# HUD'S NEW DISCRIMINATORY EFFECTS REGULATION

## ADDING STRENGTH AND CLARITY TO EFFORTS TO END RESIDENTIAL SEGREGATION


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# EXECUTIVE SUMMARY

On February 15, 2013 the Department of Housing and Urban Development ("HUD") issued its long-awaited regulation entitled the "Implementation of the Fair Housing Act's Discriminatory Effects Standard." 78 Fed. Reg.11460. The regulation, first published for comment on November 16, 2011, formalizes the long and consistent interpretation of the Fair Housing Act, (the "FHA" or "the Act") that housing policies and practices can violate the Act not only through proof of intentional discrimination, but also through a burden-shifting discriminatory effects analysis that does not require proof of discriminatory intent.

The history of the FHA makes clear that residential integration is a major goal of the Act. Just prior to passage of the Act, the National Advisory Commission on Civil Orders (the Kerner Commission) concluded that the nation was moving toward two societies, one white and one black–separate and unequal.[1]" Congress was fully aware of the entrenched residential segregation and the problems associated with it such as segregated schools, poor job opportunities, health disparities and criminal justice outcomes for people of color.

Challenges to discriminatory zoning and land use practices of local jurisdictions pursuant to the Act have been one of the most important enforcement tools in seeking to promote residential integration. Reliance on the disparate impact standard of proof has been crucial to such enforcement. That is because while discrimination in the social and economic mainstream of American life remains widespread, it is often masked in more subtle forms.

In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun.' This is often the case in exclusionary zoning and land use cases where it is common for municipalities to take discriminatory actions with the appearance of propriety. That is why the formal adoption of a disparate impact standard of proof in the regulation which makes clear that a violation of the Act does not require proof of intentional discrimination -- is so important to the goal of residential integration.

[1] Report of the National Commission on Civil Disorders, 1 (1968).

# BACKGROUND

Not long after the passage of the FHA in 1968, courts were called upon to determine whether the FHA's anti-discrimination prohibitions are limited to practices prompted by discriminatory intent or whether they also cover those that produce a discriminatory effect or disparate impact. After the Supreme Court held in 1971 that employment discrimination claims could be proven through a disparate impact analysis, the Eighth Circuit similarly found a FHA violation based on the discriminatory effect of the defendant's actions in an exclusionary land-use case brought by the Justice Department. *See United States v. City of Black Jack, Missouri*, 508 F.2d 1179,1184-85, 1188 (8th Cir. 1974 ( "[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . . Effect, and not motivation, is the touchstone . . . ."). 

Since then, nearly four decades of fair housing litigation has produced an overwhelming and unanimous consensus that violations of the Act may be proven through application of a disparate impact standard. Every one of the eleven circuits to have considered the issue has held that a violation of the FHA may be established through a discriminatory effect analysis of a neutral policy or practice even if the policy or practice was not adopted for a discriminatory purpose.[1] Moreover, for more than thirty years, HUD has unambiguously made the disparate impact theory a central part of its administration and enforcement of the FHA. This has been particularly evident since the 1988 amendments to the FHA which for the first time gave HUD significant authority to enforce the Act.[2]

Pursuant to this enforcement authority, HUD has consistently concluded in adjudications of administrative charges of discrimination that the Act is violated by facially neutral practices that have an unjustified discriminatory effect on the basis of a protected characteristic, regardless of intent.[3] Moreover, in 1994, HUD was joined by the Department of Justice and eight other federal bank regulatory agencies in adopting this standard of proof in an Interagency Policy Statement on Discrimination in Lending, designed to provide guidance about what the agencies consider in determining if lending discrimination exists. This Statement recognized the disparate impact standard as one way of proving lending discrimination under the FHA and spelled out how such an impact based case should be analyzed. See 59 Fed. Reg. 18266, 18269-70 (Apr. 15, 1994).

# THE DISPARATE IMPACT REGULATION

In the new regulation, HUD emphasizes that this rulemaking is not proposing new law nor breaking any new legal ground. See 78 Fed. Reg. 11461. The purpose of the rule is to guide HUD investigative staff in reviewing disparate impact claims that are filed as HUD administrative complaints. Not only does it strengthen HUD's commitment to disparate impact claims, it also reinforces the courts' long-held interpretation of the availability of "discriminatory effects" liability under the FHA. In addition, because there have been minor variations in how the courts of appeals have applied the disparate impact standard of proof, it brings clarity to application of the standard by endorsing a three prong, burden-shifting standard that has been followed in many HUD administrative law decisions and by most of the courts of appeals. [4]

The new rule clarifies the liability standard to be applied by HUD in administering fair housing discrimination complaints filed by private parties against public and private defendants. In this regard, it is different from the Affirmatively Furthering Fair Housing, ("AFFH") requirement of the FHA (42 USC § 3608) which guides federal housing agencies and their grantees to pursue policies that avoid segregation and promote residential integration. But because disparate impact claims are frequently invoked to challenge state and local government policy or action that reinforce or perpetuate segregated housing patterns, it also provides a crucial tool for HUD enforcement of the AFFH requirement.

