

FAIR HOUSING, DISCRIMINATION AND INCLUSIONARY ZONING IN THE UNITED STATES

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Abstract: One of the most effective means to combat housing discrimination is statutory prohibition for protected minority classes. The US Federal Fair Housing Act (FHA) represents a model for such statutory prohibitions. The FHA prohibits such discrimination by either public (state and local government agencies) or private (landlords) actors on the basis of race, religion, national origin, sex, family status or disability. Following a Supreme Court decision in the 1970s, proof of intent to discriminate is necessary to bring an action under the US Constitution's 14th Amendment Due Process and Equal Protection clauses. However, no such intent need be proved to sue under the FHA. Federal Appeals Courts sustained dozens of lawsuits claiming discrimination based simply on disparate impact of government or private action on one of the aforementioned protected classes. In 2014, the Supreme Court approved such a theory even though disparate impact is not mentioned in the FHA. However, the Court hedged the application of disparate impact with so many caveats and restrictions that many federal courts have now ruled against parties bringing disparate impact claims of discrimination under the FHA.

Keywords: *disparate impact; discrimination; Fair Housing Act; housing; impact fees; inclusionary zoning; inclusive communities; set-asides; workforce housing*

I. Introduction

The United States has struggled with discrimination in housing and the providing affordable, workforce or low-income housing for decades. This article summarises and analyses the problems and opportunities created in large measure by federal

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and state courts together with guidance provided by the US Department of Housing and Urban Development (HUD) to address these issues and problems. First, this article addresses the problem of discrimination in housing and the use of disparate impact claims as a remedy under the Fair Housing Act (FHA) in light of the recent clarification provided by the US Supreme Court in its decision in *Inclusive Communities v Texas Department of Community Affairs*. There follows a discussion of recent HUD guidance by way of administrative rule, together with a summary of how federal courts address discrimination in housing following the decision in *Inclusive Communities*. Second, this article addresses the concept of inclusionary zoning as a potential remedy for the construction of new affordable or workforce housing by placing the burden on the land development community as a condition or conditions for land development approval. This article concludes that while discrimination in housing has been well addressed by the courts, providing a remedy even when the government does not intentionally discriminate against potential poor residents on the basis of race, religion, handicapped or family status, the use of inclusionary zoning presents clear problems under the US Constitution despite the occasional support from a few state courts.

II. The Problem: Discrimination in the United States

A. *Government-sponsored segregation: discriminatory ordinances*

Following the Great Migration of African Americans from rural counties to cities at the turn of the century, and fearing their increasing purchasing power, concerned white homeowners turned to their local governments to prevent integration of their neighbourhoods.¹ Many local governments responded by enacting residential segregation ordinances.² Typically, these ordinances either:

“(1) prohibited whites from moving to all-Negro blocks and Negroes from moving to all-white blocks; (2) divided the city into segregated districts and designated a district for each race; or (3) restricted new residences in mixed blocks to the racial group which had established most of the residences on the block”.³

1 See generally David E Bernstein, “Philip Sober Controlling Philip Drunk: *Buchanan v Warley* in Historical Perspective” (1998) 51 Vand L Rev 797, 835 (discussing the prevalence of discriminatory ordinances during the migration of African Americans to the North).

2 See Josh Whitehead, “Using Disparate Impact Analysis to Strike Down Exclusionary Zoning Codes” (2005) 33 Real Est LJ 359, 362–363.

3 Bernstein “Philip Sober Controlling Philip Drunk” (n.1).

In 1910, Baltimore became the first municipality to enact such an ordinance, preventing African Americans from moving onto blocks with a white majority and vice versa.⁴ The following was stated purpose of the ordinance:

“preserving peace, preventing conflict and ill feeling between the white and colored races in Baltimore, and promoting the general welfare of the city by providing, so far as practicable, for the use of separate blocks by white and colored people for residences, churches and schools”.⁵

By 1912, Mooresville and Winston-Salem, North Carolina had passed similar ordinances.⁶ By 1913, Asheville, North Carolina; Richmond, Virginia; Norfolk, Virginia; Roanoke, Virginia; Atlanta, Georgia; Madisonville, Kentucky and Greenville, South Carolina had followed suit.⁷ By 1916, the popularity of segregation ordinances had also reached Birmingham, Alabama; Louisville, Kentucky; St Louis, Missouri and New Orleans, Louisiana.⁸ The prevalence of these ordinances persisted until 1917, when the US Supreme Court decided *Buchanan v Warley*⁹ and invalidated this thinly veiled form of state-sponsored discrimination.¹⁰

B. Segregation by contract: restrictive covenants

From 1917, when *Buchanan v Warley* was decided, until 1948, racially restrictive covenants became the primary legal mechanism for perpetuating segregation.¹¹ Typically, under these covenants, property owners would warrant not to sell or lease real property to “any person not of the Caucasian race”.¹² Racially restrictive covenants were exceptionally effective during this time because “Lochner-era¹³ courts consistently enforced them, contributing to the dramatic increase in residential segregation during the first half of the 20th century”.¹⁴

4 See Tom C Clark and Philip B Perlman, *Prejudice and Property: An Historic Brief against Racial Covenants* (Washington DC: Public Affairs Press, 1948) p.11 (originally submitted as amicus brief in *Shelley v Kraemer* 334 US 1 (1948)).

5 Baltimore, MD, Ordinance 692 (15 May 1911); see also Garrett Power, “Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913” (1983) 42 Md LRev 289, 289, for an in-depth discussion on the Baltimore ordinance and other similar ordinances.

6 See Whitehead, “Using Disparate Impact Analysis to Strike Down Exclusionary Zoning Codes” (n.2).

7 *Ibid.*

8 *Ibid.*

9 245 US 60 (1917).

10 *Ibid.*, 74–75.

11 See Clark and Perlman, “Prejudice and Property” (n.4) p.11.

12 See “Constitutional Law. Equal Protection of the Laws. Judicial Enforcement of Racial Restrictive Covenants Is State Action Prohibited by the Fourteenth Amendment” (1948) 61 Harv LRev 1450, 1450.

13 Named after *Lochner v New York* 198 US 45 (1905), the “Lochner-era” refers to the period of time between 1897 and 1937 during which the Supreme Court utilised a broad interpretation of due process that protected economic rights, tended to strike down economic regulations of working conditions, wages or hours in favour of *laissez-faire* economic policy.

14 Davidson M Douglas, “Contract Rights and Civil Rights” (2002) 100 Mich LRev 1541, 1561.

This form of discrimination was not wholly private, either. As one commentator explains, “[i]t is virtually impossible to overstate the significance of [the federal government’s] involvement in creating, sponsoring, and perpetuating the racially segregated dual housing markets that divide America”.¹⁵ For example, the Federal Housing Administration actively promoted the use of racially restrictive covenants, frequently refusing to provide its mortgage insurance or guarantees unless the covenants were attached to the deeds.¹⁶ The widespread acceptability of racially restrictive covenants was substantially abdicated in 1948, when the US Supreme Court handed down its landmark decision in *Shelley v Kraemer*,¹⁷ holding that judicial enforcement of the covenants violated the Fourteenth Amendment.¹⁸

C. *The battles of today*

As the preceding discussion indicates, by 1948, both discriminatory ordinances and racially restrictive covenants had been outlawed by the Court. The discriminatory intent behind these mechanisms is patently obvious. Present-day housing segregation, however, is perpetuated by more subtle means. Indeed, since the FHA¹⁹ was enacted, courts have accepted disparate impact claims²⁰ challenging a wide range of practices, including zoning ordinances,²¹ administration of section vouchers,²² lending practices,²³ mortgage insurance policies,²⁴ landlord and housing provider reference policies,²⁵ occupation restrictions²⁶ and the demolition of subsidised housing.²⁷

III. Fair Housing and Discrimination in Housing

A. *The FHA*

In 1968, Congress enacted the FHA “following the urban unrest of the mid-1960s and the chaotic aftermath of the assassination of the Rev. Dr. Martin Luther King, Jr.”²⁸

15 John O Calmore, “Spatial Equity and the Kerner Commission Report: A Back-to-the Future Essay” (1993) 71 NC LRev 1487, 1509.

16 *Ibid.*, 1509–1510 (outlining how the discriminatory policies of the Federal Housing Administration and VA significantly transformed the nation’s patterns of homeownership along racial lines).

17 *Shelley v Kraemer* (n.4).

18 *Ibid.*, 20.

19 42 USC, § 3601 (1988).

20 See *Gallagher v Magner* 619 F 3d 823, 833–834 (8th Cir 2010); see Disparate impact defined in Calif Fair Housing and Public Accommodation, s.5:6.

21 See *Huntington Branch, NAACP v Town of Huntington* 844 F 2d 926, 937–938 (2d Cir 1988).

22 See *Graoch Associates #33, LP v Louisville/Jefferson County Metro Human Relations Commission* 508 F 3d 366, 376–377 (6th Cir 2007).

