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Supreme Court to Review Validity of 'Effects Tests' in Fair Housing Litigation

Since the Fair Housing Act passed, courts, local governments, and private landowners have operated under the impression that housing policies or practices having a discriminatory effect violate the FHA. This year, however, the U.S. Supreme Court will question this longstanding assumption in a case dealing with urban renewal. Given the Supreme Court's conservative majority, it is possible that review of a law or policy's effect – often called disparate impact review – will be invalidated. If the Court rejects disparate impact review, fair housing plaintiffs will have greater difficulty invalidating practices and policies that are not clearly discriminatory or passed with an intent to discriminate.

In the 45 years since the FHA's passage, federal courts have established two primary ways that a private party or government agency can violate the Fair Housing Act. First, a practice or policy can be the result of *disparate treatment*. That is, the housing practice or policy will be found illegal if it discriminates against a *protected class* – such as a racial group, religious group, or persons with disabilities – either by the specific language of the practice or policy, or if the policy results from public or private officials' discriminatory intent.

Second, neutral practices or policies – those that do not discriminate clearly in their language and were not enacted with discriminatory intent – have also been found to constitute a violation of the FHA where they have a differentially

Brian J. Connolly

Attorney, Otten Johnson Robinson Neff + Ragonetti PC, Denver

negative effect on a protected group. For example, zoning ordinances prohibiting multi-family dwellings that effectively limit the ability of lower-income minority individuals and families to locate in a community can constitute an FHA violation. It is this second type of FHA violation that is being reviewed by the Supreme Court this year.

The Supreme Court case, *Township of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, 658 F.3d 375 (3d Cir. 2011), *cert. granted* (Jun. 7, 2013) (No. 11-1507), traces its roots to an urban renewal plan in a suburban New Jersey township. The township sought to redevelop a blighted neighborhood that was home to a racial minority community. Neighborhood residents challenged the township's action on grounds that the plan discriminated, both in intent and effect, against racial minorities. A federal appeals court found that the neighborhood group established that the redevelopment plan had a discriminatory effect on racial minorities in the township. The Supreme Court then granted review on the question of whether disparate impact claims are available in FHA litigation.

Although the plain text of the FHA does not require courts to review the effect of a neutral housing law or policy, federal courts have universally applied disparate impact analysis because it furthers the intent and purposes of the FHA. Opponents of disparate impact review, however, have consistently noted that the statutory text of the FHA does not call for disparate impact review, thereby differentiating housing discrimination law from other antidiscrimination laws explicitly requiring disparate impact review.

Given many of the Supreme Court justices' close adherence to the plain meaning of statutory text as opposed to overarching policy concerns, there is a probability that the Supreme Court will invalidate disparate impact review under the FHA. Furthermore, because disparate impact analysis – which draws many parallels to affirmative action programs in the education and employment contexts – is generally unpopular among political and judicial conservatives, the conservative majority of the Court will likely be unwilling to sustain its use.

If the Supreme Court invalidates disparate impact review, there will be far-reaching results for local governments and the real estate industry. In addition to eradicating an avenue for plaintiffs to challenge local ordinances or private housing practices, such a finding would ensure that any policy or law that does not differentiate buyers or renters by race, sex, religion, familial status, or disability, and that was not passed with ill intent, will be valid under federal law. Local governments would be likely to enact facially neutral zoning ordinances, such as restrictions on multifamily dwellings, which might limit the ability of minority residents to locate in the jurisdiction, but which do not obviously discriminate against minorities. The Court's invalidation of disparate impact analysis would put the onus on Congress to amend the FHA to prohibit laws or policies with a discriminatory effect, which is unlikely given the current gridlock in Congress.

Conversely, if the Supreme Court upholds disparate impact review, current assumptions regarding the FHA's requirements will be vindicated and courts will continue to review the effect of neutral laws and policies. However, it is possible that a ruling favorable to civil rights plaintiffs would spur Republicans in Congress to make efforts to amend the FHA to prohibit disparate impact review.

Oral arguments in the *Mount Holly* case are scheduled for Dec. 4, 2013. A decision will likely be rendered in June 2014.