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Does the Disparate-Impact Theory Apply to the Fair Housing Act?

Now that a settlement has been reached in the Mount Holly saga, practitioners must continue to wait for an answer

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Redevelopment agencies are left to ponder how to eliminate "blight" without facing a disparate-impact claim now that Mount Holly and residents of the Gardens neighborhood have reached a settlement. In *Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action*, property owners and amicus argued that Mount Holly engaged in discriminatory housing practices that sought to remove minority property owners from the township through redevelopment.

Practically, what would redevelopment look like if the disparate impact theory applies to the Fair Housing Act (FHA)? What would redevelopment agencies need to consider as part of the planning process in future redevelopment projects? Under a "disparate impact" theory as applied to the FHA, 42 U.S.C. §3604(a), plaintiffs must show that otherwise neutral practices have a disproportionate effect on some racial group. Whether the FHA applies to such claims appears to be a priority for the Roberts court, as the Mount Holly case, along with *Gallagher v. Magner*, 636 F.3d 380 (8th Cir. Minn. 2010), last year, is the second matter scheduled for argument at the Supreme Court in as many terms.

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History of Redevelopment

The Supreme Court decided its first major redevelopment case in 1954, *Berman v. Parker*, 348 U.S. 26 (1954), when it was asked to examine whether nonblighted property could be acquired via eminent domain for a redevelopment project seeking to remove blight from the surrounding neighborhood. The Berman court held that Washington, D.C., satisfied the Fifth Amendment's Public Use requirement by addressing blight through a redevelopment plan for a community where the majority of the dwellings were beyond repair, needed major repairs, and only a small percentage were satisfactory. The D.C. plan required at least one-third of the dwellings to be low-rent housing. The Berman opinion was recently reexamined in 2005, in *Kelo v. City of New London*, 545 U.S. 469 (2005). The Kelo court extended the Berman holding to allow the condemnation of non-blighted private property for economic development. Neither *Berman* nor *Kelo* discussed the relationship between race and redevelopment, except for Justice Thomas's dissent in *Kelo*, and race was not a factor in either opinion.

Shortly after *Berman* was decided, New Jersey's Supreme Court addressed

the constitutionality of removing blight by redevelopment under New Jersey's Blighted Area Act in *Wilson v. City of Long Branch,* 142 A.2d 837 (N.J. 1958). Race was not mentioned in the *Wilson* opinion, although the court discussed the statistical findings similar to those in *Berman* that supported the blight designation. The Wilson court, borrowing heavily from *Berman*, focused instead on the constitutional and statutory sections related to redevelopment, and the inherent police power possessed by New Jersey and its municipalities to use redevelopment to remedy blight.

New Jersey's next shift occurred in 2007 after the release of *Gallenthin Realty Development, v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007). The Gallenthin court put redevelopment agencies on notice that future blight designations were going to be closely scrutinized to ensure they met the standards enumerated in New Jersey's Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 et seq. The Mount Holly Gardens project straddled *Kelo* and *Gallenthin*, and entered its most substantive litigation phase after both were decided.

Fair Housing Act Legislation

The purpose of the FHA is to provide a framework for fair housing throughout the United States. Section 3604(a) seems relatively straightforward by making it unlawful "[t]o 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." The statute, originally adopted in 1968 as part of the overall movement to address racial discrimination in the United States, shares textual similarities with the employment discrimination law passed by Congress two years earlier, as part of Title VII of the 1964 Civil Rights Act. Section 3604(a), amended in 1974 and 1988, has not received as much attention as its other civil rights counterparts.

Disparate-Impact Law—Generally

Disparate-impact claims are demonstrated by proof of intentional discrimination, or showing that a challenged action had a racially discriminatory effect. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 & 148 (3d Cir. 1977); See also *Eastampton Center v. Twp. of Eastampton*, 155 F. Supp. 2d 102, 111 (D.N.J. 2001). Evidence that a government action had the effect of racial segregation is sufficient to establish a prima facie case of discriminatory effect, or that the governmental action has greatly burdened one race more than another (*Hallmark Developers v. Fulton County, Georgia*, 466 F.3d 1276, 1286 (8th Cir. 2006)), in conjunction with the surrounding facts and circumstances in each situation. *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340 (1977). Statistics have historically been used in discrimination cases when blatant statistical imbalances evidence purposeful discrimination, although statistics alone are proper where gross statistical disparities can be shown. *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 307-308 (1977).

