Fair Housing

AND

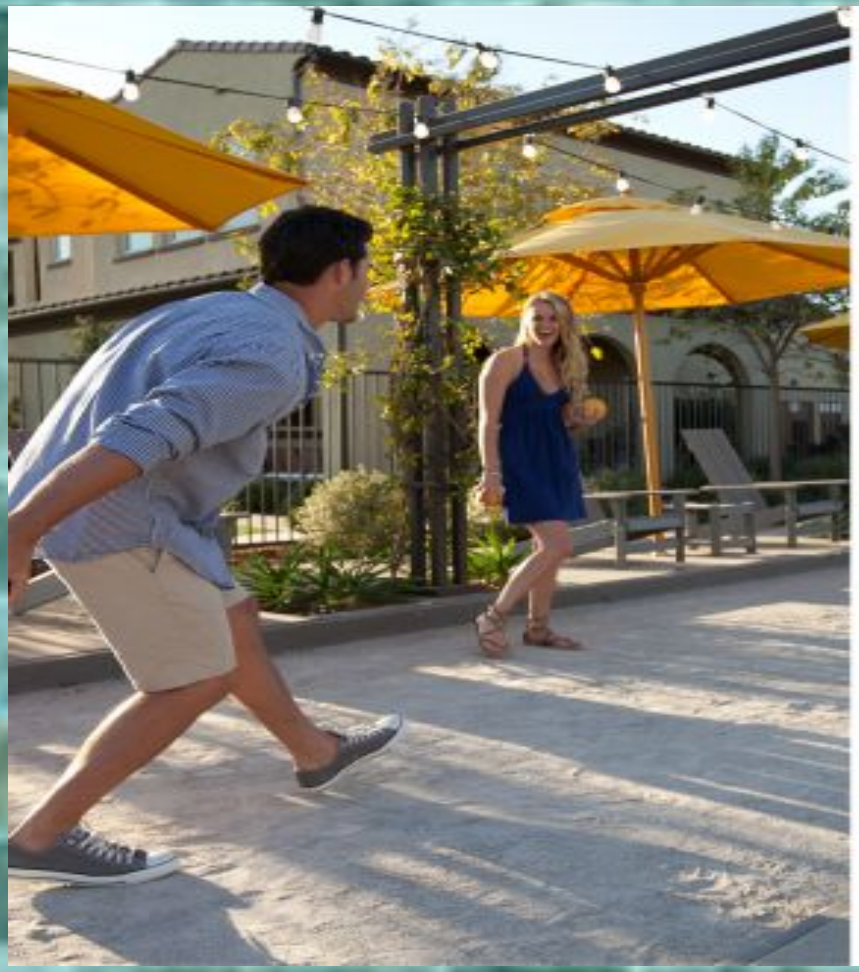
Structural Inequality

© Professor Jon C. Dubin

Associate Dean for Clinical Education,
Alfred C. Clapp Public Service Scholar

Rutgers School of Law--Newark

Fair Housing (Advertisement Steering)



Fair Housing and Structural Inequality

Fair Housing Act (FHA) (Title 8) 1968 Civil Rights Act Overview

- In the wave of Civil Rights Acts in the 60s, this was one of the last passed.
- There was considerably more resistance to the passage of this bill than most of the Civil Rights Acts.

Fair Housing Act (Title 8) Overview (cont...)

- Housing was extremely controversial because:
  - It created a means to bring low income people and people of color closer to insulated, white, upper income communities.
  - This triggered large amounts of fear of racial amalgamation and xenophobia on the part of those insulated communities.

Fair Housing Act (Title 8) Overview (cont...)

- This bill was delayed until 1968, and even so, it was expected to fail unconditionally.
- Ironically, the assassination of Martin Luther King, Jr., generated enough public support (as it's passage had been one of his last projects) to push it through.

Fair Housing Act--Purpose

- "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." FHA, 42 U.S.C. § 3601
- So what is Fair Housing? (not expressly defined in Act; rather, various discriminatory practices prohibited and various obligations imposed on agencies and grantees of government)

Fair Housing Act--Purpose

- Senator Mondale :[principal drafter, FHA primary substantive section] The reach of the proposed law was "to replace the ghettos by truly integrated and balanced living patterns." Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) 14 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).

Fair Housing Act--Purpose

- Thus, Congress intended the FHA not only to eliminate housing discrimination, but also to replace segregated living patterns with integrated ones.
- Sometimes the anti-discrimination and anti-segregation goals can be perceived as at cross-purposes: *See* John Calmore *Fair Housing vs. Fair Housing*, 15 CLEARINGHOUSE REV. 7 (May 1980).

Fair Housing Act: Key Provisions

- **42 U.S.C. § 3604**: It shall be unlawful—
- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or **otherwise make unavailable** or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . .

Fair Housing Act: Key Provisions

- **42 U.S.C. § 3604(a)**: Key Phrases: "otherwise make unavailable" vs. "because of race…" (Impact Stnd. debate)
- **42 U.S.C. § 3604(b)**: Arguably extends to "post-acquisition" discrimination in municipal and other "services" connected with housing. *See, e.g.,* The Committee Concerning Community Improvement v. City of Modesto, 583 F.3d 690 (9th Cir. 2009) (sewer services; Latino Community)

Affirmatively Furthering Fair Housing (AFFH)

42 U.S.C. § 3608

(d)All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

(e)(5)[HUD] shall administer the programs… in a manner affirmatively to further the policies of this subchapter. [Discuss, if time permitting].

Persistence of Racial and Ethnic Segregation

Segregation: 100-point "dissimilarity" index, 100= Total Seg; 60 = high seg.; 0=random

AA/W segregation index in largest metro areas, 79 in 1970; 73 in 1980; 67 in 1990; 64 in 2000; 59 in 2010. *See* John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census* 2 (2011);

Top 10 segregated metro areas are hyper-segregated-at least approximately 70 dissimilarity AA/W or above; Top 22 at approximately 60 or above. *Id.* at 6.

Increasing Income Segregation

1970: 15 % of in neighborhoods classified as affluent (>150 median) or poor (<67median)
2007: 31 % in affluent or poor community.
The income segregation for African American and Latino Families increased much more rapidly than for White families. *See* Sean F. Reardon & Kendra Bischoff, *Growth in the Residential Segregation of Families By Income 1970-2009* (Nov. 2011).

Disparate Income, Wealth &Homeownership Persist

Poverty Rates 2013: Af. Amer. 27.2%; Lat. 23.5; Wh. 9.6. Carmen De Navas-Walt & Bernadette D. Proctor, *Income and Poverty in the United States: 2013*, U.S CENSUS BUREAU 12 (Sept. 2014) ;
Wealth 2010:The median wealth of the average African American family is only 5 % that of the average White family. Rakesh Kochhar et al., Pew Research Ctr., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics* 1 (2011);
Homeownership 2013: Fewer than half of African American families own their own home, a number that lags 30 percentage points behind Whites. U.S. Census Bureau, *Residential Vacancies and Homeownership in the Third Quarter 2013* , at 9 (Nov. 5, 2013).

Practices contributing to Segregation

Racial Zoning – First zoning ordinances 1890's Buchanon v. Warley, 245 U.S. 60 (1917)(but used for years thereafter);

Racial Covenants- Shelley v. Kraemer, 334 U.S.1 (1948) (but used for years thereafter);

Fed. H. Admin/VA-Mortgage Ins.1940s-60's- Manual authorized segregation; ½ of all mortgages subsidized were FHA or VA mortgages;

Redlining more generally; Highway policy;

Intentional Public Housing Discrimination—Tenant and Site Selection--1949 Nat'l Housing Act;

Practices contributing to Segregation (cont.)

Urban Renewal/Redevelopment- 1949 NHA usually relocated residents in even more segregated and underserved areas. "In cities across the country, urban renewal came to be known as 'Negro removal.'" Kelo v. City of New London, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting)(quoting Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003)).

Practices contributing to Segregation

Overt Steering/Housing Discrimination: National testing studies show that White home-seekers are favored over their Black and Latino counterparts about 20% of the time in rental and sales situations. *See, e.g.,* Margery Austin Turner et al., *Discrimination in Metro. Housing Markets: National Results from Phase I HDS 2000 iii-iv* (2002);

Exclusionary Zoning: Income-based restrictions on low-income housing: Southern Burlington Cty. NAACP v. Mount Laurel, TP., 336 A.2d 713 (1975);

Low-income housing referenda requirements: James v. Valtierra,402 U.S. 137 (1971);

Practices Contributing to Other Structural Inequality

Inferior municipal services,-selective use of annexation and boundary line changes to disenfranchise and deny services to minority residents, inequitable relocation or non-location of important public institutions, (jobs siting/educational zoning), regressive and disparate property tax assessments, encouragement of mortgage and insurance redlining;

Practices Contributing to Other Structural Inequality

Direct displacement urban renewal, highway location, eminent domain abuse;

Incompatible Zoning: From Noxious Uses to Environmental Hazards/Environmental [In]Justice;

Off-Site Displacement/Gentrification.

See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993).

Practices Contributing to Other Structural Inequality

Reverse Redlining/Predatory Lending—Subprime instruments (deceptive teaser rates; above-mkt, longer-term rates; balloon payments; high closing costs; prepayment penalties).