23 See *Miller v Countrywide Bank, NA* 571 F Supp 2d 251, 258 (D Mass 2008).

24 See *National Fair Housing Alliance, Inc v Prudential Insurance Co of America* 208 F Supp 2d 46, 63 (DDC 2002).

25 See *Fair Housing Justice Center, Inc v Edgewater Park Owners Coop, Inc* No 10-CV-912 (RPP), 2012 WL 762323, [10]–[11] (SDNY 9 March 2012).

26 See *United States v Tropic Seas, Inc* 887 F Supp 1347, 1360 (D Haw 1995).

27 See *Charleston Housing Authority v US Department of Agriculture* 419 F 3d 729, 749–742 (8th Cir 2005).

28 HR Rep No 711, 100th Cong, 2d Sess 15 (1988).

The FHA's goal is to provide, "within constitutional limitations, fair housing throughout the United States".²⁹ Congress believed that the FHA's proscription of discriminatory housing practices would "remove the walls of discrimination which enclose minority groups"³⁰ and "replace ghettos with truly integrated and balanced living patterns".³¹

The thrust of the FHA is found within its two primary substantive provisions. First, 42 USC §3604(a) makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex, familial status or natural origin".³² Second, 42 USC § 3606(b) makes it unlawful 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 the connection therewith".³³

The FHA protects the following classes and no others (in particular, there is no protection for economic status *per se*):³⁴

- (1) Race.
- (2) Colour.
- (3) Religion.
- (4) Sex (but not sexual orientation).
- (5) Family status: This class protects primarily parents with children under 18 years from discrimination. This includes foster families and recipients of aid to families with dependent children. Licensed, age-restricted elderly living communities are exempt from compliance with this provision. It does not ban housing in favour of households with children.³⁵
- (6) National origin.
- (7) Handicapped status: a physical or mental impairment, which substantially limits one or more of such persons' major life activities, a record of such impairment or being regarded as having such an impairment.³⁶ It does not include current, illegal use of or addition to a controlled substance, but it does include past drug or alcohol addictions and human immunodeficiency virus infections.³⁷ This class protects not only persons with disabilities but also persons associated with disabled persons.³⁸ Handicapped conditions not considered disabilities under the FHA include emotional disturbance, homelessness, history of abuse,³⁹ postincarceration half-way houses⁴⁰

29 42 USC § 3601 (1988).

30 114 Cong Rec 9563 (1968) (Statement of Rep Celler).

31 114 Cong Rec 3422 (1968) (Statement of Sen Mondale).

32 42 USC § 3604(a) (1988).

33 *Ibid.*, § 3606(b).

34 *Ibid.*, § 3604.

35 *Ibid.*, § 3602(k); § 3607(b).

36 *Ibid.*, § 3602(h).

37 *Ibid.*

38 *Ibid.*, § 3604(f)(1)(c).

39 See *Sunderland Family Treatment Services v City of Pasco* 903 P 2d 986, 991 (1995).

40 See *Oxford Investments, LP v City of Philadelphia* 21 F Supp 3d 442 (ED Pa 2014).

or juvenile delinquency. The FHA prohibits a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises.⁴¹ Such modifications include installation of ramps, railings and so forth, at the expense of the disabled person, though the landlord may require restoration of the alterations to the condition that existed prior to the making of the alterations.⁴² The FHA also prohibits refusing to make reasonable accommodations in rules, policies and practices or services when such accommodation may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.⁴³ Since this applies to both private and public rules, it applies for homeowners association rules, condominium association rules, apartment policies, zoning and building and housing codes.⁴⁴

A “dwelling” under the FHA is any building, structure or portion thereof which is occupied as a residence by one or more families and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof.⁴⁵ It is illegal under the FHA 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 available or deny, a dwelling.⁴⁶ Zoning or building regulations are especially vulnerable. Besides local governments (including local government services and public utilities), private landowners, real estate agents, mortgage lenders and landlords must also comply.⁴⁷

Against the backdrop of nine circuit courts of appeals having already found claims of disparate impact cognisable,⁴⁸ Congress revisited the FHA in 1988, adding several significant amendments. First, Congress granted HUD authority to adjudicate housing discrimination claims⁴⁹ and to promulgate regulations necessary to effectuate the FHA’s goals.⁵⁰ Second, Congress created three exceptions to liability, clarifying that the FHA does not prohibit (1) “conduct against a person

41 42 USC § 3604(f)(3)(a) (1988).

42 See *Shelton v Waldron* No 3-12-0688, 2013 WL 5938016, [3] (MD Tenn 5 November 2013).

43 42 USC § 3604(f)(3)(b) (1988).

44 See *United States v Youritan Construction Co* 370 F Supp 643, 648 (ND Cal 1973), *aff’d in part, remanded in part*, 509 F 2d 623 (9th Cir 1975).

45 42 USC § 3602(b) (1988).

46 *Ibid.*, § 360(4).

47 See generally *NAACP v Secretary of Housing and Urban Development* 817 F 2d 149, 152 (1st Cir 1987).

48 See Brief for the United States as Amicus Curiae Supporting Respondents, *Texas Department of Housing and Community Affairs v Inclusive Communities Project* No 13-1371, 2014 WL 7336683, [23] (US, filed 28 October 2013) [US Brief Supporting Respondents ICP] (outlining the controlling disparate impact cases in the 11 circuits).

49 See 42 USC § 3612 (1988).

50 *Ibid.*, § 3614(a).

because such person has been convicted . . . of the illegal manufacture or distribution of a controlled substance”;⁵¹ (2) “reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling”⁵² or (3) “a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status”.⁵³ These amendments have been widely interpreted as presupposing the existence of disparate impact liability.⁵⁴

B. Discriminatory intent

In 1976, the US Supreme Court decided *Village of Arlington Heights v Metropolitan Housing Development Corp.*, holding that the US Constitution’s Equal Protection Clause provided relief in cases involving discrimination in housing if, but only if, the plaintiff alleging discrimination can demonstrate that the defendant local or state government *intends* to discriminate against the plaintiff.⁵⁵ Disproportionate impact alone would be insufficient.

In 1971, the Metropolitan Housing Development Corporation (MHDC) sought rezoning of a 15-acre parcel of land in the village of Arlington Heights, Illinois, from a single-family zoning classification to a multiple-family zoning classification.⁵⁶ With the aid of federal financial subsidies provided under s.236 of the National Housing Act, MHDC planned to construct 190 townhouse units in 20 two-story townhouse buildings: 100 single-bedroom units for senior citizens and 90 two, three, and four-bedroom units for families with low or moderate incomes.⁵⁷ The development was to be called Lincoln Green.⁵⁸

Following a recommendation of the Arlington Heights Plan Commission, the Village Board of Trustees denied the zoning request.⁵⁹ MHDC and other named plaintiffs sued in federal district court alleging that the denial was racially discriminatory in violation of the 14th Amendment and the FHA.⁶⁰ The district court upheld the Board of Trustee’s decision but was reversed by the Seventh Circuit Court of Appeals in June 1975, which was, in turn, reversed by the US Supreme Court.⁶¹

51 *Ibid.*, § 3607(b)(4) (1995).

52 *Ibid.*, § 3605(c) (1988).

53 *Ibid.*

54 See, eg. Transcript of Oral Argument at 9–12, *Texas Department of Housing and Community Affairs v Inclusive Communities Project* 135 S Ct 46 (2014) (No 13-1371) (where Scalia J asked the Solicitor General of Texas, Scott Keller, why the amendments don’t “kill” TDHCA’s case; Solicitor Keller did not appear to provide Scalia with a satisfying answer).

55 429 US 252, 265 (1977).

56 *Ibid.*, 254.

57 *Ibid.*, 257.

58 *Ibid.*

59 *Ibid.*, 258.

60 *Ibid.*, 258–259.

61 *Ibid.*, 259.

The Village of Arlington Heights is a suburb of Chicago located approximately 26 miles northwest of downtown.⁶² It is primarily a bedroom suburb, zoned largely for single-family detached houses.⁶³ According to the 1970 census, the village population was 64,000, of whom only 27 were black.⁶⁴ The 15 acres in question were owned by the Clerics of St Viator, part of an 80-acre parcel just east of the centre of the village.⁶⁵ While part of the site was occupied by St Viator's High School and a three-story novitiate building, much of the site was vacant.⁶⁶ The entire site and all of the surrounding area was zoned R-3, single-family detached.⁶⁷ Single-family homes abut the property on two sides; on the other two sides is the vacant St Viator property.⁶⁸ The proposed 15-acre development would have maintained much of the open space, with shrubs and trees screening the homes directly abutting the property, but would have required rezoning to the R-5 multiple-family classification to permit townhouses at the density proposed.⁶⁹

During the spring of 1971, the village plan commission considered the proposal at three public meetings. At the hearings, MHDC submitted studies demonstrating the need for housing of the type proposed.⁷⁰ Evidence offered at trial indicated that many of those attending the plan commission were vocal and demonstrative in opposition to Lincoln Green, while others testified in its favour.⁷¹ Some of the comments from both opponents and supporters of the rezoning petition addressed the "social issue" of introducing low- and moderate-income housing that would probably be racially integrated into Arlington Heights.⁷² Ultimately, the Court found that most of the opponents focussed on the zoning aspects of the petition, stressing the single-family character of the neighbourhood, the reliance by neighbouring citizens upon that character and, perhaps most important, Arlington Heights' policy concerning multiple-family zoning.⁷³ Adopted by the village board in 1962 and amended in 1970, the policy was that R-5 zoning should constitute a buffer between single-family and commercial, industrial, or other high-intensity land uses.⁷⁴ Lincoln Green did not meet this requirement, since the property is completely surrounded by single-family zoned property.⁷⁵

62 *Ibid.*, 255.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*, 256.

