

## Outside Counsel

## Expert Analysis

# Opening Doors On a Fair Housing Decision

**T**he recent decision of the U.S. District Court for the Eastern District of New York in the much-publicized federal Fair Housing Act case *MHANY Management v. Incorporated village of Garden City*, 2013 U.S. Dist. LEXIS 172326 (EDNY Dec. 6, 2013) presents a classic example as to how a municipality can run afoul of the federal Fair Housing Act even if none of its officers or employees directly express animus toward members of a protected class or take an action directly against a member of such a class.

*MHANY Management* stems from a decision of Nassau County to sell unneeded public property. One of the properties the county selected for sale contained various county buildings in an area of the suburban Incorporated village of Garden City which was located near single-family houses. The property was situated in the village's zoning district which only allowed public uses and did not permit residential housing.

The village retained a planning firm to provide a recommendation with regard to the rezoning of the property. The firm recommended that the property be rezoned to allow up to 311 residential units on part of the property and that the construction of multifamily housing be permitted on the property. Those recommendations were initially accepted by a committee appointed by the village to review the zoning for the property, the Superintendent of the village's Buildings Department, and the village's Board of Trustees.

Before enacting the zoning changes, the village held a public hearing at which village residents voiced concerns that multifamily housing would generate traffic and parking problems and place a burden on the local schools. At subsequent hearings, village residents raised further opposition to multifamily housing, with one village resident

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stating that she “moved here from Brooklyn so that when I walked out of my house I did not turn to my left and see apartment buildings.” A flyer distributed throughout the village suggested that any multifamily housing would be used for “affordable housing” and that such would lower property values in the village. None of these statements directly referred to persons of any particular race or national origin and none of these statements were attributed to village officials or employees.

Ultimately, in response to the opposition of its constituents, the village's Board of Trustees enacted a different zoning law than it had initially accepted. In comparison to the initially accepted zoning law, the zoning law that was adopted by the village placed greater restrictions on the number of units that could be built on the property and limited the amount of the county property that could be used for multifamily dwellings. The zoning law enacted by the village did not directly place restrictions on any particular race or national origin using the property at issue.

### Disparate Treatment Claim

According to plaintiff *MHANY Management*, a developer of affordable housing, the more restrictive zoning law that was adopted by the village made it financially infeasible to build affordable multifamily housing on the site and it would have been futile for it to submit a bid to develop the property. Consequently, in 2005, plaintiff *MHANY Management* and several others filed an action

in the U.S. District Court against the village, asserting that its rezoning of the property to effectively preclude affordable multifamily housing violated, among other civil rights laws, the federal Fair Housing Act. Plaintiffs alleged that the village's decision rezoning the property to make it infeasible to establish affordable multifamily housing constituted “disparate treatment” of African-Americans and Latinos because of their race and national origin, and that the rezoning had a “disparate impact” on African-Americans and Latinos.

After the village's motion for summary judgment was denied, an 11-day bench trial was held in 2013 before Judge Arthur D. Spatt. In a 65-page decision, Spatt found that the village's decision to change the zoning scheme from what it had approved initially in the face of community opposition constituted discrimination in violation of the federal Fair Housing Act.

With regard to the plaintiffs' “disparate treatment” claim, Spatt held that the plaintiffs were required to demonstrate that animus against a protected group was a significant factor in the positions taken either by the municipality or to whom the municipality was knowingly responsive, citing the Second Circuit's decision in *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995). Spatt noted that direct evidence of discrimination “is rarely available to plaintiffs.”

In citing the U.S. Supreme Court decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 522 (1977), Spatt stated that discrimination could be inferred from whether a challenged decision impacts more heavily on one race than another, the historical background of the decision, the specific events leading up to the decision, departures from the normal procedural sequence, substantive departures from usual actions of the municipality, and any contemporary statements by the decision-making body.

Of the factors that could be used to infer dis-

crimination, Spatt was most persuaded by the sequence of events. Spatt found that while the village's Board of Trustees initially supported a proposal allowing affordable multifamily housing, it changed its tune after village residents expressed their opposition to multifamily housing at public meetings and that that change inferred discrimination.

### Significant Findings

It is significant that Spatt found that discrimination could be inferred from the village's rezoning even though there were no discriminatory remarks made by any of the members of the village's Board of Trustees and the remarks made by residents of the village did not specifically mention the race or national origin of the prospective residents of any proposed housing. In other words, as Spatt correctly held, even if municipal decision-makers have no animus toward persons in a protected class and even if the remarks made by their constituents do not specifically mention race or national origin, municipal officials can be held liable under the federal Fair Housing Act for their responsiveness to remarks that can be perceived as seeking to preclude persons from residing in housing because of their race or national origin.

