Washington University in St. Louis
SCHOOL OF LAW

Margo Schlanger
Professor of Law
314-935-8242
mschlanger@wulaw.wustl.edu

Samuel Bagenstos
Professor of Law
314-935-6856
srbagenstos@wulaw.wustl.edu

November 12, 2007

Mira Tanna
Assistant Director
Metropolitan St. Louis Equal Housing Opportunity Council
1027 South Vandeventer Ave., 6th Floor
St. Louis, MO 63110

Re: Legal Opinion Regarding Documentation Requirements for Occupancy Permits

Dear Mira –

You asked us our views on the legality of a local policy or ordinance under which a person seeking an occupancy permit as a resident of a house or apartment must provide to local officials a Missouri driver's or non-driver's license. You have explained to us that the City of Woodson Terrace has implemented such a policy, and that it is possible other Missouri cities and towns have done something similar. In our opinion, which reflects our expertise in federal constitutional law and civil rights law, such policies or ordinances would be unlawful under the federal Constitution's Privileges and Immunities Clause, the constitutionally protected right to travel, federal immigration law, and federal fair housing law. We discuss the basis of our opinion below. Please note that opinions expressed here are personal; we provide our titles and affiliation for identification purposes only, not to imply any position on the part of Washington University in St. Louis.

Privileges and Immunities Clause/Right to Travel

It is our understanding that under Missouri law, driver's and non-driver's licenses are available only to those whose *primary* state of residence is Missouri. This appears to us clear under state law for both driver's licenses[1] and non-driver's licenses.[2] If this understanding is

[1] See 12 Mo. Code State Reg. 10-24.448 (requiring applicants to provide proof of residency). The relevant statute defines "residence" and "residence address" as "the location at which a person has been physically present, and that the person regards as home. A residence address is a person's true, fixed, principal, and permanent home, to which a person intends to return and remain, even though currently residing elsewhere." Mo. Stat. Ann. § 302.101(18). The use of the word "principal" indicates that a person whose primary residence is elsewhere, but who lives part of the year in Missouri, is not eligible for a Missouri driver's license. Indeed, state regulations make clear that Missouri employs a "one-license concept" under which any applicant for a driver's license must "surrender any license in his/her possession." 12 Mo. Code State Reg. 10-24.070(1).

[2] The relevant state regulation requires applicants for a non-driver's license to "have a Missouri address or reside within the boundaries of Missouri." 12 Mo. C.S.R. 10-24.110. But this language appears merely to permit issuance of the non-driver's license to Missouri citizens who are temporarily staying elsewhere—for

correct, then the requirement that an individual present a driver's or non-driver's license to obtain an occupancy permit would clearly violate the Privileges and Immunities Clause of the United States Constitution and the federal constitutional right to travel.

The Privileges and Immunities Clause states, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. Const. Art. IV, § 2. The Supreme Court has explained that the purpose of the clause is to "plac[e] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 296 (1998) (internal quotation marks omitted). The point is not that all distinctions among citizens of different states are disallowed. But the case law establishes that *most* such distinctions are, indeed, unlawful. For example, states may not reserve permission to practice law to residents. Barnard v. Thorstenn, 489 U.S. 546 (1989). They may not require preferences for residents in various hiring decisions. Hicklin v. Orbeck, 437 U.S. 518 (1978). And they may not reserve particular commercial licenses for state residents. Toomer v. Witsell, 334 U.S. 385 (1948). The same rules apply to municipal actions. United Bldg. & Const. Trades Council of Camden County & Vicinity v. Camden, 465 U.S. 208, 214-215 (1984).

The rule is, more generally, that distinctions that disadvantage out-of-staters must be justified, and only strong justifications will suffice. The allowed distinctions fit a few limited categories. For example, case law allows states to provide special benefits for their own citizens, such as reduced tuition at state schools, Vlandis v. Kline, 412 U.S. 441, 445 (1973), reduced fee hunting permits, see Baldwin v. Fish and Game Comm'n of Mont., 436 U.S. 371, 390-391 (1978), and the like. But a regulation such as we understand Woodson Terrace's to be, which in effect (given the requirements for receipt of a Missouri driver's or non-driver's license) denies permission to out-of-staters to have a secondary residence in the city limits, is a flat discrimination with little or no justification. It therefore violates the Privileges and Immunities Clause.

For exactly the same reasons, the Woodson Terrace policy, as you have explained it to us, violates the federal constitutional right to travel, which affords citizens of each state the right to use resources and services in other states. As the Supreme Court has explained, "The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." Saenz v. Roe, 526 U.S. 489, 500 (1999). Just as a state may not "limit to its own residents the general medical care available within its borders," Doe v. Bolton, 410 U.S. 179 (1973), so too a city cannot limit to a state's primary residents the availability of housing within its borders.