70 *Ibid.*, 257.

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*, 258.

74 *Ibid.*

75 *Ibid.*

Relying primarily on its decision in *Washington v Davis*,⁷⁶ decided after the Seventh Circuit's decision but before oral argument in *Village of Arlington Heights v Metropolitan Housing Development Corp*, the Court reiterated that official action would not be held unconstitutional solely because it resulted in a racially disproportionate impact.⁷⁷ In as plain words as can be imagined, the Court held: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause".⁷⁸ Absent such a showing, the Court said that the Seventh Circuit's finding of a "discriminatory 'ultimate effect' is without independent constitutional significance".⁷⁹

If, then, secretive motive rather than discernible effect is the critical factor, how is that motive to be shown? The court offered five possible approaches.

First, the Court suggested that while racial impact is not the ultimate test, proof of racial impact may in some cases be helpful in proving the required racial motive: "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face".⁸⁰ However, it is clear that the pattern must be "stark" and that "impact alone is not determinative".⁸¹

Second, the Court suggested that motive might be demonstrated by a historical background, which "reveals a series of official actions taken for invidious purposes".⁸² Apparently, however, the Court was not persuaded by the type of historic pattern of inaction and indifference to segregation found by the Seventh Circuit.⁸³

Third, the Court said that the specific sequence of events leading to the challenged decision may be persuasive of racial motive if it betrays a departure either from normal procedures or from substantive standards usually considered important.⁸⁴

Fourth, if contemporaneous statements of the decision makers reveal racial motive, which would be relevant.⁸⁵ However, statements of citizens addressing the decision makers seem, if relevant at all, to carry much less weight.

76 426 US 229 (1976).

77 *Village of Arlington Heights v Metropolitan Housing Development Corp* (n.55), 265.

78 *Ibid.*

79 *Ibid.*, 271.

80 *Ibid.*, 266.

81 *Ibid.*

82 *Ibid.*, 267.

83 See *Metropolitan Housing Development Corp v Village of Arlington Heights* 517 F 2d 409, 415 (7th Cir 1975) (discussing in detail the history of housing segregation in the Chicago metropolitan area).

84 *Village of Arlington Heights v Metropolitan Housing Development Corp* (n.55), 267.

85 *Ibid.*, 268.

Finally, the Court said: “In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege”.⁸⁶ The remedy, therefore, absent a showing of discriminatory intent, is discriminatory impact under the FHA. The usual way of showing such impact is by showing disparate impact on a protected class.

C. *Disparate impact and its emergence under the FHA*

The Supreme Court has previously recognised, and upheld, disparate impact claims under a number of statutes, including Title VII of the Civil Rights Act (Title VII),⁸⁷ the Age Discrimination in Employment Act (ADEA)⁸⁸ and the Americans with Disabilities Act (ADA).⁸⁹ The origins of disparate impact claims can be traced to the Court’s decision in *Griggs v Duke Power Co.*⁹⁰ In *Griggs*, an employer implemented new policies requiring prospective employees (or current employees seeking to transfer departments) to have a high school education and to pass two professionally prepared aptitude tests to be eligible for employment.⁹¹ While the new policies were facially neutral, the Court nevertheless found that they violated Title VII because of the long history of African Americans receiving inferior education⁹² and because the employer failed to establish that either requirement had a demonstrable relationship to successful job performance.⁹³

Griggs v Duke Power Co provided the analytical framework for the Eighth Circuit’s 1974 decision in *United States v City of Black Jack, Missouri*,⁹⁴ which signalled the emergence of disparate impact claims under the FHA. In *Black Jack*, the court considered whether a zoning ordinance that prohibited the construction of new multi-family dwellings violated the FHA.⁹⁵ The Eighth Circuit reversed the district court’s determination that the ordinance did not have a discriminatory effect, holding that the court failed to take into account “either the ultimate effect or the historical context of the city’s actions”.⁹⁶ Having found that the plaintiffs established a *prima facie* case of disparate impact,⁹⁷ the Eighth Circuit shifted the burden to the city to demonstrate that its conduct was necessary to promote a compelling governmental

86 *Ibid.*

87 See *Griggs v Duke Power Co* 401 US 424 (1971).

88 See *Smith v City of Jackson, Mississippi* 544 US 228, 234 (2005).

89 See *Raytheon Co v Hernandez* 540 US 44 (2003).

90 *Griggs v Duke Power Co* (n.87).

91 *Ibid.*, 427 (the new policies, however, did not apply to the company’s labour department).

92 The Court cited its prior decision in *Gaston County, North Carolina v United States* 395 US 285 (1969), where it struck a literacy test required for voter registration because of North Carolina’s long history of providing inferior education in its segregated schools.

93 See *Griggs v Duke Power Co* (n.87), 431.

94 508 F 2d 1179 (8th Cir 1974).

95 *Ibid.*, 1182.

96 *Ibid.*

97 *Ibid.*, 1186 (the court found the plaintiff’s *prima facie* case was satisfied upon showing that exclusion of multifamily dwelling would “contribute to the perpetuation of segregation in [the city]”).

interest.⁹⁸ The court ultimately invalidated the ordinance, finding that there was no factual basis to support the city's assertion that its proffered interests were furthered by the ordinance.⁹⁹

Subsequent to *United States v City of Black Jack, Missouri*, the remaining 10 circuit courts of appeal similarly recognised that claims of disparate impact were cognisable under the FHA. It was not until 2015, however, that the US Supreme Court squarely addressed the validity and limitations of such claims.¹⁰⁰

D. Texas Department of Housing and Community Affairs v Inclusive Communities Project, Inc

(i) Background and lower court decisions

In March 2008, Inclusive Communities Project, Inc (ICP) filed suit against the Texas Department of Housing and Community Affairs TDHCA in the US District Court for the Northern District of Texas, alleging, *inter alia*, discrimination under the FHA.¹⁰¹ ICP is a non-profit organisation dedicated to achieving racial and socioeconomic integration in the Dallas metropolitan area.¹⁰² In pursuit of these lofty goals, ICP helps low-income, predominately African American families who are eligible for Dallas' subsidised voucher programme to find affordable housing in predominately Caucasian, suburban neighbourhoods.¹⁰³ TDHCA is the agency vested with the responsibility of administering the federal government's Low Income Housing Tax Credits (LIHTC) programme in Texas.¹⁰⁴ Under the LIHTC programme, the federal government provides tax credits to developers of low-income housing, which developers can then sell to finance construction of the low-income projects.¹⁰⁵

⁹⁸ *Ibid.*, 1185.

⁹⁹ *Ibid.*, 1187.

¹⁰⁰ *Inclusive Communities Project* marked the third time since 2011 that the US Supreme Court granted *certiorari* to determine whether disparate impact claims were cognisable under the FHA. In both previous instances, the cases were settled prior to oral arguments. Settlement in at least one of the cases resulted from increased apprehension by the Justice Department and numerous civil rights groups that the Court was poised to strike down disparate impact under the FHA. See, eg, Hans A Von Spakovsky and Michael Flynn, "Last-Minute Settlement Saves 'Disparate Impact' — Again" *NATIONAL REVIEW* (1 November 2013, 5:51 PM), available at <http://www.nationalreview.com/corner/362917/last-minute-settlement-saves-disparate-impact-again-hans-von-spakovsky-michael-flynn>.

¹⁰¹ *Inclusive Communities Project, Inc v Texas Dep't of Hous and Cmty Affairs* 860 F Supp 2d 312, 313–314 (ND Tex 2012) (*Inclusive Communities Project I*).

¹⁰² According to its website, ICP "works for the creation and maintenance of thriving racially and economically inclusive communities, expansion of fair and affordable housing opportunities for low income families, and redress for policies and practices that perpetuate the harmful effects of discrimination and segregation", available at <http://www.inclusivecommunities.net/> (visited 19 February 2015).

¹⁰³ See *Inclusive Communities Project I* (n.101), 314.

¹⁰⁴ See Tex Gov't Code § 2306.053(b)(10). ("The department may ... administer federal housing, community affairs, or community development programs, including the low income housing tax credit program.")

