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What's New
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WHAT'S NEW

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I. FAIR HOUSING

Background. The national Fair Housing Act, 42 U.S.C. §§ 3601–3631 (FHA) forbids both public and private housing discrimination on the basis of race, color, religion, sex, familial status, or national origin. It forbids discrimination in sale or rental of housing, or in other contexts denying or otherwise making dwellings unavailable. Texas has adopted a similar fair housing law. *See* TEX. PROP. CODE § 301.023. Before 2015, some courts had held that plaintiffs attacking housing practices had to prove there was a discriminatory intent--in addition to

disparate impact--to succeed under the FHA. *See, e.g., Artisan/American Corp. v. City of Alvin*, 588 F.3d 291 (5th Cir. 2009)(plaintiff failed to show a discriminatory intent behind the City's rejection of a permit for a proposed low-income housing project, even though the City had generally opposed the project previously).

Update. In a landmark 2015 decision, a sharply-divided United States Supreme Court ruled that "disparate-impact claims are cognizable under the Fair Housing Act." *Texas Department of Housing. & Community Affairs v. Inclusive Communities Project,* 135 S. Ct. 2507 (2015). The Court explained:

> In contrast to a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff bringing a disparate-impact claim challenges practices that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate rationale.

The case arose in Dallas, where a nonprofit corporation challenged the award of low-income housing tax credits by the Texas Department of Housing & Community Affairs (TDHCA). Plaintiff alleged that TDHCA "caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." The District Court relied on statistics showing that TDHCA's tax-credit-supported projects were heavily concentrated in minority neighborhoods: (i) From 1999 to 2008, TDHCA "approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas;" and (ii) "92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *See* 749 F. Supp.2d 486, 499 (ND Tex. 2010)

To support its ruling in favor of disparate-impact liability, the five-justice majority cited the FHA's "results-oriented language" as well as "the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose."

While the case was pending, the federal Department of Housing and Urban Development (HUD) issued administrative regulations adopting the disparate-impact theory. See 78 Fed. Reg. 11460 (2013), amending 24 CFR Part 100. As summarized by the Court, the HUD regulation "established a burden-shifting framework," as follows:

> Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR §100.500(c)(1) (2014). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." §100.500(c)(2).

The Court seemed concerned that its ruling might inadvertently encourage race-based housing decisions, like quotas. To avoid them, the Court announced some "safeguards" or "limitations on disparate-impact liability," including: (i) "A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." (ii) "Courts should avoid interpreting disparate-

impact liability to be so expansive as to inject racial considerations into every housing decision." (iii) "And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." (iv) "Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions." However, the Court wrote, "[w]hen setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."

Although the case did not involve zoning or land-use regulation as such, they are apparently subject to the disparate-impact theory of liability. In its explanation of the FHA, the Court wrote:

> [The] FHA "was enacted to eradicate discriminatory practices within a sector of our Nation's economy. . . . These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability.

A 2016 Sixth Circuit decision (citing *Texas Department of Housing. & Community Affairs)* illustrates the application of disparate-impact theory in a zoning dispute. In *Avenue 6E Investments, LLC v. City of Yuma*, No. 13-16159, 2016 U.S. App. LEXIS 5601 (9th Cir., March 25, 2016), a developer challenged a City's refusal to "up-zone," claiming both disparate treatment and disparate impact. The court held that the developer's complaints should not have been dismissed, because the pleading "sufficiently alleges claims of disparate treatment under the FHA" (also the Equal Protection Clause), and the claims of disparate treatment were "plausible."

II. FIRST AMENDMENT (Signs, Content Neutrality)

Background. Many local ordinances regulate the size and placement of signs and outdoor advertising, both noncommercial and commercial. Courts have upheld reasonable regulations. Among reasons given to justify regulations are furthering the community's interest in promoting traffic safety and preserving an aesthetic environment.

Update. In 2015, the United States Supreme Court emphatically announced that a "content-based" sign restriction--no matter how reasonable it might be otherwise-- will be subjected to strict scrutiny under the First Amendment. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (U. S. 2015). Under *Reed* and prior decisions, a content-based regulation is subject to invalidation unless the government proves that the restriction: (i) furthers "a compelling governmental interest" and (ii) "is narrowly tailored to achieve that interest."

In *Reed,* the Court invalidated an ordinance that regulated three types of signs differently, based on their content. The Court explained:

> The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." . . . It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." . . . And it defines "Ideological Signs" on the basis of whether a sign

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