African American homes purchasers were 2.7 times more likely and Latinos were 2.3 times more likely than White borrowers to be issued a subprime loan. *See* ASS'N OF COMM. ORG'S FOR REFORM NOW FAIR HOUSING, FORECLOSURE EXPOSURE: A STUDY OF RACIAL AND INCOME DISPARITIES IN HOME MORTGAGE LENDING IN 172 CITIES (2007).

Middle- and upper-income African Americans were at least twice as likely as comparable whites to receive high cost loans in 71.4% of the metropolitan areas , and among low- and moderate-income borrowers in 47.3% of the areas . NATIONAL COMMUNITY REINVESTMENT COALITION, INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING II: A COMPARISON OF HIGH-COST LENDING IN AMERICA'S METROPOLITAN AND RURAL AREAS 3 (2008).

Practices Contributing to Other Structural Inequality

The foreclosure crisis (2007-09) has disproportionately affected African-American and Latino borrowers, who are 76% and 71% more likely, respectively, to have lost their homes lost to foreclosure than non-Hispanic White borrowers. Debbie G. Bocian, Wei Li, and Keith S. Ernst, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis,* CENTER FOR RESP. LENDING RESEARCH REP'T (June 18, 2010).

The disparate effects of these reverse redlining and predatory lending practices are actionable under the FHA. *See, e.g.,* Mayor of Baltimore v. Wells Fargo, 2011 W.L. 1557759 (D. Md., April 22, 2011); *see generally*, Robert Schwemm & Jeffrey Taren, *Discretionary Pricing, Mortgage Discrimination and the Fair Housing Act,* 45 Harv. C.R.-C.L. L. Rev. 375 (2010).

Consequences of Discriminatory Legacy

The effects on individuals of living in under-served segregated neighborhoods of high poverty concentration are overwhelmingly adverse, restricting access to education, employment, and public services, and negatively impacting health. David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404 (Sept-Oct 2001); *see generally* REP'T OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 467-82 (1968) (THE "KERNER COMMISSION REPORT").

Need for FHA Disp. Impact Stnd. to Challenge Above

"Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment "to replace [] ghettos 'by truly integrated and balanced living patterns.' " Moreover, a requirement that the plaintiff prove discriminatory intent . . .is often a burden that is impossible to satisfy. '[I]ntent, motive and purpose are elusive subjective concepts,'… and attempts to discern the intent of an entity such as a municipality are at best problematic. A strict focus on intent permits racial discrimination to go unpunished [absent] evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the FHA intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly." Metro Hous. Dev. Co v. Vill. of Arlington Hts, 558 F.2d 1283, 1289-90 (7th Cir. 1977).

Need for FHA Disp. Impact Stnd. to Challenge Above

"we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974).

"Anti-discrimination laws and law-suits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare.... It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind." Aman v. v. Cort Furniture Rental Corp.,84 F.3d 1074, 1081-82 (3d Cir. 1996).

Implicit Bias/Unconscious Discrimination

"Contemporary sociological and psychological research reveals that discriminatory biases and stereotypes are pervasive, even among well-meaning people." Anthony Greenwald & Linda Krieger, *Implicit Bias: Scientific Foundations,* 94 CAL. L. REV. 945, 946 (2006); *See generally*, Charles R. Laurence, *The Id, the Ego, and Equal Protection; Reckoning With Unconscious Racism*, 39 STAN L. REV. 317 (1987) (explaining how discriminatory intent jurisprudence cannot address pervasive unconscious invidious discrimination).

"**Implicit biases are . . . especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles. The very existence of implicit bias poses a challenge to legal theory and practice, because discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions."** 94 Cal. L. Rev. at 951.

Social science research reveals that implicit biases manifest in perceptions of criminality, disorder and blight. In planning, zoning and housing decisions and policy, these psychological perceptions inform government and individual actions and ultimately harm communities of color.

FHA Disparate Impact Stnd

Eleven circuit courts of appeals have held that liability under the FHA may be established based on a showing that a neutral policy/practice has a discriminatory effect even if such policy or practice was not adopted for a discriminatory purpose. *See, e.g.,* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-50 (1st Cir. 2000); Mountain Side Mobile Estate P'ship v. HUD, 56 F.3d 1243, 1250-51 (10th Cir. 1995); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937-38 (2d Cir. 1988), *aff'd,* 488 U.S. 15 (1988); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Arthur v. City of Toledo, 782 F.2d 565, 574-75 (6th Cir. 1986); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); Smith v. Town of Clarkston, 682 F.2d 1055, 1065 (4th Cir. 1982); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290-92 (7th Cir. 1977); U.S. v. City of Black Jack, 508 F.2d 1179, 1184-86 (8th Cir. 1974).

FHA Disparate Impact Stnd

Statutory Text:

- **42 U.S.C. § 3604**: It shall be unlawful—
- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or **otherwise make unavailable** or deny, a dwelling to any person **because of race**, color, religion, sex, familial status, or national origin.