¹⁰⁵ See 26 USC § 42(c) (2013). ("The number of credits TDHCA may award for a low-income housing project is determined by calculating the project's 'qualified basis', which is a fraction representing the percentage of the project occupied by low-income residents multiplied by eligible costs.")

In its complaint, ICP alleged that TDHCA had been improperly exercising its discretion in making decisions regarding the allocation of the tax credits.¹⁰⁶ According to ICP, TDHCA was allocating the credits in a manner that had a discriminatory effect on African American residents.¹⁰⁷ Specifically, ICP asserted that TDHCA had been disproportionately approving tax credit units for developments in predominantly minority neighbourhoods and disproportionately disapproving tax credit units for developments in predominantly Caucasian neighbourhoods.¹⁰⁸ The consequence, according to ICP, was the continued concentration of affordable units in minority neighbourhoods, a lack of such units in Caucasian neighbourhoods; and, therefore, a perpetuation of the housing segregation that the FHA seeks to end.¹⁰⁹

In March 2012, the district court found that ICP had succeeded in proving its disparate impact claim under the FHA, although it failed on its claims of intentional discrimination.¹¹⁰ On appeal, the Fifth Circuit's review was limited to a single issue: "whether the district court correctly found that ICP proved a claim of violation of the [FHA] ... based on disparate impact".¹¹¹ To decide whether ICP had in fact proved a disparate impact claim, the Fifth Circuit had to determine the appropriate standard for establishing liability. However, subsequent to the district court's decision, HUD had issued its regulations, discussed more fully in Section III(E), codifying disparate impact under the FHA.¹¹² Adopting HUD's burden-shifting approach, the Fifth Circuit reversed the district court and remanded the case for application given its "demonstrated expertise with [the] facts".¹¹³ However, on 2 October 2014, the US Supreme Court granted TDHCA's petition for writ of certiorari, which presented to the Court the question of whether disparate impact claims were even cognisable under the FHA.¹¹⁴

(ii) Supreme court decision: disparate impact saved? Maybe

On 25 June 2015, the Supreme Court handed down its decision in *Inclusive Communities*.¹¹⁵ That the Court found disparate impact claims cognisable under the FHA is no particular surprise since 11 federal circuit courts of appeals had previously done so, and itself had similarly done so in cases brought under the

106 See *Inclusive Communities Project I* (n.101), 317.

107 *Ibid.*, 322.

108 See *Inclusive Communities Project, Inc v Texas Dep't of Hous and Cmty Affairs* 747 F 3d 275, 278 (5th Cir 2014) [*Inclusive Communities Project II*] cert granted in part, 135 S Ct 46, 189 (2014).

109 *Ibid.*

110 See *Inclusive Communities Project I* (n.101), 319–320.

111 *Inclusive Communities Project II* (n.108), 278.

112 See *Inclusive Communities Project II* (n.108), 274.

113 *Inclusive Communities Project II* (n.108), 282.

114 See *Texas Dep't of Hous & Cmty Affairs v Inclusive Communities Project, Inc* (n.54).

115 135 S Ct 2507 (2015).

ADEA, ADA and VII cases.¹¹⁶ What is particularly significant, however, is the likely lasting effect the Court's decision will have on the ability of plaintiffs to prevail on such claims.

Generally speaking, substantiating a violation of the FHA through a disparate impact claim involves a three-prong analysis:

First, the plaintiff must show that a policy or practice has a disparate impact on a class of persons protected under the FHA: race, religion, national origin, family status and handicapped status.

Second, the defendant must be given an opportunity to rebut the charge of discrimination by demonstrating that the practice or policy is not for discriminatory purposes, but for a benign and neutral public goal or purpose or policy, such as protection of the health, safety and welfare of the community.

Third, the plaintiff alleging discrimination may still succeed if the plaintiff can show there are other, less burdensome methods to accomplish the benign and neutral goals the defendant claims for the purposes of the challenged public policy.¹¹⁷

Kennedy J's opinion in ICP concentrated primarily on the first prong, under which a plaintiff essentially must set out a *prima facie* violation of the FHA.

First, he stated that there would be no liability for government if the challenge and allegation of disparate impact are based solely on a showing of statistical disparity.¹¹⁸ Second, that statistical disparity must also fail if plaintiffs cannot point to a policy of the offending government, rather than a simple instance of an action which has such a statistical disparate impact.¹¹⁹ The court said that "racial imbalance alone does not without more establish a prima facie case of disparate impact" and "fiscal disparity must fail if plaintiff cannot point a defendant's policy causing disparity".¹²⁰ The court characterised this as a "robust causality requirement".¹²¹ The court distinguished between "artificial, arbitrary and unnecessary barriers", which should be struck down under disparate impact analysis, and "displacement of valid governmental policies", which should not.¹²²

In considering the second and third prongs, the Court said that it would be "paradoxical to construe the FHA to impose onerous costs on actors who encourage

116 *Griggs v Duke Power Co* (n.87); *Smith v City of Jackson, Mississippi* (n.88); *Raytheon Co v Hernandez* (n.89).

117 See *Inclusive Communities Project II* (n.108), 282.

118 See *Texas Dept of Housing and Community Affairs v Inclusive Communities Project, Inc* (n.115), 2522.

119 *Ibid.*, 2523 (citations omitted).

120 *Ibid.*

121 *Ibid.*

122 *Ibid.*, 2522.

revitalization of dilapidated housing merely because some other priority might seem preferable”.¹²³

According to Kennedy J:

“disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity”.¹²⁴

Further, “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies”.¹²⁵ Accordingly, “[t]he FHA is not an instrument to force housing authorities to reorder their priorities, [but rather,] aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation”.¹²⁶ Similarly, “[i]t may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units...”¹²⁷

In summary, Kennedy J has hedged the Court’s confirmation of the use of disparate impact analysis under the FHA with so many caveats that it would likely make it more difficult to mount and win a disparate impact discrimination case after the Court’s analysis than before. In particular, his robust causality, policy-only and cautionary quotas language significantly changes the relatively straightforward disparate impact test crafted by most of the federal circuit courts which had previously approved of the test. Subsequent cases from district courts around the country confirm that it has indeed become more difficult to mount and win such cases, largely based on the Kennedy cautionary language.

(iii) *Texas Department of Housing and Community Affairs v Inclusive Communities* on remand and rehearing

The district court’s treatment of *Inclusive Communities* on remand from the Supreme Court best illustrates how lower courts are construing *Inclusive Communities* as elevating the burden for plaintiffs, particularly at the *prima facie* stage. Prior to the Fifth Circuit’s and Supreme Court’s decisions, the district court had granted ICP partial summary judgment, finding it had sufficiently established a *prima facie* case of disparate impact.¹²⁸ On remand from the Supreme Court, however, the district

¹²³ *Ibid.*, 2512.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 2522.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, 2523–2524.

¹²⁸ *Inclusive Communities Project, Inc v Texas Dep’t of Hous & Cmty Affairs* 749 F Supp 2d 486, 500 (ND Tex 2010).

court found it necessary to reconsider whether ICP had established a *prima facie* case, noting that it had previously done so “without the benefit of the Supreme Court’s opinion”.¹²⁹

Relying upon Kennedy’s J “cautionary language”, the district court concluded that it had not previously “give[n] the *prima facie* requirement the same emphasis the Supreme Court had given it”.¹³⁰ The court noted that, while it had not relied solely on evidence of statistical evidence alone, many of the other sources ICP cited also largely relied upon statistical evidence, and thus the court arguably had “not analyze[d] ICP’s evidence through the prism of the ‘robust causality requirement’ envisioned by the Supreme Court”.¹³¹

The court further emphasised that TDHCA also did not have the benefit of the Supreme Court’s decision.¹³² Noting that TDHCA “essentially d[id] not contest ICP’s *prima facie* case”, the court concluded that “TDHCA should be permitted to challenge ICP’s *prima facie* showing based on a clearer understanding of the requirements and consequences of ICP’s establishing a *prima facie* case”.¹³³ Consequently, “the interests of justice and fundamental fairness require[d] not only that ICP’s disparate impact claim be decided anew under the burden-shifting regimen adopted by HUD and the Fifth Circuit, but that the court start with whether ICP has established a *prima facie* case”.¹³⁴

On rebriefing and a fresh round of oral arguments, the impact of Kennedy J’s opinion became even more apparent when the district court held that ICP had failed to establish a *prima facie* violation of the FHA and dismissed the entirety of ICP’s disparate impact claim.¹³⁵ In fact, the court’s decision was not simply based on a single deficiency in ICP’s claims, but rather, a wholesale failure to satisfy the newly informed disparate impact standard.

First, the court found that ICP “failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact”.¹³⁶ Specifically, “[b]y relying simply on TDHCA’s exercise of discretion in awarding tax credits, ICP has not isolated and identified the specific practice that caused the disparity in the location of low-income housing”.¹³⁷ Rather, ICP relied upon the “cumulative effects” of TDHCA’s decision-making process over a multiyear period, and similar

129 *Inclusive Communities Project, Inc v Texas Dep’t of Hous & Cmty Affairs* No 3:08-CV-0546-D, 2015 WL 5916220, [3] (ND Tex 8 October 2015).

