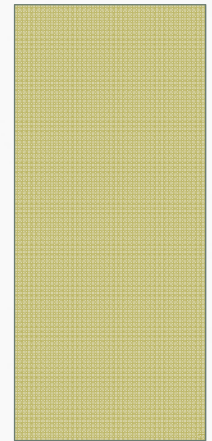
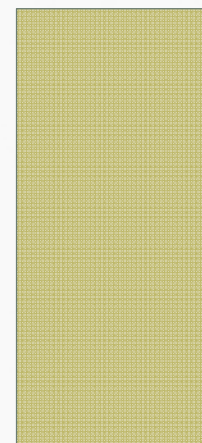


DISCRIMINATORY EFFECTS REGULATION



BACKGROUND



FAIR HOUSING PROVISION

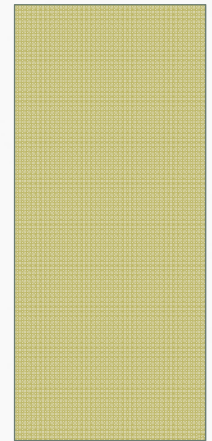
- The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."



FAIR HOUSING ACT

- Residential integration is a major goal
- After passage, courts were called upon to determine whether FHA's anti-discrimination prohibitions were limited to practices prompted by discriminatory intent
 - *United States v. City of Black, 508 F.2d 1179 (8th Cir. 1974)* ("to establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect....Effect, and not motivation is the touchstone.")
- Overwhelming and unanimous consensus that violations of the act may be proven through application of a disparate impact standard

DISCRIMINATORY EFFECT



DEFINITIONS

Disparate Treatment

- Refusing to sell, rent or lease housing to an interested tenant based on a protected class
- Applying different sale, rental or occupancy terms for different people based on protected class

Disparate Impact

- Neutral policy
- Discriminatory effect
- No sufficient business justification
- Less discriminatory alternative available

DISPARATE IMPACT/ DISCRIMINATORY EFFECTS

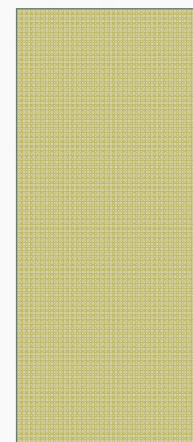
- Outwardly neutral practice that causes either:
 - A significantly adverse or *disproportionate impact* on members of a protected class; or
 - That *perpetuates segregation* and thereby prevents interracial association
- Usually requires proof by statistical evidence
- A practice that has a discriminatory effect is unlawful unless justified by “business necessity”
 - Contributes substantial value to landlord’s business
 - No less-discriminatory alternative available

DISPARATE IMPACT

- “HUD, which is statutorily charged with the authority and responsibility for interpreting and enforcing the Fair Housing Act and with the power to make rules implementing the Act, has long interpreted the Act to prohibit practices with an unjustified discriminatory effect, regardless of whether there was an intent to discriminate. The eleven federal courts of appeals that have ruled on this issue agree with this interpretation.”

- U.S. Dept. of Housing & Urban Dev., “Implementation of the Fair Housing Act’s Discriminatory Effects Standard: Final Rule,” 78 Fed. Reg. 11460 (Feb. 15, 2013)

HUD REGULATION



HUD REGULATION

- On February 15, 2013, HUD issued regulation entitled the "Implementation of the Fair Housing Act's Discriminatory Effects Standard." 78 Fed. Reg.11460 (February 15, 2013)
- Formalizes the long and consistent interpretation of the Fair Housing Act that housing policies and practices can violate the Act not only through proof of intentional discrimination, but also through a burden-shifting discriminatory effects analysis that does not require proof of discriminatory intent



HUD RULE, 24 CFR 100.500

- “A practice has a **discriminatory effect** where it actually or predictably results in a disparate impact on a group of persons...because of race, color, religion, sex, handicap, familial status, or national origin.”
- A legally sufficient justification exists where the challenged practice
 - Is necessary to achieve **substantial, legitimate and non-discriminatory interest** and
 - Those interests could not be served by another practice that has a **less discriminatory effect**