HUD's 2013 FHA Disparate Impact Regulations

First, the plaintiff or charging party has the burden of proving that a practice has caused or will predictably cause a discriminatory effect. 24 C.F.R. § 100.500(c)(1). If the plaintiff or charging party satisfies this burden, then the defendant or respondent has the burden of demonstrating that the practice will achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant or respondent. *Id.* § 100.500(c)(2). If the defendant or respondent satisfies this burden, then the plaintiff or charging party may still prevail by proving that the substantial, legitimate, nondiscriminatory interests could be served by another practice that has a less discriminatory effect. *Id.* § 100.500(c)(3).

What Impacts/Effects?

"A practice has a discriminatory effect where it[:1] actually or predictably results in a disparate impact on a group of persons [;] or [2] creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.500(a).

What Disparaties?

"[N]o single test controls in measuring disparate impact, but the [plaintiffs] must offer proof of disproportionate impact, measured in a plausible way. Hallmark Developers, Inc. v. Fulton Cnty., 466 F.3d 1276, 1286 (11th Cir.2006). Typically, 'a disparate impact is demonstrated by statistics,' *id.* at 1286, and a *prima facie* case may be established where 'gross statistical disparities can be shown.' Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977)." Mount Holly Gardens Citizens in Action, Inc., v. Township of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011).

Disparate Impact Stnd. Empirical Success

"In general, plaintiffs have obtained positive outcomes in only 20% of their FHA disparate impact claims on appeal. …Plaintiffs' positive FHA disparate impact outcomes have been affirmed only 33.3 % of the time, compared with defendants' affirmance rate of 83.8%." "Comparing plaintiffs' outcomes in housing barrier (i.e. exclusionary zoning) and housing improvement (i.e. urban renewal-eminent domain) cases, plaintiffs succeeded twice as often in barrier cases (42%) than in improvement cases (21%)." Stacy Seicshnaydre, *Disparate Impact Having Any Impact,?* 63 AM U. L. REV. 357 (2013).

Disparate Impact Stnd. Results (not a panacea)

Courts can and do often reject disparate-impact claims that fail to provide sufficient evidence, through inferences or otherwise, of a causal relationship between the disputed practice and its alleged adverse effects or to the presence of a sufficient disparate impact. *See, e.g., McCauley v. City of Jacksonville,* 739 F. Supp. 278, 282 (E.D.N.C. 1989) (granting summary judgment to a municipality due to the lack of "evidence in the record from which one could infer that a significantly higher percentage of … families [qualified to rent low-income units] would have been black"). In redevelopment and planning contexts, some plans receive broad-based community support. But disparate-impact enforcement is an important tool to promote careful consideration of alternative approaches to ensure that planning and redevelopment projects advance and do not frustrate the FHA's critical objectives.

Disparate Impact Stnd. Results (not a panacea)

By the same token, other practices (i.e. environmentally incompatible zoning/land use, low income tax credit assisted housing sited in concentrated minority areas, higher rate subprime mortgage credit formulas, demolition of aged public housing projects, etc) do not necessarily violate the FHA. Some of these actions may be truly necessary or commanded by business/public necessity—but disparate impact analysis smokes out those which are discriminatory and not essential—are pretextual or really serving other less substantial interests— simply at the expense of minority residential wellbeing and sometimes survival. The "burden-shifting framework" distinguishes "unnecessary barriers" from "valid policies and practices crafted to advance legitimate interests." This means that actions that have both beneficial *and* discriminatory effects may still be unlawful if there is another, less discriminatory means to accomplish the same objective.

FHA Disparate Impact and International Norms

International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), art. 1(1) ("[R]acial discrimination" is "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose* or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.").

"In seeking to determine whether an action has an effect contrary to the Convention, [the CERD Committee] will look to see whether that action has an unjustifiable **disparate impact** upon a group distinguished by race, colour, descent, or national or ethnic origin." Rep. of the Comm. on the Elimination of Racial Discrimination, 42d Sess., Mar. 1-17, 1993, ¶ 2, U.N. Doc. A/48/18; GAOR, 48th Sess., Supp. No. 18 (1993). *See* Michael B. De Leeuw, et al, *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on Elimination of All Forms of Racial Discrimination*, 13 MICH. J. OF RACE & L. 337 (2008).

FHA in Action: Case Studies/ Cases Before SCOTUS

Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 747 F.3d 275 (5th Cir. 2014), *cert. granted in part*, 135 S. Ct. 46 (October 2, 2014).

On March 24, 2014, the Fifth Circuit was the first Circuit to directly adopt and apply HUD's 2013 disparate impact regs.