130 *Ibid.*, [3] (in its order granting partial summary judgment, the district court had previously stated that “ICP’s *prima facie* burden is not a heavy one”, explaining that “ICP need only provide evidence that raises an inference of discrimination” because “we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors”. (citation omitted).

131 *Ibid.*

132 *Ibid.*, [4].

133 *Ibid.*

134 *Ibid.*

135 *Inclusive Communities Project, Inc v Texas Dep’t of Hous & Cmty Affairs*, No 3:08-CV-0546-D, 2016 WL 4494322, [1] (ND Tex 26 August 2016).

136 *Ibid.*, [6].

137 *Ibid.*

such arguments have been rejected as insufficient to underlie disparate impact claims in other contexts.¹³⁸

The court noted that ICP's failure to identify a specific, facially neutral policy also became apparent when considering what potential remedy would be available in the event that ICP were to prevail. According to the court, Kennedy J's opinion requires that "[r]emedial orders in disparate-impact cases ... concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies", and lower courts should be careful not to "impose racial targets or quotas," because doing so "might raise difficult constitutional questions".¹³⁹ In other words, "[t]o remedy disparate impact, the court must craft a race-neutral remedy that removes the offending practice".¹⁴⁰ Yet, "[a]lthough ICP complains of TDHCA's exercise of discretion in housing decisions, it does not ask the court to prohibit TDHCA from using its discretion; rather, it asks the court to require that TDHCA exercise its discretion in a specific way: to desegregate housing".¹⁴¹ Such a remedy, therefore, would not be race neutral.

Second, the court also concluded that ICP's claim must be dismissed because, "regardless of the label ICP places on its claim, it is actually complaining about *disparate treatment*, not *disparate impact*".¹⁴² As the court explained, "[w]here the plaintiff establishes that a subjective policy, such as the use of discretion, has been used to achieve a racial disparity, the plaintiff has shown *disparate treatment*".¹⁴³ Therefore, because ICP was not complaining of the existence of TDHCA's discretion, but rather how TDHCA was exercising such discretion, its claim was actually one of *disparate treatment*.¹⁴⁴

Third, the court further reasoned that, even if TDHCA's use of its discretion is a specific, facially neutral policy, ICP nevertheless failed to establish a causal relationship between the exercise of that discretion caused racial disparity complained of.¹⁴⁵ Noting that Kennedy J cautioned that "[i]t may be difficult [for ICP] to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units[.]" the court concluded that "ICP ha[d] not proved that TDHCA's exercise of discretion—and not other factors—caused the statistical disparity".¹⁴⁶

138 *Ibid.* (citing *Anderson v Douglas & Lomason Co* 26 F 3d 1277, 1283–1285 (5th Cir 1994) (an employment discrimination case where the plaintiff unsuccessfully asserted that the cumulative effects of the defendant's employment practices caused a racial disparity in promotions).

139 *Ibid.* (citing *Inclusive Communities* (n.115), 2512).

140 *Ibid.*, [7].

141 *Ibid.*

142 *Ibid.* (emphasis added).

143 *Ibid.* (citing *Johnson v Metropolitan Government of Nashville and Davidson County* 2008 WL 3163531, [4–6] (MD Tenn 4 August 2008)).

144 *Ibid.*

145 *Ibid.*, [8].

146 *Ibid.*, [9] (alterations in original).

Finally, further buttressing its conclusion, the court explained that, even if ICP was able to establish that a specific, facially neutral policy caused the disparity it complained of, ICP failed to prove a statistically significant disparity warranting the imposition of FHA liability.¹⁴⁷ Simply put, the court concluded that the evidence ICP submitted failed to prove that the statistical disparity would have been lessened if TDHCA did not exercise the discretion that ICP's claim targeted.

(iv) Other cases focusing on ICP's cautionary language

The decisions of a significant number of courts that have confronted FHA disparate impact claims subsequent to the Supreme Court's decision in *Inclusive Communities* similarly demonstrate that plaintiffs now must carry undeniably heightened burdens simply to proceed past the *prima facie* stage. Generally, plaintiffs' claims in these cases fail for one or more of the following reasons: (1) failure to satisfy the robust causality requirement;¹⁴⁸ (2) inadequate evidence to demonstrate a statistical disparity¹⁴⁹ and (3) failure to identify a specific, facially neutral policy.¹⁵⁰

Perhaps the most frequently identified deficiency is the failure to satisfy Kennedy J's "robust causality" requirement. For example, in *Azam v City of Columbia Heights*,¹⁵¹ the plaintiff alleged that the city's enforcement of its health and safety codes with respect to his rental properties "ha[d] the effect of making affordable rental dwellings unavailable ... [resulting in] a disparate impact [on] persons intended to be protected by the [FHA]".¹⁵² In granting the defendant's motion for summary judgment, the court found that the plaintiff failed to establish a *prima facie* case of disparate impact, particularly the "robust causality requirement" and, in any event, failed to submit an alternative practice with a lesser impact.¹⁵³

With regard to a failure to proffer sufficient evidence demonstrating a statistical disparity, *City of Los Angeles v Wells Fargo & Co*¹⁵⁴ is illustrative. In that case, the city

147 *Ibid.*, [10].

148 See *De Reyes v Waples Mobile Home Park Ltd P ship* No 1:16-CV-563, 2016 WL 4582049 (ED Va 1 September 2016).

149 See *City of Miami v Wells Fargo & Co* No 13-24508-CIV, 2016 WL 1156882 (SD Fla 17 March 2016).

150 See *City of Joliet, Illinois v New W, LP* 825 F 3d 827 (7th Cir, cert denied sub nom; *Mid-City Nat Bank of Chicago v City of Joliet, Ill* 137 S Ct 518 (2016).

151 No CV 14-1044 (JRT/BRT), 2016 WL 424966, [1] (D Minn 3 February 2016).

152 *Ibid.*, [10] (some alterations in original).

153 *Ibid.*, [11]; see also *Ellis v City of Minneapolis*, No 14-CV-3045-SRN/JJK, 2015 WL 5009341, [1] (D Minn 24 August 2015) (finding that, even if plaintiff statistically demonstrated disparate impact, it nevertheless failed to satisfy the "robust causality requirement"); *De Reyes v Waples Mobile Home Park Ltd Partnership* (n.148), [6] (plaintiff's claims challenging mobile home park's newly instituted identification policy failed to satisfy robust causality requirement); *Cobb Cty v Bank of Am Corp* 183 F Supp 3d 1332, 1347 (ND Ga 2016) (plaintiff failed to demonstrate causal connection between lender's lending practices and alleged disparity); *City of Miami v Wells Fargo & Co* (n.149), [5] (city failed to meet ICP's "'robust causality requirement', which requires the City to 'allege facts at the pleading stage ... demonstrating a causal connection' between the challenged policy and the alleged statistical disparity").

154 No 213CV09007ODWRZX, 2015 WL 4398858, [1] (CD Cal 17 July 2015).

alleged that Wells Fargo's issuance of "high-cost loans", ie, loans with an interest rate three per cent points or more above the federally established benchmark, was having a disparate impact on racial minorities.¹⁵⁵ The city submitted evidence demonstrating that while a Hispanic Wells Fargo borrower has a 0.0033 per cent likelihood of receiving a high-cost loan and a similarly situated African American Wells Fargo borrower had a 0.0067 per cent likelihood of receiving a high-cost loan, a similarly situated non-Hispanic white borrower faces only a 0.0008 per cent likelihood of receiving a high-cost loan.¹⁵⁶ While the court noted its cognisance that evidence is not to be weighed at summary judgment, it was also mindful that the Court's "recent guidance in *Inclusive Communities* precludes the City's statistical disparity evidence from creating a genuine dispute regarding a prima facie case".¹⁵⁷ Therefore, the court concluded that the "difference between 0.0033 percent and 0.0008 percent does not create a genuine dispute such that a jury must decide this issue", and "comparing thousandths of a percentage fails to meet the minimum threshold of *Inclusive Communities*".¹⁵⁸

Similar to the district court on rehearing in *Inclusive Communities*, in *City of Joliet, Illinois v New W, LP*, the Seventh Circuit Court of Appeals upheld the district court's dismissal of the plaintiff's claims for, *inter alia*, failing to identify a specific, facially neutral policy.¹⁵⁹ In that case, the city commenced condemnation proceedings against an allegedly dilapidated, crime-ridden apartment complex that was comprised of approximately 95 per cent African Americans.¹⁶⁰ Noting *Inclusive Communities*' caution that "a one-time decision may not be a policy at all", the Seventh Circuit upheld the "district court's findings ... that the condemnation of [the complex wa]s a specific decision, not part of a policy to close minority housing in Joliet".¹⁶¹ The court further noted that "governmental entities ... must not be prevented from achieving legitimate objectives" and that the city's condemnation was in furtherance goals approved by the court in *Inclusive Communities*.¹⁶²

E. Affirmative fair housing

Affirmatively providing fair housing is required of recipients of federal funds under the Housing and Community Development Act of 1974.¹⁶³ In particular, the grantee of such funds must certify that the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the FHA and that the grantee will affirmatively further fair housing.¹⁶⁴ This section discusses HUD's

155 *Ibid.*

156 *Ibid.*, [7].