Under the burden-shifting approach endorsed by the regulation, the plaintiff or charging party in an adjudication initially bears the burden of proving its prima facie case of either disparate impact or perpetuation of segregation, after which the burden shifts to the defendant or respondent to prove that the challenged practice is necessary to achieve one or more of the defendant's or respondent's substantial, legitimate, nondiscriminatory interests. If the defendant or respondent satisfies its burden, the charging party or plaintiff may still establish liability by demonstrating that these substantial, legitimate, nondiscriminatory interests could be served by a practice that has a less discriminatory effect. See 78 Fed. Reg. at 11479.

# THE PRIMA FACIE CASE

A prima facie disparate impact claim under the FHA may be established in one of two ways -- by demonstrating that a facially neutral policy or practice of the defendant results in a discriminatory effect or disparate impact on a group of persons protected by the FHA, or where the policy or practice harms a community by perpetuating or exacerbating residential segregation.

Specifically, the HUD regulation states that:

> *"[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." See 78 Fed. Reg. at 11482. Further, "[a]ny facially neutral action, e.g., laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria, may result in a discriminatory effect actionable under the Fair Housing Act and this rule." See 78 Fed. Reg. at 11479.*

The burden of showing a discriminatory effect may be met by establishing (usually through statistical evidence) that members of a protected class are disproportionately harmed by the challenged practice and that the disproportionate impact is substantial. In a perpetuation of segregation analysis, the burden can be met by establishing that the challenged practice tends to reinforce patterns of segregation by excluding minorities from predominantly White areas. See 78 Fed. Reg. at 11463.[5]

# DEFENDANTS' BURDEN OF PROOF

A housing practice with a discriminatory effect will still be lawful if it is supported by a "legally sufficient justification." 78 Fed. Reg. at 11479. Under the HUD regulation, if the plaintiff makes out a prima facie case of discriminatory effect or perpetuation of segregation, the burden of proof shifts to the defendant to prove there is a "legally sufficient justification" for the practice or policy at issue.

More specifically, the regulation provides that a "legally sufficient justification exists where the challenged practice: is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent . . . or defendant." A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. Id.

# LESS DISCRIMINATORY ALTERNATIVES

Even if a defendant can show that a policy or practice that has a disparate impact on a prohibited basis has a legally sufficient justification, it still may be found to be violate the Act if an alternative policy or practice could serve the same purpose with less discriminatory effect.

Under the burden-shifting analysis adopted by the HUD regulation, the burden for showing there is a less discriminatory alternative shifts back to the plaintiff.[6]

# THE IMPORTANCE OF DISPARATE IMPACT CLAIMS IN ADDRESSING DISCRIMINATORY OBSTACLES TO RESIDENTIAL INTEGRATION

Our nation's highly segregated housing patterns did not occur by accident. Rather, it is well-established that they are a product of a complex web of private and public policies, practices and decisions made since the beginning of the 20th century.[7] Impediments to addressing residential segregation have been a core concern of the FHA since its passage because such impediments hinder advancement of the FHA's goal of achieving "truly integrated and balanced living patterns." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

The Act's principal sponsor, Sen. Walter Mondale, stated that the FHA was intended to undo the effects of past governmental discrimination and specifically noted how the exclusionary attitude of many municipalities toward subsidized housing contributed to the segregated housing patterns that the FHA was designed to eliminate. 114 Cong. Rec. 2698-2703 (1968).

One of the greatest impediments to residential integration has been discriminatory zoning and land use decisions by local governments, usually in reaction to discriminatory community resistance to placement of affordable housing in predominantly white, high opportunity residential areas. The earliest applications of the discriminatory effects standard were in cases challenging municipal zoning and other land-use restrictions that blocked proposals for affordable housing developments that were to be located in predominantly white communities and which would promote residential integration. See *United States v. City of Black Jack*, supra, 508 F.2d at 1186 (where a city ordinance preventing the construction of low-income multifamily housing contributed "to the perpetuation of segregation in a community which was 99% white.").