Facts: FHA challenge to allocation of low income housing tax credits. Plaintiff, a group ("ICP") that assists low-income families eligible for Section 8 vouchers, argued that the Texas Department of Housing and Community Affairs ("Texas DHCA") disproportionately approved tax credits for affordable housing developments in predominantly minority neighborhoods while it disproportionately denied tax credits for similar affordable housing developments in predominately white areas.

TDHCA v. ICP (Cont.)

Impacts: Between 1999 and 2008, TDHCA gave tax credits to 49.7 percent of units in areas where less than 10 percent of the population was white, but only 37.4 percent of units areas where the population was at least 90 percent white. 92.29% of LIHTC units in the city of Dallas were located in census tracts less than 50% White.

The district court, found a disparate impact existed from plaintiff's statistics and concluded that the Texas DHCA had a legitimate bona fide interest in its review process, but it had not produced any evidence that there were no less discriminatory alternatives.

TDHCA v. ICP (Cont.)

Less Discrim. Alts: The Court concluded that Defendants had not shown "that TDHCA cannot allocate LIHTC in a manner that is objective, predictable, and transparent, follows federal/ state law, and furthers the public interest, without disproportionately approving LIHTC in predominantly minority neighborhoods and disproportionately denying LIHTC in predominantly [White]neighborhoods." *Id.* For example, the Court found Defendants did not prove that "TDHCA cannot add other below-the-line criteria [to QAP/tax credit formula] that will effectively reduce the discriminatory impact while still furthering its interests." *Id.* at 327. It also found, TDHCA's discretion "appears to extend to the authority to choose the number of points to be accorded each above- and below-the-line criterion, so long as the priority of statutory above-the-line criteria is maintained and the Governor approves." *Id.* at 328. The trial court adopted a remedial plan that included alterations to the process in which tax credits were awarded and implemented an annual review for at least five years.

TDHCA v. ICP (Cont.)

Fifth Circuit: On appeal, the Fifth Circuit adopted the burden-shifting approach in HUD's 2013 disparate impact rule. The Court vacated and remanded the case to the trial court to apply the new burden-shifting approach.

Judge Jones concurrence: Would vacate district court decision on additional grounds: Plaintiff has not proved causation under the HUD regs and has not identified a specific, facially neutral practice in the QAP which is the cause of the disparity in tax credit allocation.

10/2/14-Sup ct. grants cert. on whether the FHA has a disparate impact standard (Question#1); not on the standard's specifics and burden-shifting in HUD regs (#2).

Mt. Holly Gardens v. Tp. Of Mt. Holly

Mount Holly Gardens Citizens in Action, Inc., v. Township of Mount Holly, 658 F.3d 375 (3d Cir. 2011), *cert. dism'd*, 134 S.Ct. 636 (2013)

Facts: Challenge to redevelopment plan calling for complete razing of low-income predominantly AA and Latino community near downtown and replacement with higher income, foreseeably white-occupied market housing. The Gardens is the only neighborhood in the Township comprised predominantly of African American and Latino residents. Almost all of its residents earn less than 80% of the area's median income; with most earning much less (very low income, below 50% poverty). Of the 1,031 residents living in the neighborhood, 203, or 19.7%, were non-Latino Whites; 475, or 46.1% were African American; and 297, or 28.8% were Latino, the highest concentration of minority residents within Mt. Holly.

Mt. Holly Gardens v. Tp. Of Mt. Holly

Garden Area Redevelopment Plan (GARP) called for the demolition of all of the homes in the neighborhood and the permanent or temporary relocation of all of its residents. In their place, the plan provided for the construction of 180 new market-rate housing units.

Impacts: 22.54% of African American households and 32.31 % of Latino households in Mt. Holly will be affected by the demolition. The same is true for only 2.73% of White households. African Americans would be 8 times more likely to be adversely affected by the project than Whites, and Latinos would be 11 times more likely to be affected. Only 21% of African American and Latino households in Burlington County would be able to afford new market-rate housing in the Gardens, compared to 79% of White households.

Mt. Holly Gardens v. Tp. Of Mt. Holly

The District Court ruled that there was no *prima facie* case of disparate impact under FHA and that, even if there were, the Residents hadn't shown how an alternative course of action would have lesser impact.

Third Circuit: FHA Burden Shifting: 1) Disparate impact clear; 2) blight removal is a substantial and legitimate reason; 3) genuine issue of fact on whether less discriminatory alternatives substantially serve blight removal purposes so case is vacated and remanded for trial.

Plaintiffs' Alternative Plans: a) more gradual redevelopment with less disruption and return rights; b) substantial rehab. in lieu of demolition.

Sup Ct: Accepts Cert on FHA Disp. Impact issue 2/13; Case settled before S.Ct. resolution 11/13. (7 homeowners agreed to accept buyouts totaling $691,000, and 20 consented to move into new units in a market-rate housing development planned for the 30-acre site).