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example because they are soldiers stationed out of state or students attending college out of state—rather than to authorize a non-driver's license for those who have homes in Missouri but whose principal residence is elsewhere. The Missouri Department of Revenue has recognized the point by requiring that applicants for driver's and non-driver's licenses submit the same "proof of residency." See Documents Required to Apply for or Renew a Missouri Driver License, Nondriver License, or Instruction Permit, available at http://dor.mo.gov/mvdl/drivers/idrequirements.pdf.

To summarize, it appears that Missouri law does not allow citizens of other states to obtain the identification cards required by the Woodson Terrace policy, and therefore that such out-of-staters are unable to obtain the occupancy permit they need to establish a secondary residence here. That is a violation of the Privileges and Immunities Clause and the constitutionally protected right to travel.

National Immigration Law

There is another, wholly independent, legal problem with the Woodson Terrace policy as you have explained it to us: The policy would effectively implement a regulation of immigration, forbidding undocumented immigrants of various types from living in Woodson Terrace. This, too, is unlawful, because it contradicts congressional regulation in this area.

The immigration issue arises because Missouri law requires that applicants for a driver's or non-driver's license demonstrate their "lawful presence" in the United States. Mo. Stat. Ann. § 302.171. State authorities have provided an extremely complex set of implementing procedures. See Documents Required to Apply for or Renew a Missouri Driver License, Nondriver License, or Instruction Permit, *supra*. This state law regulating immigration in the context of drivers' licenses is expressly authorized by federal statute. See Real ID Act, Pub.L. 109-13, Div. B, Title II, § 201 et seq., May 11, 2005, 119 Stat. 311, codified at 49 U.S.C. § 30301 note. But the federal authorization of state immigration regulation relating to drivers' licenses does not by any means extend to state or local immigration regulation relating to residency. And such regulation—which is precisely what is attempted by the Woodson Terrace policy you have described—is unconstitutional for several reasons.

Most basically, immigration regulation is reserved to Congress, except where Congress authorizes local regulation. And neither cities nor states have been authorized to decide where non-citizens can live; the effort to do so is simply beyond their authority. Permitting or barring residency of non-citizens is the core of immigration regulation reserved to Congress by the Constitution. See, e.g., Truax v. Raich, 239 U.S. 33, 42 (1915) (state laws effectively denying aliens "entrance and abode" "are constitutionally impermissible" because they "encroach upon exclusive federal power"); Graham v. Richardson, 403 U.S. 365, 379 (1971) (same). Moreover, Congress has entirely occupied the relevant field, leaving no room for contrary or even supplemental regulation by states, much less by cities. See Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941). Deciding which foreign nationals may live within our nation's borders and for how long—whether as of right for some immigration statuses, or as a matter of discretion for congressionally specified federal officials—is a *federal* decision, governed by an extraordinarily complex and comprehensive federal network of substantive and procedural statutes and regulations. When the federal government has not acted to deport someone, whatever that person's formal immigration status, individual cities may not countermand that federal decision and create a checkerboard of residency exclusions. As the Supreme Court explained when invalidating a Massachusetts statute touching on foreign relations, "Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379-380 (2000); see also American Ins. Assoc. v. Garamendi, 539 U.S. 396 (2003).

Washington University School of Law, Campus Box 1120, One Brookings Drive, St. Louis, MO 63130-4899
Phone (314) 935-8242 Fax (314) 935-6493 *mschlanger@wulaw.wustl.edu http://schlanger.wustl.edu*

Moreover, even if it were permissible for cities to regulate residency for non-citizens (which it is not), the Supremacy Clause would bar such regulation from conflicting with federal requirements. See, e.g., Geier v. American Honda Motor Co., 529 U.S. 861 (2000). Here, restriction of occupancy permits to citizens and immigrants able to document their immigration status to the satisfaction of the state Department of Motor Vehicles conflicts irreconcilably with numerous provisions of both federal immigration and federal housing law.

Most specifically, people in numerous categories of legal immigration statuses—including A-1 diplomatic visa holders, B-1 and B-2 temporary visitors, and visitors who have entered the United States lawfully under the Visa Waiver Program—are not eligible for a Missouri driver's or non-driver's license. See Documents Required to Apply for or Renew a Missouri Driver License, Nondriver License, or Instruction Permit, *supra*. But under federal immigration law, those individuals are explicitly allowed to live in the United States for a temporary period that typically lasts at least several months. See 8 U.S.C. § 1187. Obviously, federal law anticipates that they be able to obtain housing during that period.