It is also significant that Spatt found that the village's rezoning could be discriminatory even though the rezoning did not preclude entirely either multifamily dwellings or affordable housing from being developed on the site at issue, and certainly did not preclude specifically anyone from living at the site on the basis of being a member of a protected class. Spatt relied upon the plaintiffs' statistical expert who demonstrated that the zoning scheme initially supported by the village "would have created a pool of potential renters with a significantly larger percentage of minority households than the pool of potential renters for the zoning proposal ultimately adopted as law by Garden City." Spatt held that the statistics demonstrated that the village's rezoning affected minority families to a greater degree than Caucasian families, and that, therefore, such statistics could support an inference that the village's rezoning was discriminatory.

After determining that plaintiffs had demonstrated a prima facie case of discrimination, the burden shifted to the village to demonstrate a legitimate, non-discriminatory reason for its actions. Spatt found that the village had proven that the zoning proposal it enacted would result in less traffic in the neighborhood than the initial zoning proposal and would promote the development of "townhomes" that were previously

non-existent in the village.

Nonetheless, Spatt still held that the village's rezoning was discriminatory and thus violated the federal Fair Housing Act. Citing the Second Circuit decision in *Cabrera v. Jakobovitz*, 24 F.3d 372 (2d Cir. 1994), Spatt noted that a municipality "can escape liability if it proves it would have rendered the same decision had it not considered impermissible reasons." However, Spatt found that the traffic figures relied upon by the village and the village's interest in developing "townhomes" came after the increase in public opposition to the initial zoning plan and thus held that the "Plaintiffs have established that discrimination played a determinative role" and that the village "failed to prove they would have made the same decision absent discriminatory considerations."

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Judge Spatt stated that "municipalities cannot frustrate the underlying policy of providing fair housing within their communities."

Therefore, in spite of the fact that there was no direct evidence of animus toward a protected class on the part of any village officials or direct actions taken by any village officials against any members of a protected class, and even though the village had posited some legitimate non-discriminatory reasons for its ultimate rezoning decision, the village was still found to be guilty of discrimination because of its responsiveness to the sentiments of its constituents and because of the impact the village's decision to abandon its initial zoning scheme and enact the ultimate scheme had on minorities.

### Disparate Impact Claim

Spatt also ruled in favor of the plaintiffs on their "disparate impact" claim. Spatt found that the plaintiffs had demonstrated that the village's change from the zoning originally proposed to what it had ultimately adopted had largely eliminated the potential for affordable rental multifamily units. Based on the statistics presented by plaintiffs' expert, Spatt held that the village's change had a disproportionate impact on minorities. Spatt noted that the village had demonstrated that the enactment of its zoning scheme advanced the legitimate,

bona fide government interests of reducing traffic and providing for the construction of "townhomes." However, Spatt found that the village failed to establish that it could have achieved these goals with a less discriminatory alternative and held that "the Village's acts had both an adverse impact on minorities and tended to perpetuate segregation."

In the past few years, the U.S. Supreme Court has twice granted certiorari on the question of whether "disparate impact" claims are cognizable under the federal Fair Housing Act and both cases, including *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), cert granted, 133 S.Ct. 2824 (2013) that Spatt noted in his opinion, settled before being heard by that court. Nonetheless, for the time being and as demonstrated by the MHANY Management decision, with persuasive statistical evidence, a "disparate impact" claim is a powerful weapon in a Fair Housing Act plaintiff's arsenal.

As Spatt correctly noted, even though the village posited legitimate non-discriminatory reasons for the zoning scheme it ultimately chose, the fact that the village failed to demonstrate a less discriminatory alternative established liability on the "disparate impact" claim. Again, even without a finding that village officials had any animus toward minorities, the village was found to have acted in a discriminatory manner under the federal Fair Housing Act.

As the property at issue in this action is no longer available for development, it remains to be seen what relief the district court will craft. Judge Spatt has requested that the parties submit to him proposals for relief if they are unable to reach agreement. *MHANY Management v. Incorporated Village of Garden City*, 2014 U.S. Dist. LEXIS 34589 (EDNY March 17, 2014).

Regardless of the plan that is eventually worked out by the parties or imposed by the court, the decision in *MHANY Management* demonstrates the power of the federal Fair Housing Act to examine not only statements made by municipal officials but also the actions taken by those municipal officials, the responsiveness of municipal officials to the apparent prejudices of their constituents, and the impact of actions taken by municipal officials on minorities in determining whether discrimination has indeed occurred.