Affirmative Duty to Further Fair Housing (AFFH) §3608

A leading case Judge (now Justice) Stephen Breyer on Section 3608 and AFFH (NAACP, Bos. Chapter v. U.S. Dep't of HUD, 817 F.2d 149, 156 (1st Cir. 1987)):

- [The FHA's] framers meant to do more than simply restate HUD's existing legal obligations. . . . [A]s a matter of language and of logic, a statute that instructs an agency "affirmatively to further" a national policy of nondiscrimination would seem to impose an obligation to do more than simply not discriminate itself. If one assumes that many private persons and local governments have practiced discrimination for many years and that at least some of them might be tempted to continue to discriminate even though forbidden to do so by law, it is difficult to see how HUD's own nondiscrimination by itself could significantly "further" the ending of such discrimination by others.

AFFH Boston NAACP Case

Holding in case : (1)HUD's duties and by extension those of its grantees are not merely the avoidance of discriminatory action, but the requirement of affirmative steps to achieve racial integration in the particular housing markets funded; (2) private enforcement of this mandate is not available through the FHA's normal enforcement mechanisms nor based on a private right of action under § 3608, but only through an Administrative Procedure Act (APA)-based claim; and (3) courts could only set aside HUD actions that were determined to be an "arbitrary or capricious" violation of § 3608, and such APA-based claims could only result in injunctive relief and not also damages or attorney's fees. *See id.*

AFFH and CDBG Housing and Development Funding

CDBG: Principal area of AFFH Application: Use of CDBG grants by local government. $3.6 Billion in grants awarded in FY 2009.

The CDBG program: created by Congress in 1974 to provide grants to local jurisdictions to develop "viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c).

CDBG grants made to units of local governments and states; the former are cities in metropolitan areas with populations of over 50,000 and urban counties with more than 200,000 people (known as "entitlement communities"), while smaller "non-entitlement" localities may receive funds indirectly through grants made to their states or as part of a consortium led by an entitlement community.

HUD AFFH/CDBG Regs

1995 HUD AFFH Regs for CDBG Grantees: The Grantee must do three specific things: "[1] conduct an analysis to identify impediments to fair housing choice within the jurisdiction, . . . [2] take appropriate actions to overcome the effects of any impediments identified through that analysis, and [3] maintain records reflecting the analysis and actions in this regard." 24 C.F.R. § 91.225(a)(1) (2014) Also, Each jurisdiction-recipient "is expected to have conducted its first analysis of impediments" [AI] within one year of the effective date of the 1995 regulations. A new AI need not be done every year thereafter, but grantees have to provide a summary of their AIs in other required reports to HUD. Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1895 (Jan. 5, 1995).

AFFH CDBG Performance

Grantee AFFH Performance to Date: Sketchy. Audit of grantees' CDBG AIs from 2005-09: 6% of these AIs were from dates "unknown" and an additional "29 percent . . . were prepared in 2004 or earlier, including 11 percent that date from the 1990s." As to the remaining 64% whose AIs were fairly recent, the GAO questioned "the usefulness of many such AIs as fair housing planning documents . . . [because] a significant majority of the current AIs did not identify time frames for implementing the recommendations or contain the signatures of top elected officials as . . . suggested in HUD's guidance." HUD largely "indifferent." Few grants were denied or rescinded, few if any, of the grantees with out-dated or inadequate AIs criticized or threatened with remedial action. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 4-5 (2010); Robert Schwemm, *Overcoming Structural Barriers to Integration: A Back to the Future Refection on The Fair Housing Act's "Affirmatively Further"* Mandate, 100 KY. L.J. 125, 153 (2012).

AFFH/CDGB (Cont.)

But cf. United States v. Incorporated Village of Island Park, 888 F. Supp. 419, 450-53 (E.D.N.Y. 1995) (granting judgment to the U.S. in action against CDBG recipient for its fraudulently failing to AFFH and ordering return of defendant's CDBG funds for a multi-year period).

[AFFH —Remedial (non-perpetuation) plan for past discriminatory actions? In-place community based improvement for benefit of residents; anti-displacement measures (loans /assistance to purchase; vouchers to rent); mobility measures (portable subsidies voucher/certificates; mobility counseling); low income housing assistance in non-impacted census tracts, etc]

Discriminatory Intent: Village of Arlington Heights v. Metro. Hous. Dev. Corp

- If race (or other invidious factor) played any part in the decision, then a Prima Facie case can be made, and the burden of proof is shifted to the municipality to show that even if that factor weren't present it would have made the exact same decision.
- 429 U.S. 252 (1977).