More generally, the federal immigration laws establish a complex and careful set of procedures designed to assure that an alien is not erroneously identified as unlawfully present. The process of determining who can stay and who must go involves written notice, a hearing with the opportunity to present evidence and argument, administrative appeal, and judicial review. *See, e.g.,* 8 U.S.C. §§ 1154, 1228-1252, 1255-1259. While the federal system implements Congress's specified procedures, aliens frequently have the right to remain in the United States—during removal proceedings, which often last months and sometimes even years, and during the pendency of asylum applications or for "withholding of removal," see 8 U.S.C. §§ 1158 and 1251(b)(3); 8 C.F.R. § 274a.12 (a) (11-13),(c) (8-11, 14, 18-20, 22, 24); Clark v. Martinez, 543 U.S. 371 (2005) (allowing persons released from detention pursuant to legal mandates and restrictions to stay and work in the U.S. regardless of immigration court's removal order); Zadvydas v. Davis, 533 U.S. 678 (2001) (same). Federal officials also may exercise discretion not to deport otherwise removable persons for humanitarian reasons. See 8 C.F.R. § 212.5(f). All these provisions of federal law would be rendered illusory if states or local governments could countermand the federal permission and deny residence permission to aliens who have been found removable but not yet deported. Accordingly, policies such as Woodson Terrace's are unconstitutional because preempted by federal law.

A number of cities around the country have over the past year attempted to impose immigration regulations restricting residency to citizens and lawful immigrants. In only one case has the constitutionality of the provision been fully litigated; the provision was struck down on the same grounds we discuss above. Lozano v. City of Hazleton, 496 F.Supp.2d 477, 530-533 (M.D. Pa. 2007). In several other cases, courts found the plaintiffs challenging the ordinances likely to succeed on their claims, and accordingly stayed operation of those ordinances. See Garrett v. City of Escondido, 465 F.Supp.2d 1043 (S.D. Cal. 2006); Villas at Parkside Partners v. City of Farmers Branch, 496 F.Supp.2d 757 (N.D.Tex. 2007). In still other cases, legal challenges have led to the rescission of the ordinance at issue. See, e.g., http://chadmin.wustl.edu/chDocs/public/IM-NJ-0001-0013.pdf (discussing Riverside Coalition of Business Persons and Landlords v. Township of Riverside, New Jersey, and the resulting repeal of a local immigration ordinance). But in no case of which we are aware has a court refused such an injunction. Litigation in Missouri has resulted in the revocation of a housing

Washington University School of Law, Campus Box 1120, One Brookings Drive, St. Louis, MO 63130-4899
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ordinance in Valley Park, because it violated state limits on the authority of municipalities. See Reynolds v. Valley Park (Mo.), Cause No. 06-CC-3802 (St. Louis County Cir. Ct.), March 12, 2007, available at http://chadmin.wustl.edu/chDocs/public/IM-MO-0001-0017.pdf. The point is that there is abundant precedent that stands against local regulation of immigration.

Fair Housing: Disparate Impact

Finally, the Woodson Terrace policy that you have described conflicts with the Fair Housing Act. Landlords with housing to rent naturally wish to find a tenant and get necessary permits speedily—they do not want the disruption and high cost of finding out, days or weeks later, that the City will not grant an occupancy permit for that tenant. For the same reason, sellers want to find a buyer and get the necessary permits quickly. But landlords and sellers have no way to know which of their would-be tenants or purchasers will qualify for a Missouri identification card. The only course readily open to them is to avoid renting to would-be tenants or selling to would-be buyers who somehow look or sound foreign-born—conduct that violates the Fair Housing Act, which prohibits housing practices, including leasing and sale, based on, inter alia, race, color, and national origin. *See* 42 U.S.C. § 3604. Landlords and home sellers are thus placed in an untenable position—the requirements of local law push them inexorably to violate federal law. The ordinance, as you have described it to us, "frustrate[s] the accomplishment of a federal objective" and is therefore "nullified by the Supremacy Clause." Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 873 (2000) (internal quotation marks omitted); see also Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (federal statute preempts state law not just "where it is impossible for a private party to comply with both state and federal requirements" but also "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks omitted).

* * *

In short, the Woodson Terrace policy you have described to us violates both the Constitution and several federal statutes. Any municipal or state policy or ordinance that denies an occupancy permit to anyone whose primary residence is out-of-state would violate the Constitution's Privileges and Immunities Clause and the constitutionally protected right to travel. And a restriction that forbids residency to immigrants, whatever their immigration status, violates both the immigration and fair housing laws, even if it is implemented by piggybacking on the state's system governing driver's and non-driver's licenses.

We hope this letter is helpful to you in your efforts to fulfill your missing of "ensur[ing] equal access to housing for all people through education, counseling, investigation and enforcement."

Yours,

Samuel Bagenstos

Margo Schlanger

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