157 *Ibid.*, [8].

158 *Ibid.*; see also *Texas Dept of Housing and Community Affairs v Inclusive Communities Project, Inc* (n.115), 2524.

159 *City of Joliet, Illinois v New W, LP* (n.150), 830.

160 *Ibid.*, 829.

161 *Ibid.*, 830.

162 *Ibid.*

163 42 USC § 5301.

164 *Ibid.*, § 5304(b)(2).

implementation of the FHA's Discriminatory Effects Standard promulgated by a final rule, 24 CFR Pt.100.

A local-government applicant for HUD housing funds has always had to prepare consolidated plans, an analysis of impediments to fair and affordable housing in its jurisdiction, and certify that the grant recipient will affirmatively further fair housing as required by the FHA. Following *United States ex rel Anti-Discrimination Ctr of Metro New York v Westchester County*,¹⁶⁵ these requirements have been increased and tightened. In *Westchester County*, the county was found to have made a false or fraudulent claim because it had not sufficiently analysed racial discrimination as an impediment to fair housing and had not taken steps to require production of affordable housing in certain municipalities in the county.¹⁶⁶ The county settled by paying a \$62 million fine, constructing 750 units of affordable housing in non-minority areas and undertaking affirmative marketing of such affordable units. As a result of this litigation, the affirmative obligations of HUD affordable housing funds recipients are as follows:

- (1) Define affirmatively furthering fair housing and related terms.
- (2) Make a new assessment of fair housing process and tools.
- (3) Focus on patterns of segregation compared to prior regulatory regime.
- (4) In particular, focus on the effect of regulations like zoning codes on affordable housing.¹⁶⁷

There is an increasing overlap between fair housing and affordable housing. Local government/municipal actions that have the effect of reducing the supply of affordable housing are increasingly vulnerable to claims that such actions have a disparate impact on a protected class of persons under the *Inclusive Communities* (and other federal circuit court cases) standards.¹⁶⁸ Thus, for example, women, ethnic and racial minorities and persons with disabilities can all be defined as comparatively low-income wage earners. Therefore, so the reasoning goes, making it difficult for these groups to find affordable housing can be construed as having a disparate impact on a protected class.¹⁶⁹ In the context of local land use controls like zoning, the following either drive up the cost of housing and/or prevent the construction of affordable housing in a municipality:¹⁷⁰

- (1) Minimum lot size.
- (2) Minimum house size.

165 668 F Supp 2d 548 (2009).

166 *Ibid.*, 562–565.

167 See *County of Westchester v US Department of Housing and Urban Development* 802 F 3d 413, 419 (2d Cir 2015).

168 See generally *Southern Burlington County NAACP v Mount Laurel Twp* 456 A 2d 390 (1983).

169 See generally Christopher Serkin and Leslie Wellington, "Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale" (2013) 40 *Fordham Urb LJ* 1667, 1671.

170 See Note, "Exclusionary Zoning and Equal Protection" (1971) 84 *Harv L Rev* 1645.

- (3) Restrictions on multifamily development or density.
- (4) Restrictions on manufactured housing.
- (5) Costly design and site development standards (landscaping, open space/side-front yards, expensive materials).
- (6) Restrictions on group living arrangements for FHAA-protected classes, like spacing requirements, special or conditional permit requirements and development or service standards.

IV. Inclusionary Zoning: Mandatory Set-Asides or Quotas of Affordable, Workforce Housing as a Land Development Condition

As the costs of providing affordable, workforce housing increase and the burdens upon local government of providing such housing using federal (HUD) funds, together with the risk of compliance failure as noted in Section II also increases, the trend towards obtaining such housing from private sector land developers as conditions for development approval also increases.¹⁷¹ Such mandatory affordable housing requirements are subject to the standards set out by the US Supreme Court in a series of three cases decided between 1987 and 2015, none of which deal with affordable housing requirements *per se*.¹⁷² As a result, some state supreme courts have decided that the federal standards set by the US Supreme Court do not apply to mandatory fair/affordable housing quotas.

A. The federal cases

While much of the recent case law dealing with such conditions and exactions has developed from challenges to impact fees, the language is applicable to all three. To be enforceable and valid, an impact fee must be levied upon a development to pay for public facilities, the need for which is generated, at least in part, by that development.¹⁷³ This is the so-called rational nexus test developed by the courts in Florida and other jurisdictions that have considered such fees and exactions.¹⁷⁴

171 See generally Michael Floryan, "Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices" (2010) 37 Pepp L Rev 1039, 1048.

172 *Nollan v California Coastal Commission* 483 US 825 (1987); *Dolan v City of Tigard* 512 US 374 (1994).

173 David L Callies, Robert H Freilich and Thomas E Roberts, *Cases and Materials on Land Use* (St Paul, MN, USA: Thompson West Publishing Co, 6th ed., 2012), Chapter 4; Julian Conrad Juergenmeyer, *Funding Infrastructure: Paying the Costs of Growth Through Impact Fees and Other Land Regulation Charges* edited by James C Nicholas (Chicago: Planners Press, 1985); Brian W Blaesser and Christine M Kentopp, "Impact Fees: The Second Generation" (1990) 38 Wash UJ Urb & Contemp L 28; David L Callies, "Impact Fees, Exactions and Paying for Growth in Hawai'i" (1989) 11 U Haw L Rev 295.

174 See, eg, *Hernando County v Budget Inns of Florida Inc* 555 So 2d 1319 (Fla Dist Ct App 1990); *Frisella v Town of Farmington* 550 A 2d 102 (NH 1988); *Baltica Constr Co v Planning Bd of Franklin Twp* 537 A 2d 319 (NJ Super Ct App Div 1987); *Batch v Town of Chapel Hill* 387 SE 2d 655 (NC 1990); *Unlimited v Kitsap County* 750 P 2d 651 (Wash Ct App 1988).

First proposed in 1964,¹⁷⁵ it became the national standard by the end of the 1970s.¹⁷⁶ The test essentially has two parts. First, the particular development must generate a need to which the amount of the exaction bears some rough proportionate relationship. Second, the local government must demonstrate that the fees levied will be used actually for the purpose collected.¹⁷⁷

This test was made applicable to all land development conditions by the US Supreme Court in 1987. Decided on the last day of the Court's 1987 term, *Nollan v California Coastal Commission*¹⁷⁸ deals ostensibly with beach access. Property owners, James and Marilyn Nollan, sought a coastal development permit from the California Coastal Commission to tear down a beach house and build a bigger one. The commission granted the permit only upon condition that the owners give the general public the right to walk across the owners' backyard beach area in the form of an easement over one-third of the lot's total area. The purpose, the commission said, was to preserve visual access to the water, which was impaired by the much bigger beach house. The Court, however, held that, assuming the commission's purpose to overcome the psychological barrier to the beach created by overdevelopment was a valid public purpose, it could not accept that there was any *nexus* between that interest or purpose and the public lateral access or easement condition attached to the permit.¹⁷⁹

The Court stated, however, that it is an altogether different matter if there is an "essential nexus" between the condition and what the landowner proposes to do with the property.¹⁸⁰ Thus, local governments must consider several important factors when levying impact fees:

- (1) The fees must generally be charged as part of the land *development* process, not the land reclassification or rezoning process. Fees are development

175 Ira Michael Heyman and Thomas K Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions" (1964) 73 Yale LJ 1119; see also Fred P Bosselman and Nancy Stroud, "Legal Aspects of Development Exactions" in Frank and Rhodes (ed), *Development Exactions* (Chicago: Planners Press, 1987).

176 See Bosselman and Stroud, "Legal Aspects" (n.175), p.74.

177 Fred P Bosselman and Nancy E Stroud, "Mandatory Tithes: The Legality of Land Development Linkage" (1985) 9 Nova L Rev 381, 397-399; see also *Holmdel Builders Ass'n v Twp of Holmdel* 583 A 2d 277 (NJ 1990).

178 *Nollan v California Coastal Commission* (n.172).

179 *Ibid.*, 838-839. For full discussion, see J David Breemer, "The Evolution of the 'Essential Nexus': How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here" (2002) 59 Wash & Lee L Rev 373.

180 *Nollan v California Coastal Commission* (n.172), 836-837; see also Callies, Freilich and Roberts, *Cases and Materials on Land Use* (n.173); Bosselman and Stroud, *Mandatory Tithes* (n.177); Brenda Valla, "Linkage: The Next Stop in Development Exactions" (1987) 2 Growth Mgmt Stud Newsl 4; Callies, "Impact Fees" (n.173); Jerold S Kayden and Robert Pollard, "Linkage Ordinances and Traditional Exactions Analysis" (1987) 50 L & Contemp Probs 127; Rachele Alterman, "Evaluating Linkage and Beyond" (1988) 32 Wash UJ Urb & Contemp Probs 127. But see *Holmdel Builders Ass'n v Twp of Holmdel* (n.177) (upholding impact fees for housing as functional equivalents of mandatory set-asides, which the court had already approved under New Jersey's constitutionally based "fair share" doctrine).