The U.S. Court of Appeals for the First, Second, Third and Eighth Circuits have established a "burden shifting" method of review for disparate-impact claims under the Fair Housing Act, similar to employment claims. Other Circuits —i.e., the Fourth, Sixth, Seventh and Tenth—employ a balancing test. The Fifth, Eleventh and D.C. Circuits have not yet chosen a test.

Generally, under the burden-shifting cases, a party presents a prima facie case by showing: (1) the occurrence of certain outwardly neutral practices; and (2) a significantly adverse or disproportionate impact on particular persons produced by the defendant's facially neutral acts or practices. *Lapid-Laurel v. Zoning Bd. of Adj. ff Twp. of Scotch Plains*, 284 F.3d 442, 466-467 (3d Cir. 2002). The defendant then attempts to rebut the presumption by establishing that the acts have a legitimate, nondiscriminatory purpose, and that no alternative course of action exists which could be accomplished with less discriminatory impact.

The balancing tests closely resemble those in equal protection claims and require no shifting of the burden of proof. Under a balancing test "not every action which produces discriminatory effects is illegal." *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673 (D.C. Cir. 2006) (quoting *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977)). The four-part test developed by the Seventh Circuit, and used in whole or part by the other balancing-test courts, examines: (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy an equal protection claim; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant affirmatively to provide housing for a protected class, or merely to remove obstacles to private provision of such housing.

The various tests used by the different circuit courts suggests that redevelopment agencies must be mindful of the law in their circuit, and in their state, when formulating their redevelopment plans. The Supreme Court is obviously looking for an opportunity to address the FHA/disparate-treatment question, and the Mount Holly case settlement has now left that question for another day.

Mount Holly Redevelopment History

The Gardens was a neighborhood in the Township of Mount Holly that was comprised of 329 homes that were predominantly two-story brick buildings built in the 1950s. Until 2004, the neighborhood also contained a playground and a community center. Calls for redevelopment, private initiatives or some type of government improvement project arose as early as the 1980s because of overcrowding, drainage problems, boarded-up vacant properties and crime. Although the Gardens represented only 10 percent of the township's population, approximately 28 percent of its crimes occurred in the Gardens.

Mount Holly commissioned an expert to determine whether the Gardens qualified as an "area in need of redevelopment." A Nov. 8, 2000, report concluded it did because of blight, excess land coverage, poor land use and excess crime. The township immediately began acquiring properties through negotiations, although the properties were left

vacant pending a formal redevelopment plan.

The Gardens Area Redevelopment Plan, issued in 2003, called for 180 market-rate housing units, with 30 set aside for senior citizens. The plan was amended in 2005, enlarged to include additional land, and renamed the West Rancocas Redevelopment Plan. The new plan called for the demolition of all Gardens homes, the permanent or temporary relocation of the Gardens residents, and 228 new residential units composed of two-family dwellings and townhouses with approximately 10 percent designated as affordable housing. A final revision in 2008, redesignated as the Revised West Rancocas Redevelopment Plan, called for the construction of up to 520 houses, and now only set aside 56 deed-restricted affordable housing units, 11 of which would be offered on a priority basis to existing Gardens residents, and no rehabilitation component.

Gardens residents objected to the varying redevelopment plans from the outset, complaining the neighborhood was being destroyed, and the current residents could not afford to live elsewhere in the township or in the new neighborhood (with new homes estimated between $200,000 and $275,000, and apartments renting for $1,230 per month) once redevelopment was complete. An expert testified that approximately 90 percent of the current residents would not be able to afford the newly constructed homes. The township's appraisers determined fair market values of the homes in the Gardens were between $32,000 and $81,000.

By August 2008, 75 homes had been destroyed and 148 homes had been acquired and left vacant. By the summer of 2009, nearly 200 homes had been knocked down. By June 2011, only 70 homes remained under private ownership.

The Gardens residents challenged the redevelopment plan without success in the New Jersey state courts. Once the New Jersey Supreme Court denied certification, the Gardens residents filed their federal antidiscrimination claims in the federal court in 2008. The District Court ruled there was no prima facie case of discrimination under the FHA, and found the residents failed to show that an alternative course of action would have a lesser impact than that chosen by the township. The United States Supreme Court granted certiorari on the first question presented by the petitioners, but the agreement reached between the parties, and approved on Nov.13, 2013, removed the disparate-impact claim issue from the court's grasp. The unresolved question leaves redevelopment agencies in limbo regarding future disparate impact claims and whether their remedial actions will be sufficient to withstand judicial scrutiny.