Complications of Defining Intent in Zoning/Planning

- It is extremely difficult to prove a singular discriminatory intent because the process of arriving at a zoning or planning decision has innumerable components:

Complications of Defining Singular Governmental Intent

- Multiple bodies participate
- Differences between individual and collective intent in each body
- Defining collective intent of the combined bodies
- Political process of trading votes

Significance of *Arlington Heights* Decision

- A challenge to zoning/planning under the intent standard of the Equal Protection Clause or FHA therefore requires only that discrimination be a part of the motivation for the decision.
- Evidence of discrimination can be circumstantial, and not just direct.

6 Categories of Relevant Circumstantial Evidence

- Impact/effect, of zoning/planning measure
- Sequence of events
  - i.e. *Town of Huntington* where the Supreme Court affirmed the finding of intentional discrimination
- Historical evidence of discrimination
  - i.e. When the City of Dallas took advantage of Texas' pre-1969 authorization to create zones solely by race

6 Categories of Relevant Circumstantial Evidence (cont...)

- Departures from specified procedures
  - Whatever normal protocols are established for the entity have been violated
- Departures from substantive criteria
  - Criteria for decisions have been changed
- Administrative history and history of enactment
  - Statements made by legislators and administrators.

Applying *Arlington Heights* Discrim. Intent Criteria

Case Studies: *E.g.,* Williams v. City of Dothan, Ala., 745 F.2d 1406, 1414 (11th Cir. 1984) (finding intentional discrimination in delivery of municipal services to African American community); Dowdell v. City of Apopka, 698 F.2d 1181, 1185 (11th Cir. 1983) (same); Ammons v. Dade City, 594 F. Supp. 1274, 1300 (M.D. Fla. 1984), *aff'd per curiam,* 783 F.2d 982 (11th Cir. 1986) (same); Baker v. City of Kissimmee, 645 F.Supp. 571 F. Supp. 571, 586 (M.D. Fla. 1986)(same); Johnson v. City of Arcadia, 450 F.Supp. 1363 (M.D. Fla. 1978) (same).

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation

- **"Saving Public Housing for Low-Income Families," Rutgers Clinic News, Fall 2007:**
- "Commencing in the mid-1980's, the Newark Housing Authority (NHA) embarked on one of the largest housing demolition campaigns in the now-70+year history of the public housing program, when it proposed the destruction of more than 6,000 apartments from Newark's 13,000-unit inventory. Federal administrations seeking to phase out housing for the poor supported the NHA's actions, which were consistent with nationwide

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont...)

trends in large urban centers responding to deteriorating living conditions and public opinion about public housing. Critics pointed to the problems of crime, drugs, disrepair and diminished life opportunities from residence in racially segregated pockets of concentrated poverty. Housing officials in cities such as Chicago, St. Louis, Baltimore, Providence, New Haven, and Houston sought to destroy large projects, arguing that they never should have been constructed or at least not in the manner pursued by prior administrations.

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont..)

- At the same time, low-income housing advocates pointed to sky rocketing housing costs, frequent conversions of privately-owned publicly-subsidized housing and the expiration of lower income residency restrictions, and burgeoning homelessness as justifications for fighting to preserve permanent federal housing for the poor. They also identified gentrification as a factor in the "end it don't mend it" approach to public housing, noting that much inner-city land on which public housing was constructed had become increasingly valuable, creating market pressures for higher-income uses. They feared the vast majority of displaced tenants would be unable to share in the

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont..)

- benefits of the lauded "revitalizations" of their communities through demolition. The situation reached a head in Newark in the late 1980s when public housing tenants and applicants and the Newark Coalition for Low Income Housing ("NCLIH" or the "Coalition") brought a lawsuit seeking to enjoin the first major demolition phase--the destruction of 2,000 apartments primarily from the deteriorating Columbus Homes projects in Newark's developing north ward. NCLIH v. NHA & HUD. The lawsuit sought to prevent NHA and HUD from demolishing units without meaningful replacement

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont..)

- housing plans, to repair and rent vacant units, to prevent mismanagement in housing construction and maintenance, and to mitigate the discriminatory impacts of NHA policies. In 1989, the parties entered into a settlement decree requiring, among other things, replacement on a one-for one basis of 1,777 high-rise units slated for demolition with mostly scattered site low-rise townhouse apartments, the renting and repair of vacant units on a timely basis, the voiding of a contract for private market development on the Columbus Homes site and the requirement that a

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont..)

- public housing townhouse development be constructed there, and an agreement to remedy racial imbalances from the steering of minority tenants away from other north ward projects. Primary co-counsel for the plaintiffs were Legal Services of New Jersey's Vice President and long-time Rutgers Adjunct Professor Harris David, and Rutgers Professor and Associate Dean for Clinical Education Jon Dubin, who began work on the case while Associate Counsel for the NAACP Legal Defense Fund.

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont..)

