988) (internal citations omitted).

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In Inclusive Communities, the Supreme Court said that "[suits targeting] unlawful practices includ[ing] zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification […] reside at the heartland of disparate-impact liability." 576 U.S. at 521.

The court in Inclusive Communities distinguished individual decisions, such as where to build specific housing units, from policies, such as whether a type of housing is allowed, and made it clear that one must show a policy has a discriminatory effect to mount a challenge. See 576 U.S. at 542-543.

Discretionary zoning relief, such as a special permit, may also be subject to challenge where the decision must be consistent with the zoning code. See G.L.c. 40A, §9.

To show the discriminatory effect of a policy for a disparate impact claim, one can point to a "statistical disparity" impacting a protected class. 576 U.S. at 521. However, a policy with a disparate impact may be upheld if no other policy would achieve the same valid goals without the resulting impact on the protected class. Id. at 542-543.

The Inclusive Communities requirements for bringing a disparate impact fair housing claim are similar to those established around 20 years ago by the 1st U.S. Circuit Court of Appeals. See Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-52 (1st Cir. 2000).

The fair housing act is in the news in large part because the U.S. Department of Housing and Urban Development has proposed rule changes. One rule change, recently finalized, is purportedly to make HUD's regulation regarding disparate impact claims consistent with the Inclusive Communities decision.

HUD had adopted a disparate impact rule before that decision issued. The court in Inclusive Communities gave no deference to HUD's interpretation of the fair housing act, and instead interpreted the statute itself and decided what must be shown to bring and sustain a claim. For this reason, it is unlikely that this or any future HUD rule change will greatly rework the disparate impact requirements set in Inclusive Communities.

A second reason the fair housing act claims may seldom be brought is that discussions about disparate impacts are difficult to have with zoning boards and are somewhat likely to result in litigation.

A board must have an opportunity to grant relief in the first instance, even if litigation appears to be certain. A central premise of fair housing claims is that zoning codes are flawed. The task is to convince a board that the momentum of once-normal policies, practices and prejudices causes the local zoning code, presumably applied without discrimination, to have a discriminatory effect.

Putting aside the fact that this contention might vex board members, the board will be left with a clear choice. Members can acknowledge the effect and require a demonstration that the proposal will reduce segregation or otherwise benefit a protected class before approving it. Alternatively, they can deny the effect, if only to avoid further requests for zoning changes under the fair housing acts.

Said differently, as developer's counsel, you will need studies and data to make your case and must keep in mind a limited hope of success.

There are several recent data-driven studies focused on Massachusetts that demonstrate segregation or other discriminatory effects and connect these to local development controls. If a client is on board with asking for zoning relief under the fair housing acts, these studies could help facilitate a reasoned discussion about why relief is needed.

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Preventing racial segregation is the original purpose of both state and federal fair housing laws.

In Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., the U.S. Supreme Court described the genesis of the federal fair housing act as follows: "By the 1960's […] policies, practices, and prejudices had created many predominantly [B]lack inner cities surrounded by mostly white suburbs. […] The statute [adopted in 1968] addressed the denial of housing opportunities on the basis of 'race, color, religion, or national origin.'" 576 U.S. 530-531.

Fair housing act protections have broadened over time. There are now federal and state protections on the basis of sex, disability and familial status. There are even more protected classes under state law depending, in part, on the type of housing discrimination at issue.

Because of the range of classes protected, fair housing laws are notable for covering intersectional discrimination. For example, refusing to build housing suitable for people with children (familial status) may perpetuate racial segregation if a town has only a few expensive houses suitable for people with children.

There are well-documented present-day economic disparities between white and Black people in Massachusetts (due, in part, to historic segregation). The fair housing laws would not require proving an impact on Black people, however. All one would have to show is an impact on people with children.

Part 1 discussed two reasons why there may be so few fair housing challenges to zoning: a possible misconception that proof of intentional discrimination is required, and discussions about disparate impacts are difficult to have with zoning boards and somewhat likely to result in litigation. A third reason is that these cases require unique preparation.

Standing is a requirement for bringing any suit, and having a co-plaintiff who wants to buy the housing that would be built (but for the zoning regulation) is almost certainly necessary. One of the complicating factors in bringing a zoning challenge is that an appellant has just under three weeks from the date the written decision issues to file a complaint in court. This is probably an insufficient amount of time to find a co-plaintiff with an interest in purchasing a unit one has no building permits to construct.

Furthermore, representation of the developer and that co-plaintiff would need to be carefully delineated, given that these parties will hopefully later be on the opposite sides of a real estate transaction.

One way to identify and engage these necessary co-plaintiffs would be through relationships with organizations advocating for the advancement of historically disenfranchised communities.

Many developers have engaged with community groups that support more housing opportunities in an effort to be responsive to what these organizations are

seeking. Many community groups have reached out to developers in an attempt to foster development that works for them.

Perhaps more involved engagement regarding a fair housing claim may need to occur in advance of or in conjunction with seeking relief from the local board in order to identify co-plaintiffs.

A fourth reason why there may not be more fair housing challenges to zoning is practitioner unfamiliarity with the law.

"An increasing number of data-driven studies of segregation and its causal connection to zoning laws provide the necessary support to seek fair housing zoning relief."

— Joel Quick

Where these claims aren't often brought, they may seldom be considered.

In Inclusive Communities, the Supreme Court noted that disparate impact claims have allowed "private developers to vindicate the [fair housing act's] objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units." Id. at 540.

Federal fair housing challenges to zoning are brought somewhat regularly nationwide, providing a broad base of case law. The federal fair housing act, in 42 U.S.C. 3613, allows a claim to be brought in state court if that is the preferred forum. That section also allows for the award of attorneys' fees.

The Massachusetts fair housing act, codified as part of G.L.c. 151B, does not have the same history of use to change or avoid zoning regulation. However, the Supreme Judicial Court in 2016's Burbank Apartments Tenant Ass'n v. Kargman decided not to adopt a "rule precluding disparate impact liability under the fair housing statutes where a [person] has acted in accord with statute, regulation, and contract, absent evidence of intentional discrimination." 474 Mass. at 122.

The court confirmed that the fair housing act can be used to overturn other laws based on language in G.L.c. 151B, §9. Id. at 122-123. Section 9 states: "[t]his chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply." That section allows for the award of attorneys' fees as well.

With regard to one class protected by the state fair housing act, people having children, the Attorney General's Office has taken the position that a zoning bylaw reducing bedroom counts could be a violation of Chapter 151B if applied so as to exclude people having children. See e.g., Attorney General's Office Zoning Article Approval, Carlisle Special Town Meeting of Oct. 18, 2017 — Case No. 8634, Warrant Article No. 1 (Zoning), at p. 3-4 (Jan. 25, 2018); Attorney General's Office Zoning Article Approval, Shrewsbury Annual Town Meeting of May 15, 2017 — Case No. 8513, Warrant Articles No. 18, 19, 20, 21, 22, 23 and 24 (Zoning), at p. 3-5 (Nov. 13, 2017); Attorney General's Office Zoning Article Approval, Milton Annual Town Meeting of May 1, 2017 — Case No. 8560, Warrant Articles No. 48, 51 and 52 (Zoning), p. 2-3 (Nov. 13, 2017).

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