HUD REGULATION

- Not proposing new law or breaking any new legal ground
- Purpose of the rule is to guide HUD investigative staff in reviewing disparate impact claims that are filed as HUD administrative complaints
- Reinforces the courts' long-held interpretation of the availability of "discriminatory effects" liability under the FHA
- Brings clarity to application of the standard by endorsing a three-prong, burden-shifting standard that has been followed in many HUD administrative law decisions and most courts of appeals

UNDER HUD'S DISCRIMINATORY EFFECTS RULE:

- Plaintiff must prove that a challenged practice caused or predictably will cause a discriminatory effect
- The defendant has the burden of proving that the challenged practice is necessary to achieve one or more nondiscriminatory interests of the defendant
- Plaintiff may still prevail upon proving that the nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect

PRIMA FACIE CASE

- Established in one of two ways
 - By demonstrating that a facially neutral policy or practice of the defendant results in a discriminatory effect or disparate impact on a group of persons protected by the FHA
 - Where the policy or practice harms a community by perpetuating or exacerbating residential segregation
- HUD Regulation
 - “A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin”
 - “Any facially neutral act, e.g., laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria, may result in a discriminatory effect actionable under the Fair Housing Act and this rule”

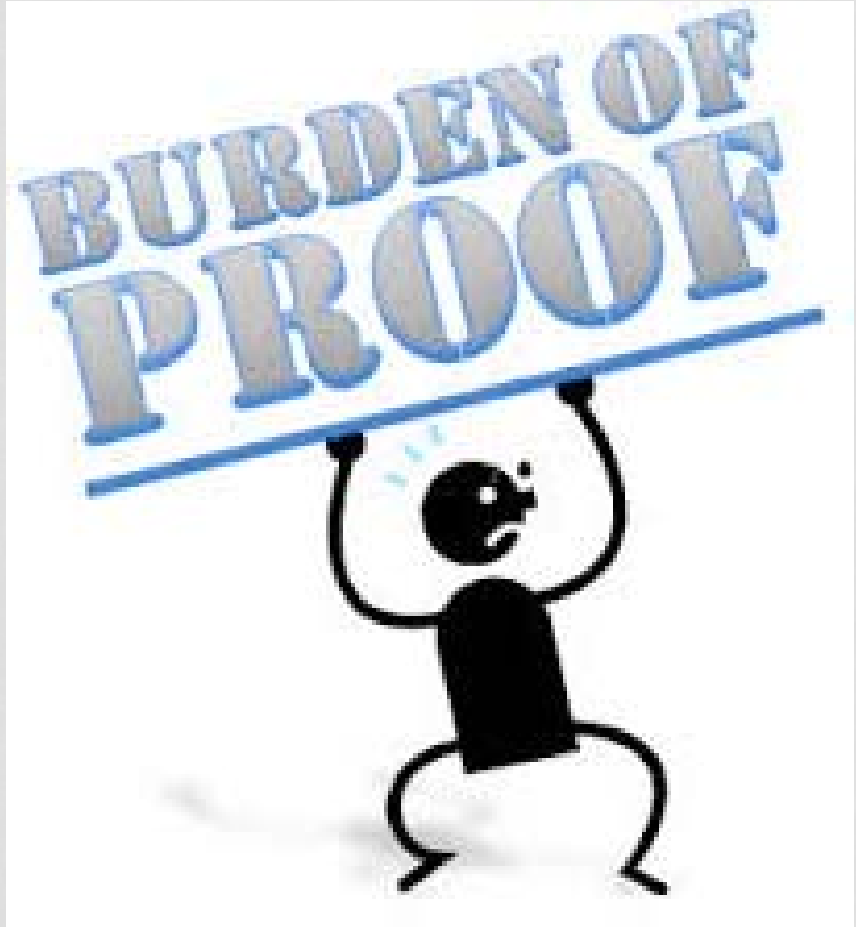
DEFENDANT'S BURDEN OF PROOF



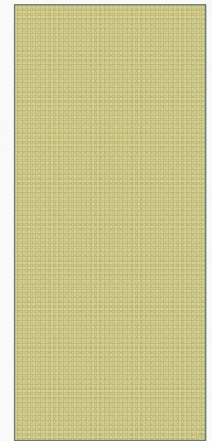
- Supported by a “legally sufficient justification”
- A “legally sufficient justification exists where the challenged practice: is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent...or defendant”