- Over the years, the Coalition frequently returned to court to enforce the decree. In 1999, when Professor Dubin joined the Rutgers faculty and returned to the Coalition's legal team, Rutgers Legal Clinic students commenced participation in this effort. Since 1999, the Coalition has challenged the NHA's failure to implement a meaningful mobility program to provide a wide choice of housing outside of racially and economically segregated areas to the families being relocated from recently demolished projects. Clinical law students helped to organize tenants and advise them of their

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont..)

- relocation rights, conducted surveys of the NHA's treatment of tenants in the relocation process, and prepared and presented affidavits to the court on the NHA's deficient relocation program at evidentiary hearings. After the hearings, U.S. District Judge Dickensen Debevoise entered an order temporarily removing mobility program functions from the NHA due to faulty performance and requiring the retention of an outside entity for a period of time before ceding these functions back to the NHA under a court-appointed expert's supervision.

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont..)

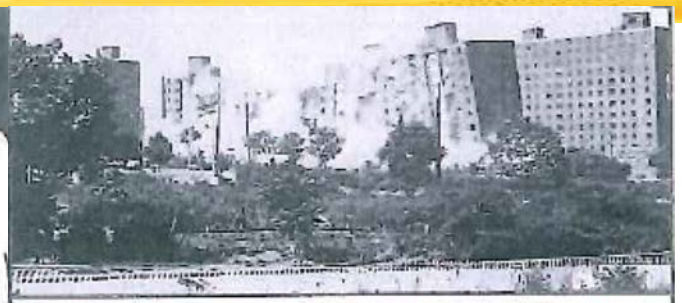
- More recently, the clinic led a successful challenge to plans by the NHA and HUD to count homeownership units-- that eventually may be sold to the highest bidder on the private market--as replacement "public housing" under the decree. In light of the federal government's increasing abandonment of public housing, the rise in demolitions, and a growing trend to place public resources in private hands, this issue has significant national implications. In 2005, Judge Debevoise rejected the inclusion of homeownership units as "replacement" apartments based on the original decree's emphasis on

Fair Housing & Structural Inequality:
Rutgers Law Clinic Litigation (cont..)

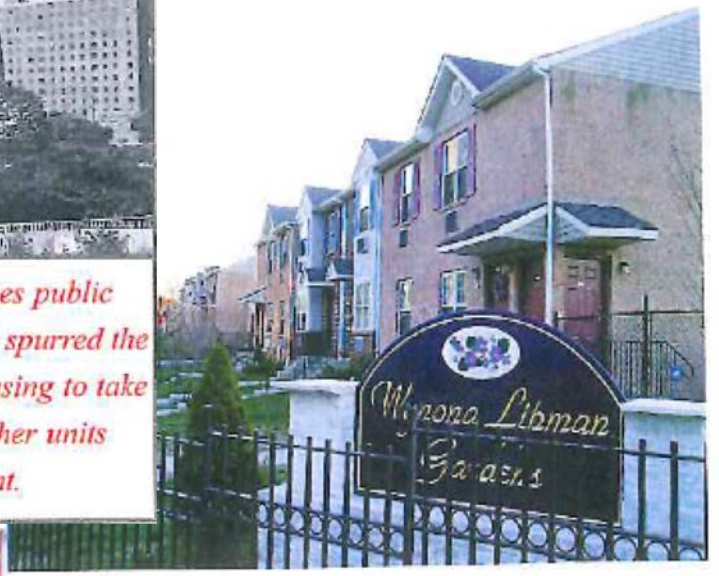
- maximizing scarce housing resources for as many low-income families as possible. After 2005, the NHA failed to take steps to meet the court order and replace units sold into homeownership. In response to the Coalition's contempt motion in 2006, the NHA in July 2007 finally agreed to a plan and timetable to replace homeownership units with permanent low-income rental apartments to meet the court order's requirements. The remaining presence of public housing in Newark is a direct effect of the Coalition's efforts of the past two decades."

Fair Housing/Structural Inequality
Rutgers Law Clinic Litigation

From L to R, Coalition leader and President of the New Jersey Black Issues Convention, Councilman Donald Kofi Tucker; Co- Counsel Arthur Baer, Puerto Rican Legal Defense Fund; Co-Counsel Jon C. Dubin; Co-Counsel, Harris David; Coalition Leader and Chairman of the Ironbound Community Corporation, Victor De Luca, in federal court after approval of the settlement decree in 1989.



The destruction of the Scudder Homes public housing project in 1987 (shown above) spurred the Newark Coalition for Low Income Housing to take legal action to avert the loss of further units without adequate replacement.



Wynona Lipman Gardens, named after New Jersey's first African American Woman State Senator, is a townhouse public housing complex built on the site of the former Columbus Homes Projects as a portion of the replacement housing obligation under the court order in NCLIH v. NHA & HUD. Photo source: http://newarkusa.blogspot.com/2006_04_01_archive.html