- driven, and land reclassification, while it may well be a prelude to development, does not create any need for public facilities whatsoever.¹⁸¹
- (2) Collected fees do not belong to the general fund, or the need is questionable.¹⁸²
 - (3) The fees cannot be kept by government indefinitely, or the need is questionable.

Ignoring the foregoing raises a presumption, as a matter of both law and policy, that the impact fee is nothing more than a revenue-raising device, either for a facility that has nothing to do with the land development upon which the fee is raised or for undetermined fiscal purposes generally. In either case, the “fee” is then presumed to be a tax. This characterisation as a tax is almost always fatal to an impact fee since most local governments have very little specific authority to tax beyond the property tax and, occasionally, a sales or income tax.¹⁸³ Because an impact fee is none of the above, and because all local government taxes must be supported by specific statutory authority, the fee is almost always declared illegal.¹⁸⁴

The Court in *Nollan v California Coastal Commission* did not discuss the required degree of connection between the exaction imposed and the projected impacts of the proposed development. This issue was left open until 1994 when the Supreme Court decided *Dolan v City of Tigard*.¹⁸⁵ In this 5-4 decision, the Court held for the first time that a city must demonstrate a “reasonable relationship” between the conditions imposed on a development permit and the development’s impact.¹⁸⁶

Florence Dolan owned a plumbing business and electrical supply store located in the business district of Tigard, Oregon, along Fanno Creek, which flowed through the southwestern corner of the lot and along its western boundary. Dolan applied to the city for a building permit to double the size of the store and pave the 39-space parking lot. To mitigate for increased runoff from her property that would result from her expansion plans, the commission required that Dolan dedicate to the city the portion of her property lying within the 100-year flood plain along Fanno Creek for a public greenway. To mitigate for increased traffic and congestion caused by an increase in visitors to her store, the commission also required that Dolan dedicate an additional 15-foot strip of land adjacent to the flood plain as a public pedestrian and bicycle pathway.

181 Although in California such fees are charged when land is rezoned to planned unit development, a special zone in most jurisdictions, often carrying with it developmental rights.

182 See *Brown v City of Horry* 417 SE 2d 565, 568 (1992).

183 See generally Juergensmeyer, *Funding Infrastructure* (n.173).

184 See, eg, *Home Builders Ass'n of Cent Ariz, Inc v Riddel*, 510 P 2d 376 (Ariz 1973); *Town of Longboat Key v Lands End Ltd*, 433 So 2d 574 (Fla Dist Ct App 1983); *Lafferty v Payson City*, 642 P 2d 376 (Utah 1982). See generally Juergensmeyer, *Funding Infrastructure* (n.173).

185 *Dolan v City of Tigard* (n.172).

186 *Ibid.*, 390.

While in *Dolan v City of Tigard*, there was a clear nexus between the impact of the proposed development and the conditions required by the commission, the Supreme Court adds a second test beyond “nexus”; whether the degree or amount of the exactions demanded by the city’s permit conditions were sufficiently related to the projected impact of the development proposed. The Court coined the term “rough proportionality” to describe the required relationship between the exactions and the projected impact of the proposed development.¹⁸⁷ While “[n]o precise mathematical calculation is required... the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development”¹⁸⁸.

The Court reviewed the exactions (the two required dedications of the public greenway and the pedestrian and bicycle pathway) and found that the city’s burden on the development was not roughly proportional to the adverse effects of the development would create. Therefore, the exactions were unconstitutional.

Together, *Nollan v California Coastal Commission* and *Dolan v City of Tigard* require that to pass constitutional muster, land development conditions imposed by government must:

- (1) seek to promote a legitimate state interest;
- (2) be related to the land development project upon which they are being levied by means of a rational or essential nexus; and
- (3) be proportional to the need or problem which the land development project is expected to cause, and the project must accordingly benefit from the condition imposed.

Under the first standard, legitimate state interest, an agency may only require a landowner to dedicate land (or interests in land) or contribute money for public projects and purposes, such as public facilities and, in most jurisdictions, public housing.

Under the second standard, essential nexus, an agency must find a close connection between the need or problem generated by the proposed development and the land or other exaction or fee required from the landowner or developer. Thus, for example, a residential development will in all probability generate a need for public schools and parks. A shopping centre or hotel in all probability will not. Both will generate additional traffic and therefore generate a need for more streets and roads.

Under the third standard, proportionality, a residential development of, say, 300 units may well generate a need for additional classroom space, but almost

187 *Ibid.*, 391. After coining the term “rough proportionality”, the Court, in its majority opinion, never used that term again when it applied its decision to the facts; instead it continued to use the words “required reasonable relationship” or “reasonably related”. Notably, the Court rejected stricter standards as the constitutional norm. See *Herron v Mayor of Annapolis*, 388 F Supp 2d 565, 570–571 (D Md 2005).

188 *Dolan v City of Tigard* (n.172), 391.

certainly, not a new school or school site. On the other hand, such a residential development of several thousand units would, when constructed, likely generate a need for a new school and school site, depending on the demographics of the new residents.

More recently, the US Supreme Court decided in *Koontz v St Johns River Water Management District*, holding that both *Nollan v California Coastal Commission* and *Dolan v City of Tigard* nexus and proportionality requirements apply to monetary exactions like mitigation fees, in-lieu fees and impact fees, as well as government-required dedication of land or interests in land (like easements).¹⁸⁹ Thus, for example, a government could constitutionally require a land owner to provide a public school site or in-lieu fee as a condition for approval of a large residential development or a fee representing a development's fair share of the cost of such a school site on a small residential development. However, it could not require either a site or a fee from a commercial centre development for lack of a nexus: commercial developments do not drive a need for schools, but residential developments do.

(i) A constitutional issue: nexus

Because impact or "linkage" fees for affordable or workforce housing are a form of exaction, they are subject to the "essential nexus" takings test of *Nollan v California Coastal Commission*.¹⁹⁰ Under *Nollan*:

"a permit condition that serves the *same* legitimate police-power purpose as a refusal to issue to permit should not be found to be a taking if the refusal to issue to permit would not constitute a taking".¹⁹¹

In addition, under *Nollan*, the government bears the burden of proving this nexus.¹⁹² Linkage fees satisfy this test "only if the municipality can show that development contributes to the housing problem¹⁹³ the linkage exaction is intended to remedy".¹⁹⁴

189 133 S Ct 2586 (2013).

190 *Nollan v California Coastal Commission* (n.172), 837; see *Commercial Builders of N Cal V Sacramento* 941 F 2d 872, 874 (9th Cir 1991).

191 *Nollan v California Coastal Commission* (n.172), 836 (emphasis added).

192 *Dolan v City of Tigard* (n.172), footnote 8 (citing *Nollan v California Coastal Commission* (n.172), 836).

193 Mandelker, *Land Use Law* (5th ed., 2003), Section 9.23. A "housing problem" is the typical interest which the counties of Hawai'i identify as a legitimate state interest in their ordinances. See, eg, Maui, Haw. Code, § 2.94.010 (2007) ("The council finds that there is a critical shortage of affordable housing in the county."); Hawai'i, Haw. Code, § 11-2(5)(2010) (setting forth the objective of "Requir[ing] large resort and industrial enterprises to address related affordable housing needs as a condition of rezoning approvals, based upon current economic and housing conditions"). In *Ass'n of Owners v Honolulu* 742 P 2d 974 (Haw Ct App 1987), the Intermediate Court of Appeals of Hawai'i acknowledged the legitimacy of this interest in the context of the challenge to a condominium declaration, stating that "affordable housing and public parking for downtown Honolulu were important to the welfare of the community". *Ibid.*, 985.