LESS DISCRIMINATORY ALTERNATIVE

- Burden for showing there is a less discriminatory alternative shifts back to the plaintiff



EXAMPLES



DISCRIMINATORY ZONING AND LAND USE

- One of the greatest impediments to residential integration has been discriminatory zoning and land use decisions by local governments
- Sen. Walter Mondale stated the FHA was intended to undo the effects of past governmental discrimination and specifically noted how the exclusionary attitude of many municipalities toward subsidized housing contributed to the segregated housing patterns that the FHA was designed to eliminate

*HUNTINGTON BRANCH NAACP V.
TOWN OF HUNTINGTON, N.Y.,
844 F.2D 926 (2D CIR. 1988)*

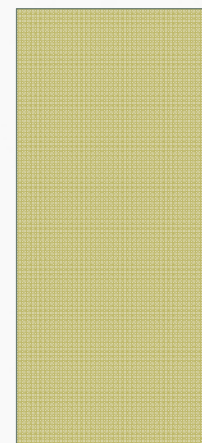
Town's zoning ordinance, which limited private construction of multifamily housing to a largely minority neighborhood, had the effect of perpetuating segregation "by restricting low-income housing needed by minorities to an area already 52% minority."



FAILURE TO REZONE

- Town refused to rezone to allow construction of a housing unit in which mostly minorities would reside
- Court held that an intent to discriminate is not needed to establish the plaintiff's prima facie case; Plaintiff must only show a disproportionate impact or a segregate effect by the defendant's actions
- Here, the failure to rezone had a substantial adverse impact on minorities because a higher percentage of minorities need subsidized rentals

ST. BERNARD PARISH



POST-HURRICANE KATRINA HOUSING DISCRIMINATION LAWSUIT

- Suit alleged the parish violating the Fair Housing Act by “engaging in a multi-year campaign to limit rental housing opportunities for African-Americans in the parish.”



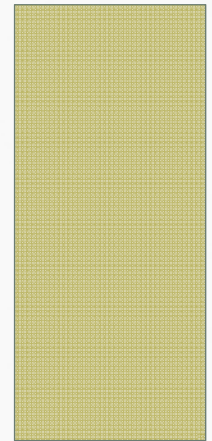
ZONING ORDINANCES

- Prior to Hurricane Katrina, the population of St. Bernard Parish was approximately 86% white and 10% African American, while the population of neighboring Orleans Parish was approximately 29% white and 67% African American
- In September 2006, St. Bernard Parish imposed rental permitting requirements on all persons seeking to rent single-family dwellings but exempted homeowners who rented to persons "related by blood"
- In January 2007, the Parish enacted a replacement permissive use requirement for single-family rentals in districts zoned for single-family use; limiting the density of rentals to two per 500 feet of frontage
- In December 2009, the Parish eliminated multi-family housing as a use allowed by right in four zones and entirely eliminated the "RO" zone which also allowed multi-family residential use

SETTLEMENT

- Pay \$275,000 to eight aggrieved persons identified by the United States and \$15,000 to the US as a civil penalty
- Establish a new Office of Fair Housing and hire a fair housing coordinator
- Spend \$25,000 each year in a marketing and advertising campaign to attract renters and developers of multi-family rental housing to the parish
- Establish a rental land grant program through which the parish will transfer lands in its possession, free of cost, to qualified persons or entities who are willing to create or rehabilitate housing for rental purposes

ROAD HOME CASE



POST-HURRICANE KATRINA HOUSING DISCRIMINATION LAWSUIT

- Suit alleged the formula used to allocate grants to homeowners had a discriminatory impact on thousands of African-American homeowners
- Road Home program data showed that African-Americans were more likely than whites to have their grants based upon the much lower pre-storm market value of their homes, rather than the estimated cost to repair damage



GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER V. HUD

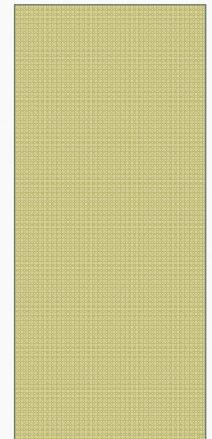


- U.S. District Judge Henry Kennedy agreed that there was a “strong inference” of discrimination and that the housing advocates were likely to prove their case
- Ordered the State of LA to stop using the pre-storm value to calculate any future Road Home grants

SETTLEMENT

- HUD and the State of LA changed the grant formula to provide full relief to more than 13,000 homeowners
- HUD and the State of LA agreed to amend the Road Home program to offer additional large supplemental rebuilding grants
- Provide homeowners additional time to rebuild their homes without fear of penalty or foreclosure

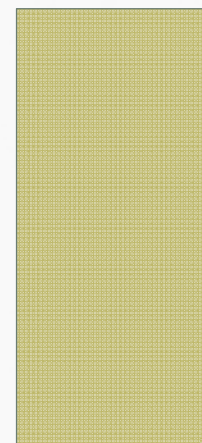
RESIDENCY POLICIES



PHA RESIDENCY PREFERENCE

- PHA in a town that is 90% white and is located next to a neighboring town that is 90% minority
- PHA in the first town adopts a residency preference for persons who live in the town
- Given that the neighboring town is 90% minority, because of the residency preference, whites who live in the town receive housing but African-Americans who live in the neighboring town would remain on the waiting list
- Disparate impact – denies access to public housing
- Perpetuates segregation – deny entry into town

OCCUPANCY STANDARD

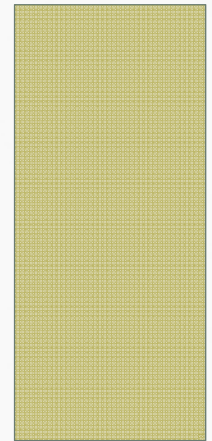


OCCUPANCY RESTRICTION



- Landlord adopts an occupancy restriction of two persons per bedroom (e.g. no more than two people allowed in a one-bedroom apt)
- Pursuant to this policy, seeks to evict a couple who has just had a baby from a one-bedroom apartment
- Significant disparate impact on families with children

FIRST-COME
FIRST-SERVED

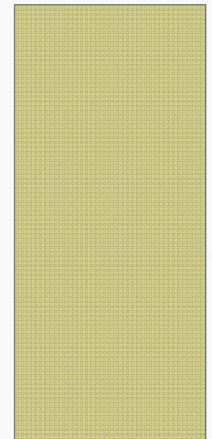


APPLICATION PROCESS

- PHA opens its waiting list for one day and has only one way to apply- waiting in line all day
- Disabled/elderly applicants may suffer a discriminatory effect if applications taken solely on a first-come, first-serve basis



MT. HOLLY CASE



MT. HOLLY GARDEN CITIZENS IN ACTION VS. MT. HOLLY, 658 F.3D 375 (3RD CIR. 2011)

- Certiorari granted by Supreme Court
- Imperils discriminatory effects theory with respect to Fair Housing Act
- Whether disparate impact claims can be brought under the FHA
- Township's plan to redevelop a residential area known as the Gardens, including the demolishing the neighborhood and building new, significantly more expensive housing units
- Residents alleged the plan violated the FHA by having a disparate impact on minorities

THIRD CIRCUIT COURT OF APPEALS

- Concluded the residents presented a prima facie case under the FHA because the municipality sought to redevelop a blighted housing development that was disproportionately occupied by low and moderate income minorities
- Found the redevelopment sought to replace the housing with new market rate housing which was unaffordable to the current residents
- Held that a prima facie case had been made despite the fact that there was no evidence of discriminatory intent and no segregative effect

WRIT OF CERTIORARI GRANTED



- On appeal before the U.S. Supreme Court, Mount Holly argues that the FHA was not intended to allow for disparate impact claims
- Further argues that allowing such suit to proceed would leave municipalities open to significant liability for otherwise lawful activity

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