There was an early recognition that in exclusionary zoning and land use cases, a standard which did not require proof of intent was necessary. In a 1977 Seventh Circuit case, *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978), where the defendant Village's refusal to rezone effectively precluded a developer from constructing affordable housing in the Village, the Court provided the rationale for a disparate impact standard:

> ***"A strict focus on intent permits racial discrimination to go unpunished in the absence of 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 Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly".***

Since then, the disparate impact standard has remained crucial to challenges to zoning and other land use decisions designed to overcome barriers to promoting and achieving residential integration. HUD recognized this when it published the regulation for comment on November 16, 2011. In setting forth examples of cases in which housing policies and practices were found to have violated the FHA, most were cases challenging zoning, land use and related policies which had a disparate impact on protected classes and perpetuated residential segregation. See 76 Fed. Reg. 70921, 70924-25 (November 16, 2011).

One of the leading exclusionary zoning cases noted by HUD was *Huntington Branch NAACP v. Town of Huntington, N.Y.*, 844 F.2d at 934-39 (2d Cir. 1988) where the town's zoning ordinance, which limited private construction of multifamily housing to a largely minority neighborhood, had the effect of perpetuating segregation "by restricting low-income housing needed by minorities to an area already 52% minority."

The proposed regulation went on to cite several similar zoning and land use cases:

- *United States v. City of Black Jack*, supra; *Keith v. Volpe*, 858 F. 2d 467, 484 (9th Cir. 1988), where the city's land use decisions that prevented the construction of two housing developments for city residents displaced by a freeway had a greater adverse impact on minorities than on whites because two thirds of the persons who would have benefited from the housing were minorities)

- *Smith v. Town of Clarkton*, N.C., 682 F. 2d 1055, 1065-66 (4th Cir. 1982), where the town's withdrawal from a multi-municipality housing authority effectively blocked construction of 50 units of public housing, adversely affecting African American residents of the county, who were those most in need of new construction to replace substandard dwellings)

- *Dews v. Town of Sunnyvale*, Tex., 109 F. Supp. 2d 526, 567 (N.D. Tex. 2000), where the town's zoning ordinance that banned multifamily housing and required single-family lots of at least one acre had the effect of perpetuating segregation by keeping minorities out of a town that was 94 percent white.

Cases challenging public housing authorities' use of local residency preferences in administering its Section 8 program which resulted in a disparate impact on minority applicants and perpetuated residential segregation in the community were also noted by HUD:

- *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000), or where a housing program's preference for residents of the Village, most of whom were White, had a disparate impact on African-Americans

- *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 447 (E.D.N.Y. 1995)

There are also a number of cases that have relied on disparate impact claims to challenge other government actions which had segregative consequences usually in the context of historic public housing segregation.[9] In addition, there have been a few cases challenging individual states' policies that have led to segregated outcomes in the Low Income Housing Tax Credit program. These cases have had mixed outcomes, but appear to have influenced a more geographically balanced portfolio of developments in these states.[10]

Further recognition in the new regulation of the importance of the disparate impact standard to exclusionary zoning and land use cases by HUD is the addition of a new illustration of discriminatory housing practices to those already set forth in the existing regulation (24 CFR 100.70). The new illustration adds as an example of other prohibited conduct the "[e]enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings because of race, color, religion, sex, handicap, familial status, or national origin." 78 Fed. Reg. at 11480.

# CONCLUSION

The FHA was intended to remove all barriers to fair housing, whether caused by intentional bigotry or arbitrary and unnecessary practices. That has been the law for more than 40 years, as held by courts and HUD and it has been especially important to addressing discriminatory zoning ordinances, and other land use obstacles to residential integration. But, until now, HUD had never setout the rules for applying this principle in a regulation, which is the clearest statement that an agency makes on its understanding of the law.

While it is important to understand that HUD's new regulation does not change in any major way fair housing law that has existed for nearly forty years, it is also important that by adopting this regulation, HUD has now has formally endorsed and strengthened the long existing standard and provided more clarity to it.

Equally important, the new regulation, as well as significant improvement in HUD's recent enforcement of the FHA requirement that recipients of federal housing assistance affirmatively promote residential segregation, appears to signal a new HUD resolve to examine and challenge discrimination that causes residential segregation more vigorously than it has in the past.[11]

# ENDNOTES

**1**-The HUD regulation at 78 Fed. Reg. 11460, 11462, fn.28, lists the following cases as examples of such cases: *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 374–78 (6th Cir. 2007); *Reinhart v. Lincoln Cnty.,* 482 F.3d 1225, 1229 (10th Cir. 2007); *Hallmark Developers, Inc. v. Fulton County, Ga.,* 466 F.3d 1276, 1286 (11th Cir. 2006); *Charleston Hous. Auth. v. U.S. Dep't of Agric*., 419 F.3d 729,740–41 (8th Cir. 2005); *Langlois v. Abington Hous. Auth*., 207 F.3d 43, 49–50 (1st Cir. 2000*); Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Jackson v. Okaloosa Cnty.,* Fla., 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937–38 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988) (per curiam); *Resident Advisory Bd. v. Rizzo*, 564 F.2d126, 148 (3d Cir. 1977); *Betsey v. Turtle Creek Assocs.,* 736 F.2d 983, 987–89 & n.3 (4th Cir. 1984); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights,* 558 F.2d 1283, 1290–91 (7th Cir. 1977); *United States. v. City of Black Jack*, 508 F.2d 1179, 1184–86 (8th Cir. 1974). There are scores of other such cases decided by both courts of appeals and district courts.