194 Mandelker, *Land Use Law* (n.193).

There is no disagreement in federal courts that Nollan's nexus test, or its close equivalent, applies to linkage fees. For example, in *Commercial Builders of Northern California v City of Sacramento*,¹⁹⁵ the Ninth Circuit held that an ordinance which imposed a linkage "fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs"¹⁹⁶ (in other words, a workforce affordable housing requirement) was constitutional under *Nollan v California Coastal Commission*.¹⁹⁷ Plaintiffs challenged the ordinance directly on *Nollan* grounds: lack of nexus or connection between the development and the affordable housing condition. First, the court addressed the holding of *Nollan*. *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.¹⁹⁸ The court then explained that "the [o]rderance was implemented only after a detailed study revealed a substantial connection between development and the problem to be address".¹⁹⁹

The Court related at some length what the City of Sacramento did to establish the "substantial connection between the development and the problem" of affordable housing.²⁰⁰ First, it commissioned a study of the need for low-income housing, the effect of non-residential development on the demand for such housing and the appropriateness of exacting fees in conjunction with such developments to pay for housing:

"[The study] estimat[ed] the percentage of new workers in the developments that would qualify as low-income workers and would require housing. [The study] also calculated fees for development ... Also as instructed, however, in the interest of erring on the side of conservatism in exacting the fees, it reduced [the] final calculation[] by about one-half. *Based upon this study*, the City of Sacramento enacted the Housing Trust Fund Ordinance [which] ... included the finding that *nonresidential* development is 'a major factor in attracting new employees to the region' and that the influx of new employees 'creates a need for *additional housing in the City*.' Pursuant to these findings, the Ordinance imposes a fee in connection with *the issuance of permits for nonresidential development of the type that will generate jobs*'".²⁰¹

Consequently, the court found "that the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster".²⁰²

195 See *Commercial Builders of N Cal V Sacramento* (n.190).

196 *Ibid.*, 873 (emphasis added).

197 *Ibid.*, 875.

198 *Ibid.*

199 *Ibid.*

200 *Ibid.*, 857.

201 *Ibid.*, 873.

202 *Ibid.*, 875.

B. *The state cases*

Nevertheless, there are a few state cases upholding inclusionary housing programmes.

In *Home Builders Ass'n of Northern California v City of Napa*,²⁰³ the city enacted an inclusionary zoning ordinance requiring 10 per cent of all newly constructed units be affordable, but again only after the city made significant findings and studied possible affordable housing solutions, much like the city of Sacramento.²⁰⁴ Moreover, the court specifically recognised that “The City’s inclusionary zoning ordinance imposes significant burdens on those who wish to develop their property”.²⁰⁵ Therefore, the court noted specifically that “the ordinance also provides significant benefits to those who comply with its terms... expedited processing, fee deferrals, loans or grants and density bonuses”.²⁰⁶ The municipality provided over 700 pages of documentation for its program and set its required set-aside at only 10 per cent.

Also, in June 2015, the California Supreme Court rendered its decision in *California Building Industry Ass'n v City of San Jose*, which upheld a city inclusionary zoning ordinance requiring that 15 per cent of the dwelling units in a new development be set-aside for affordable or workforce housing.²⁰⁷ Alternatively, the landowner could construct affordable units off-site equal to 20 per cent of the total projected market-rate units or pay an in-lieu fee.²⁰⁸ While the decision only applies to California, the case has been widely reported in national media.

The California Supreme Court specifically held that nexus and proportionality do not apply to mandatory affordable housing requirements.²⁰⁹ Instead, the court agreed with the lower court of appeals that since California’s planning statutes require each local government to formulate a comprehensive plan and to include an affordable housing element, the San Jose ordinance was not different from any zoning ordinance regulation like use, yard and set-back regulations.²¹⁰ Moreover, the court further held that the mandatory housing requirement was no more than the equivalent of a rent-controlled ordinance most of which have been approved where litigated, especially in California.²¹¹

The court’s demonstrated that ignorance of basic zoning law — indeed local land-use controls generally — is breathtaking. Zoning ordinances are regulatory: They prevent certain uses or limit the size of permitted structures through bulk

203 108 Cal Rptr 2d 60 (Ct App 2001).

204 *Ibid.*, 62.

205 *Ibid.*, 64.

206 *Ibid.*

207 *California Bldg Indus Assn v City of San Jose* 351 P 3d 974 (2015), *cert denied sub nom; California Bldg Indus Ass'n v City of San Jose*, Calif 136 S Ct 928 (2016).

208 *Ibid.*

209 *Ibid.*

210 *Ibid.*, 991.

211 *Ibid.*

requirements such as height, setback and yard maximums and minimums. By contrast, the mandatory workforce housing requirement in San Jose requires a landowner to affirmatively provide a public need or benefit — affordable housing — just as other land development conditions require water and sewer systems, roads, schools, parks, and other public facilities, provided the development drives a need for them. There is no such need for affordable housing driven by or caused by a residential development for market-rate housing.

Moreover, these decisions must be read in the context of California's Density Bonus Law which requires local governments to "reward developers that agree to build a certain percentage of low-income housing" with increased density bonuses above those permitted by applicable local regulations.²¹² While the Density Bonus Law can, by itself, be considered a voluntary inclusionary zoning programme, these density bonus mandates are then tacked on to those already provided by a local government's inclusionary zoning programme.²¹³ Therefore, developers building in jurisdictions that impose inclusionary zoning ordinances have a state guaranteed avenue to mitigate the burdens of providing affordable housing required by local governments, and nonetheless, developers who build in jurisdictions without inclusionary zoning programmes have incentives to build affordable housing.

California Code s.6915 requires local governments to provide applicants who "seek and agree to construct a housing development" containing at least 5 per cent of the units affordable to very low-income households or 10 per cent of the units affordable to lower-income households with at least a 20 per cent density bonus.²¹⁴ Developers may also set aside 10 per cent moderate-income affordable units but will only receive a 5 per cent density bonus.²¹⁵ In order to create better incentives for developers to produce affordable housing, the Density Bonus Law offers increased density bonuses on a sliding scale for developers who meet and surpass the minimum set-aside requirements.²¹⁶ Depending on the type of affordable unit set-aside, developers will receive a higher percent density bonus for every percent increase in affordable housing they offer above the minimum threshold. The developer will earn an increased density bonus of 2.5 per cent for every per cent of very low-income housing set-aside, 1.5 per cent for every per cent of lower-income housing set-aside and 1 per cent for every per cent of moderate-income housing set aside.²¹⁷ These density bonuses are capped at 35 per cent. Thus, a developer who sets aside 11 per cent of the development's units for very low-income units, 20 per cent lower-income units or 40 moderate-income units will earn the maximum density bonus.²¹⁸ Although the mandatory density bonus award under the state's

212 *Shea Homes LP v Cnty of Alameda* 2 Cal Rptr 3d 739 (Ct App 2003).

213 Barbara A Kautz, *A Public Agency Guide to California Density Bonus Law* (2005).

214 Cal Gov't Code § 65915(b)(1)(West 2008).

215 *Ibid.*

216 *Ibid.*, § 65915(f).

217 *Ibid.*, § 65915(f)(1)–(4).

218 *Ibid.*

Density Bonus Law is capped at 35 per cent, this maximum cannot be “construed to prohibit a [local government] from granting a density bonus greater” than that required by state law.²¹⁹

California Code s.65915 also requires local governments to provide developers who meet the aforementioned minimum set-aside requirements with incentives or concessions that “result in identifiable, financially sufficient, and actual cost reductions”.²²⁰ These concessions and incentives include, but are not limited to, (1) reductions in development standards, (2) modifications of zoning or building code requirements and (3) “approval of mixed use zoning in conjunction with the housing project” if it is compatible with the project and will reduce costs.²²¹ Local governments are required to provide developers with one concession or incentive for every 10 per cent of the total units dedicated to lower-income households, 5 per cent to very low-income households or 10 per cent to moderate-income households.²²² However, a developer may only receive up to three concessions or incentives.²²³

V. Conclusion

Federal remedies for housing discrimination have a long history in the United States. After the US Supreme Court required a showing of intentional discrimination as a prerequisite for a Constitutional challenge, the emphasis for challenging housing discrimination shifted to the federal FHA. In a series of federal appellate court decisions over the past 40 years, the courts established the theory of disparate impact: no need to show intent to discriminate but only that the complained of action has a discriminatory effect on a class (race, religion, gender, family status, disabilities) protected by the FHA. It is not particularly surprising, therefore, that the US Supreme Court in the recent Inclusive Communities case upheld the theory. However, the Court hedged its application with so many conditions and expressed so many concerns that were arguably more difficult for plaintiffs alleging discrimination to succeed, than it was before the Court weighed in. Such difficulty is apparent in the wave of federal district (trial court) cases approving government actions and dismissing discrimination claims over the past two years, led by the Texas federal district court’s decision in Inclusive Communities on remand from the US Supreme Court, to reverse its previous finding of discrimination after the “guidance” from the US Supreme Court.

The situation places increased importance on other ways of providing affordable housing. One such attempt by government is to require or mandate

219 *Ibid.*, § 65915(n).

220 *Ibid.*, § 65915(k).

221 *Ibid.*, § 65915(l).

222 *Ibid.*, § 65915(d)(2).

223 *Ibid.*

a percentage of any approved market-price housing development for affordable or workforce housing. While the goal is laudable, the process cannot withstand scrutiny under the US Constitution. Conditions on development must be connected (a nexus) proportionately to public needs generated by that development. Building market-rate housing does not drive a need for affordable housing, although certain types of commercial development requiring the employment of an economically disadvantaged workforce might. While attempts to mitigate the burden on land development caused by such affordable housing such as density bonuses on tax incentives may well ease the economic effect of such conditions on the land development community, it does not change the unconstitutional nature of the exaction. It simply makes it less likely that the exaction will be challenged in the court.