MEMORANDUM

To: The Mayor and Trustees of the Village of Port Chester
cc: Chris Steers, Anthony Cerreto, Eric Zamft and Peter Feroe
From: Mark A. Chertok
Date: October 31, 2016 (revised)
Re: Residency or Local Employment Requirements or Preferences for Affordable Housing

You have asked about the Village Board of Trustee's authority to require Port Chester residency and/or local employment as qualifications or preferences for affordable residential units, if such housing is required as part of a proposed redevelopment (the "Project").[1]

If the Village required the Project to include affordable housing, it could not impose a durational residency or local employment requirement (i.e., require that a person show he or she has lived or worked in the Village for a minimum period of time), but it could impose a bone fide residency or local employment requirement (i.e., require that a person show he or she is a resident of the Village or works in the Village), assuming such a requirement would not violate the Fair Housing Act ("FHA") by having a disparate impact on a protected group (i.e., conduct that is not intentionally discriminatory but has a discriminatory [disparate] result against a protected class: race, color, national origin, religion, sex, disability, or the presence of children).[2]

Discussion

In the context of a government-imposed residency and/or local employment requirement, there are two ways, explained below, in which such a requirement could be considered illegal: (1) it is a durational requirement, which would likely violate the U.S. Constitution, or (2) it discriminates against people within a class protected by the federal FHA.

Residency Requirements

As a threshold matter, the Supreme Court has defined residence in the context of a bona fide residency requirement as "physical presence and an intention to remain." *Martinez v. Bynum*, 461 U.S. 321, 330 (1983) ("… when a person takes up his abode in a given place, without any present intention to remove therefrom, such place of abode becomes his residence." *Id*. at 331.).

In the context of establishing venue (i.e., the geographic location) for a lawsuit, courts generally require proof of residency. *See Ellis v. Wirshba*, 18 A.D.3d 805, 805 (2d Dep't 2005) (plaintiffs' affidavits and copies of sublease and contract for sale of apartment, utility bill, stock certificate, and liability insurance sufficiently established county of residence); *see also Jones-Ledbetter v. Biltmore Auto Sales, Inc*., 229 A.D.2d 518, 519 (2d Dep't 1996).

[1] For the remainder of this memorandum, residency and/or local employment requirements will be understood to encompass preferences as well.
[2] In contrast to governmental action, a private developer on its own, without being forced or aided by the government, could legally place a durational residency and/or local employment requirement on affordable units.

We have not found reported decisional law from any jurisdiction articulating the standard for residency in the context of a requirement for affordable housing, but the intent of the cases noted is clear: if a person can show he or she resides in a community through some valid basis, such an utility bills, insurance and the like, that person is considered a bone fide resident.

Constitutional Constraints

Some residency requirements are considered unconstitutional based on what the U.S. Supreme Court has articulated as a fundamental right to travel. Under the Equal Protection Clause of the Constitution, any classification by a state actor (such as a municipality) that impinges on this right is unconstitutional unless it promotes a compelling government interest. *See King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)) (striking down as unconstitutional durational residency requirement that public housing applicants have resided in New Rochelle for not less than five continuous years prior to application). The Court of Appeals for the Second Circuit, which encompasses New York State, found in *King* no compelling governmental interest for the durational residency requirement because there was no contention "that long-term residents are more needy than short-term residents, nor that public housing will be of more benefit to long-term residents." *Id.* at 649.

In a comparable case from the First Circuit (with jurisdiction over most of New England), *Cole v. Housing Authority of City of Newport*, 435 F.2d 807 (1st Cir. 1970), the Court discredited a slew of putative justifications for a two-year durational residency requirement as not constituting a compelling government interest: discouraging low-income families of neighboring communities from moving in, establishing a known population of residents for planning purposes, benefitting residents who have paid taxes longer, and benefitting residents who are "more a part of the community" than newcomers.

Therefore, courts will likely find that durational residency requirements impede the right to travel, do not promote a compelling government interest, and therefore likely violate the Equal Protection Clause. *See King*, 442 F.2d 648-49 (citing *Shapiro* and *Cole*).

Conversely, the U.S. Supreme Court has found that bona fide residency requirements, which grant preferences to residents over nonresidents regardless of how long the residents have lived in the municipality (i.e., do not entail a durational component), do not impede the right to travel; people are free to move to a community and establish residence there. *See Martinez*, 461 U.S. at 328-29. Therefore, as long as bona fide residency requirements are rationally related to a legitimate government interest, they will be constitutional. *Id.* at 328, n.7.