Practical Issues

Future redevelopment will only be impacted if the Supreme Court concludes that the FHA applies to disparate impact claims. The practical problems created by trying to recognize, address and litigate potential disparate impact claims will keep redevelopment agencies busy trying to avoid such claims by addressing them as part of the redevelopment process.

• *Collect Data at the Planning Stage*

Redevelopment agencies should carefully examine whether or not a project will have a disparate impact while examining whether the area qualifies as an area in need of redevelopment. Failing to address a potential disparate impact could lead to a plan being voided, while careful planning with data collection and analysis can help to ensure a plan moves ahead without being voided during litigation.

Identifying potential disparate-impact claims through data collection should be the first step, because courts have historically relied on statistical information. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 559 (U.S. 2009); *New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 70 (2d Cir. N.Y. 2000). Examining race, gender, existing home values, income, educational opportunities and resident-owned versus landlord-owned properties can provide an overview of how residents will be affected by a redevelopment project. Data can be found in the most current census, tax and other public records, door-to-door interviews, phone surveys and online surveys.

The next logical step would be to look at income information for the area. The majority of the Gardens residents earned less than $40,000 per year, which was insufficient to cover housing costs in the new homes. However, if all of the residents could realistically (not just statistically) afford to live in the new area, the impact would be diminished even if the residents chose to move elsewhere.

One district court described the potential burden of proof as a "sliding scale," with the amount of proofs required depending on the level of impact on the minority group. This concept leaves judges with broad discretion, and redevelopment agencies should determine a course of action based on what constitutes an acceptable level of risk for a project being voided versus one that may remediate any disparate impact. If a report presents reliable impact numbers that may not hold up under judicial scrutiny, the redevelopment agency will have to decide whether to proceed or to see what remedial actions could be taken to move the "sliding scale" back in their favor. Using statistics, the simplest way to address a disparate impact claim will be to provide housing equal to what was available preredevelopment that is affordable to the existing residents.

• *Use Zoning to Minimize Claims While Increasing Utility and Profitability*

Redevelopment depends on private developers wishing to maximize profits under a viable plan. Including affordable housing can make a project less attractive. However, by using modern planning techniques, like cluster housing and the transit village, a redevelopment agency may be able to incorporate sufficient affordable housing with market-rate housing and commercial uses to permit existing residents to integrate into the new community, while maintaining a financial incentive for the redeveloper.

Redevelopment permits creative solutions because the redevelopment zoning replaces the old zoning and, under a new plan, uses can be combined to increase developable space. This creates financial incentives for the redeveloper, while also allowing remedial actions reducing any potential disparate impact claims. As an example, an area containing dilapidated but affordable apartment

housing exists next to a failing retail area with underdeveloped lots and single-story retail. New zoning may permit retail with multistory buildings containing retail and office space on the lower levels with residential (market rate or affordable) on the upper levels. This new zoning expands market-rate and affordable housing opportunities where the blighted but affordable housing apartments were previously situated.

• *Realistically Investigate Reasonable Alternatives*

Proactively addressing potential disparate-impact claims will be more complex than placing statements on the record that the agency seeks to retain as many of the citizens as possible in the area postredevelopment. For the redevelopment agency, the goal will be to build as complete a record as possible to show that, even if a disparate impact has occurred and is unavoidable, the plan with the least impact was selected.

Mount Holly attempted, initially, to reverse the deterioration of the Gardens by rehabilitating 10 homes, establishing a community policing center and providing additional social services. Arguably, Mount Holly was not interested later in rehabilitation because it had failed in the past. Conversely, one could argue that rehabilitating 10 homes could hardly be expected to turn around a neighborhood containing 329 homes.

Conclusion

It's clear that the United States Supreme Court wants to address whether the disparate-impact theory applies to the FHA. It's no longer a question of "if," but "when." Redevelopment agencies will still need to examine whether or not an area qualifies as "in need of redevelopment." This examination period is the time to thoroughly analyze both the make-up of the structures in an area, and the make-up of the community. Having this information before a redevelopment plan is drafted can better aid the redevelopment agency to address potential claims proactively, rather than shoehorning a solution in when directed to do so by the courts. Until the Supreme Court settles the question, municipalities would be wise to assume a claim will be analyzed under a disparate-impact theory or risk being forced to do it all again later after years of planning and expending tens to hundreds of thousands of taxpayer dollars. ■