**2**-The 1988 amendments to the Fair Housing Act gave persons who believed they were victims of discrimination the ability to file complaints with HUD. The amended Act required HUD to investigate such complaints and file administrative charges if it found reasonable cause to believe the Act had been violated. Such charges are litigated before an administrative law judge, or, if either party elects, in federal court. In either case, the complainant's case is litigated by a HUD or Department of Justice attorney, and thus has been helpful to those complainants who could not afford an attorney to bring a case in court. See 42 U.S.C. 3610.

**3**-78 Fed. Reg. at 11461See e.g. *HUD v. Mountain Side Mobile Estates P'ship*, 1993 WL 307069 (HUD Sec'y July 19, 1993), aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995).

**4**-HUD has always used a three step burden-shifting approach, as do a majority of the federal courts of appeals. See e.g. *Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 937–39 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988); *Charleston Hous. Auth. v. U.S. Dep't of Agric*., 419 F.3d 729, 740–42 (8th Cir. 2005); *Langlois v. Abington Hous. Auth*., 207 F.3d 43, 49–50 (1st Cir. 2000). Other courts of appeals apply a multi-factor balancing test, Metro. Hous. Dev. Corp., 558 F.2d at 1290 (applying a four-factor balancing test); and others apply a hybrid between the two. Graoch Assocs. #33, *L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n,* 508 F.3d 366, 374–78 (6th Cir. 2007); (balancing test incorporated as elements of proof after second step of burden-shifting framework).

**5**-Many disparate impact claims rely on both methods of establishing a prima facie case. See e.g. Huntington Branch, supra, 844 F.2d at 937.

**6**-There is disagreement among some of the courts of appeals as to where the burden rests for showing whether or not there are any less discriminatory alternatives. All but one of the federal courts of appeals that use the burden-shifting approach place the ultimate burden of proving that a less discriminatory alternative exists on the plaintiff as does the HUD regulation. One places the burden on the defendant. See 78 Fed. Reg. 11462-63.

# ENDNOTES (CONT.)

**7**-For a summary of these historical discriminatory actions, see "The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity (December 2008), pp. 6-9, 31-32. Available at www.lawyerscommittee.org/admin/fair_housing/documents/files/0005.pdf.

**8**-This is not to say that such discriminatory zoning and land use actions cannot be proved violations of the FHA by evidence of intentional discrimination and in most of the zoning and land use cases, plaintiffs allege both intentional discrimination and disparate impact claims. See e.g. *United States v. Yonkers Bd. of Education*, 837 F.2d 1181 (2d Cir. N.Y. 1987); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish,* 641 F. Supp. 2d 563 (E.D. La. 2009). But, because there rarely is "smoking gun" evidence of intent, many discriminatory actions would be very difficult, if not impossible, to establish without a disparate impact standard of proof and would escape FHA liability.

**9**-See e.g. Resident *Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977) (where low-income public housing and related organizations successfully brought a disparate impact claim successfully challenging a public housing authority's failure to develop land cleared for low-income public housing which would promote residential desegregation).

**10**-The HUD proposed regulation, 76 Fed. Reg. at 70925, cites *Inclusive Communities Projects, Inc. v. Texas Dep't of Housing & Community Affairs*, 860 F. Supp. 2d 312 (N.D. Tex. 2012), pending appeal, No. 12-11211 (5th Cir.), where the court found a disparate impact violation where the state's disproportionate denial of tax credits for nonelderly housing in predominately white neighborhoods had a segregative impact on the community and where the state did not demonstrate that there were no less discriminatory alternatives. See also, In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 46-47 (N.J. Super. Ct. App. Div. 2004) where the court applied a disparate impact analysis in deciding plaintiffs' FHA challenge to the State's 2003 qualified allocation plan for the LIHTC program, but found no violation.

**11**-See "Affirmatively Furthering Fair Housing at HUD: A First Term Report Card," found at http://www.lawyerscommittee.org/admin/fair_housing/documents/files/HUD-Report-Card-Part-II-.pdf ).


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