In the context of affordable housing, bona fide residency requirements generally meet this standard because municipalities have "a legitimate interest in taking the responsibility for providing housing for [their] own residents before aiding the residents of other communities." *Fayerweather v. Town of Narragansett Hous. Auth.*, 848 F. Supp. 19, 22 (D.R.I. 1994); *see Daubner v. Harris*, 514 F. Supp. 856, 867 (S.D.N.Y. 1981), *aff'd,* 688 F.2d 815 (2d Cir. 1982).

Therefore, a residency requirement for affordable housing based solely on residency, not on duration of residency, will likely be legal. It is a logical extension of this case law, although no

court has so decided, that any government-imposed bona fide residency requirement should not require proof of residency that might be construed as a durational residency requirement.

Similarly, employment requirements should be constitutional as long as they are rationally related to a legitimate government interest. Local employment requirements meet this test because municipalities have an interest in preserving resources for people connected to their communities. *See Fayerweather*, 848 F. Supp. at 22; *Family Life Church v. City of Elgin*, No. 07 CV 0217, 2007 WL 2790752, at *2 (N.D. Ill. Sept. 24, 2007) (requirements related to having family in or children attending school in the municipality are also constitutional).[3]

Fair Housing Act Constraints

The FHA applies to public and private entities and prohibits discrimination (disparate treatment [i.e., intentional discrimination] *and* disparate impact [i.e., not intentional but a discriminatory result]) against certain protected classes. *See* 42 U.S.C. § 3604(a); *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015). Non-residents are not a protected class, but if a residency requirement could be seen as causing a disparate impact on a protected class, then it might be considered in violation of the Act.[4] The same would apply to a local employment requirement.[5]

A recent case involving Garden City, New York on Long Island is illustrative of the reach of the FHA and other provisions. In 2005, several public interest organizations and individuals sued Garden City and Nassau County, asserting claims under the FHA and certain provisions of the federal Civil Rights Act and U.S. Constitution. Plaintiffs principally argued that Garden City's shift in zoning from a multi-family residential group (R–M) district to a Residential Townhome (R–T) district was racially discriminatory, and that Nassau County failed to prevent this discrimination. Plaintiffs also argued that the abandonment of R–M zoning in favor of R–T zoning had a disparate impact on minority groups, and thus violated the disparate-impact component of the FHA.

The District Court dismissed the claims against Nassau County but ruled against Garden City in 2013. Earlier this year, the Court of Appeals for the Second Circuit issued its decision on appeal.

[3] We have not found any reported New York decisional law applying the bone fide employment concept to affordable housing.

[4] On August 3, 2016, the U.S. Department of Housing and Urban Development ("HUD") issued a decision relating to two types of residency or employment preferences at a San Francisco public housing complex. HUD rejected a preference placed on 40 percent of the units for people who live in a specific City district because, among other things, it may violate the FHA by limiting equal access to housing and by perpetuating segregation. HUD conditionally approved a preference placed on 100 percent of the units for people who live or work in San Francisco; the City must, prior to finalizing tenant selection with the preference, show that the preference will not have a disparate impact on members of a protected class in violation of the FHA. *See* J.K. Dineen, *Feds reject housing plan meant to help minorities stay in SF*, San Francisco Chronicle, Aug. 17, 2016, *available at* http://www.sfchronicle.com/politics/article/Feds-reject-housing-plan-meant-to-help-minorities-9146987.php.

[5] If the Village (or a private developer) considers imposing of some type of local employment requirement, it should first determine whether the makeup of the subject workforce could result in a disparate impact on a protected class. That analysis is beyond the scope of this memorandum.

Mhany Management, Inc. [aka New York Acorn Housing Company] v. County of Nassau, 819 F.3d 581 (2016). The Court upheld the District Court's finding that Garden City had violated the FHA by the shift in zoning districts, but it remanded the case to the District Court to determine whether Plaintiffs had met their burden of proving, under FHA regulations, that the "substantial legitimate, nondiscriminatory interests supporting the challenged practice [i.e., the rezoning] could be served by another practice that has a less discriminatory effect." *Id*. at 624-25.

The decision is inapplicable to the Project, as the proposed zoning amendment does not eliminate or even reduce multi-family housing but actually would increase it. Further, unlike Garden City, which had no affordable housing, the Village has considerable affordable housing.

