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## Recent US Supreme Court Decision Impacts Affordable Housing Industry

On June 25, the US Supreme Court upheld a decision that the Fair Housing Act (“Act”) includes disparate impact claims. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court extended the scope of claims under the Fair Housing Act to consider more than discriminatory intent. By allowing disparate impact claims to be made, a plaintiff can demonstrate a violation of the Act by establishing discriminatory effects of a policy rather than proving that a policy is motivated by discriminatory intent. Disparate impact claims typically invite statistical evidence into the courtroom to demonstrate objective, disproportionate impacts on a protected class.

*Texas Department of Housing and Community Affairs* arose out of a claim that the Department disproportionately allocated low-income housing tax credits to housing in predominantly African-American inner-city communities. The US District Court for the Northern District of Texas concluded that the plaintiff had shown disparate impact based upon two central statistics. First, from 1999 to 2008, 49.7 percent of proposed non-elderly units were approved in areas with a Caucasian population of less than 10 percent, but only 37.4 percent were approved in areas with a Caucasian population over 90 percent. In addition, the District Court found that approximately 92 percent of low-income tax credit units in Dallas were located in areas with a Caucasian population less than 50 percent. Combined, these statistics were sufficient to require proof by the Department that a less-discriminatory alternative could not achieve the same legitimate interests. Unconvinced by the Department’s argument, the District Court issued a remedial order in favor of the plaintiff.

The Supreme Court upheld the District Court’s decision that disparate impact claims are valid under the Act on multiple grounds including the statutory language, the purpose of the statute and Congress’s acceptance of disparate impact claims under the Act. In finding that disparate impact claims are consistent with the language of the statute, the Supreme Court relied on the phrase “otherwise make unavailable” in Section 804(a) of the Act to suggest that consequences of, in addition to the intent behind, actions should be considered. In addition, the Supreme Court discussed the societal goal of the Act to promote integration as the justification for including disparate impact claims. Finally, the Supreme Court stated that substantial precedent supported the conclusion that the Act includes claims of disparate impact, and Congressional amendments to the Act presuppose disparate impact claims.

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Still, the Supreme Court limited the scope of these claims due to their practical implications. Practical implications affect developers seeking to expand development efforts and housing authorities seeking to reduce their exposure to disparate impact claims. The availability of disparate impact claims give proponents of affordable housing another tool in their legal toolkit to challenge restrictions on development. As a result, public housing authorities and governmental offices will need to demonstrate that policies with discriminatory effects are made by prioritizing valid interests rather than perpetuating segregation.

Disparate impact claims may not be viable if the defendant considered a reasonable factor other than race in their decision-making process. Furthermore, there must be a “robust” causal relationship between the policy in question and the subsequent disparate impact. For example, a real estate appraiser who takes into account a neighborhood’s school, is unlikely susceptible to a disparate impact claim despite statistics demonstrating disproportionate home values because homeowners have a legitimate interest in valuing neighborhood schools. This limitation serves to balance the interest of decision makers while seeking to protect developers from unlawful zoning laws and other housing restrictions that function to exclude groups from certain neighborhoods without sufficient justification.

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