Residency and Employment Requirements or Preferences in Westchester County Municipalities

The Port Chester Village Code § 345-18 requires new multifamily dwellings containing 10 or more units in certain zones to provide at least 10% as moderate-income housing. Preference for the moderate-income housing is to be given to Port Chester residents[6] and employees of the Village of Port Chester, including volunteer firefighters, and the Port Chester School District. Similarly, Section XVII.A. of the Port Chester Housing Authority Admissions and Occupancy Policy includes a preference for applicants based on a variety of factors, including Port Chester residency (a bona fide residency requirement) and head of household and/or spouse employment in Port Chester. Comparable requirements could be imposed on the Project (likely through modifications to the proposed zoning amendments).

Other municipalities in Westchester County have residency and/or local employment housing preferences. Some of these are noted in Appendix A to this Memorandum.[7]

Conclusion

In conclusion, the most legally sound requirement in the context of potential affordable housing in a Project would be a bona fide residency and/or local employment requirement or preference that does not disparately treat or impact a protected class under the federal FHA. If the Village was interested in imposing a durational residency and/or local employment requirement, it would

[6] The Code does not indicate that to qualify for such housing an applicant needs to reside in the Village for a specified period of time; presumably, if a durational requirement had been intended, rather than a simple bona fide residency requirement, the Code would have incorporated a particular time period.

[7] The Sustainable Port Chester Alliance has commented on apprenticeship agreement requirements. The referenced requirements are based on municipal police power, not zoning, with the goals generally being to create additional employment opportunities and enhance worker safety. *See e.g.*, the referenced Huntington and North Hempstead provisions (we found four other Long Island municipalities with similar local laws.) The requirements generally apply to commercial or industrial construction of 100,000 sf or more. N.Y. Labor Law §§ 816-817 allow for, but do not require, the adoption of apprenticeship requirements. In any event, there is no nexus of the job opportunities to the Project, which would create additional jobs. Worker safety, to the extent it is different for the Project than other private projects, is addressed in the SEQRA documents (e.g., remediation of hazardous materials would be overseen by NYSDEC or the Village can retain an outside consultant at applicant expense).

need to determine that there was a compelling interest that warranted such requirements; it would seem quite difficult to satisfy this burden.

Appendix A

- Bedford (Town Code §§ 125-29.2, 125-29.3, 125-56(E))
    - Requires that at least 20% of the dwelling units in the DH (diversified housing) and EL (elderly) districts be middle-income housing, and preference is given to, among others: Bedford residents, employees of schools within the Town of Bedford, full-time Town of Bedford municipal employees, and others employed in the Town of Bedford (no durational requirement)
- Cortlandt (Town Code § 307-94(B)(2))
    - Requires that 10% of units in the Community Betterment District qualify as affordable housing, and Town of Cortlandt residents receive preference for the affordable units (no durational requirement)
- Lewisboro (Town Code § 220-26(B), (F)(5))
    - Allows the Planning Board to authorize an increase in permitted density in the R-MF multifamily residence district if at least 1/3 of the additional density units are middle-income dwelling units and/or affordable units
    - Middle-income families applying for middle-income units are prioritized based on criteria that include, among others: Lewisboro municipal and school district employees, others employed in Lewisboro, and Lewisboro residents (no durational requirement)
- North Castle (Town Code § 355-24(I)(12)(d))
    - Prioritizes financially eligible applicants for middle-income housing based on a point system where applicants get points for being, among others: North Castle residents of at least two years, North Castle municipal or school district employees (full time, for a minimum of 24 months), and otherwise employed in New Castle (no durational requirement)
- North Salem (Town Code Part 250, Attachment 17)
    - Prioritizes financially eligible applicants for middle-income housing based on a point system where applicants get points for being, among others: North Salem residents of at least two years, North Salem municipal or school district employees (full time, for a minimum of 24 months), and otherwise employed in New Salem (no durational requirement)
- Pound Ridge (Town Code § 113-99(C))
    - Prioritizes financially eligible applicants for below-market-rate housing based on criteria that include, among others, Pound Ridge residents and municipal employees (no durational requirement)
- Somers (Town Code § 170-60.2(A))
    - Prioritizes financially eligible applicants for affordable housing based on criteria that include, among others, Somers residents (defined as "someone residing or dwelling in Somers") (no durational requirement) and municipal and school district employees (full time, for a minimum of 24 months)