

Who's In Charge Here?

How Fair Housing Laws Will Shape Rental Housing Policies after the Mass SJC's *Burbank Tenants Assn.* Decision and the US Supreme Court's Decision in *Inclusive Communities*

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BURBANK CASE

BACKGROUND OF BURBANK CASE

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Historical background and facts of case

- ❑ Burbank's operation as an affordable housing development beginning in 1970 subject to 40 year federal financing, use and rent restrictions, and project-based Section 8 subsidy – right to pre-pay after 20 years
- ❑ Congress' actions, beginning in the 1980s, to discourage prepayment of mortgages and regulate termination of mortgages and use agreements, and creation of the Enhanced Voucher Program in the late 1990s
- ❑ State statute passed to regulate termination of affordability agreements in 2010

BACKGROUND OF BURBANK CASE

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Historical background and facts of case

□ Burbank's actions

- Agreed not to prepay its mortgage and entered into a new Use Agreement and Section 8 project-based subsidy contracts ensuring affordability through the expiration of the full term of the mortgage on March 31, 2011
- Decided not to renew its project-based Section 8 Agreement when other agreements expired, complied with all federal and state termination requirements, and fully implemented the Enhanced Voucher Program, obtaining many more vouchers than needed by tenants at Burbank

THE BURBANK LAWSUIT

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- ❑ Brought by a tenant organization, individual tenants and potential tenants, and community organizations that represent the interests of low income Boston residents
- ❑ Claimed housing discrimination under the federal Fair Housing Act and state housing discrimination laws- - asserted a prohibited disparate impact on protected classes from Burbank's decision not to renew project-based Section 8 contract
- ❑ Claimed subsidy discrimination under state law (MGL c. 151B, §4(10))- - asserted refusal to renew project-based Section 8 contract was subsidy discrimination against tenants who otherwise would have been able to receive project-based subsidy at Burbank

BURBANK'S POSITION

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- ❑ Owners who participate in highly regulated federal finance and subsidy programs, and comply with all their requirements for terminating their participation in those programs, cannot as a matter of law be subject to claims of housing or subsidy discrimination
- ❑ Even if such claims are viable, Plaintiffs failed to assert an adequate claim of disparate impact under the new US Supreme Court decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. (“Inclusive Communities”), decided in June, 2015, while SJC appeal pending
- ❑ Choosing among subsidy programs equally offered to tenants does not violate the state subsidy discrimination statute

DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT (BRIEF SUMMARY)

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- ❑ Did not adopt a “per se bar to disparate impact liability” under the fair housing statutes where a property owner has complied with fair housing statutes and contractual obligations
- ❑ Applied a rigorous pleading standard to disparate impact complaints alleging housing discrimination as laid out in Inclusive Communities, requiring Plaintiffs to allege facts showing that Defendants’ policies directly caused any disparate impact on protected classes. Plaintiffs’ complaint failed to show that Burbank’s decision caused such impact
- ❑ Rejected the subsidy discrimination claim under state law

COURT'S DECISION ON THE STATE LAW SUBSIDY DISCRIMINATION CLAIM

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- ❑ Statute (MGL c. 151B, §4(10)) makes it unlawful to discriminate against an individual who is a recipient of subsidy because the individual is such a recipient or because of any requirement of such the subsidy program
- ❑ Plaintiffs asserted that, for existing tenants, Enhanced Vouchers were less beneficial than project-based subsidy and that, for potential future tenants, the termination of project-based subsidy lessened the chances that they could rent at Burbank

COURT'S DECISION ON THE STATE LAW SUBSIDY DISCRIMINATION CLAIM

CONTINUED

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- ❑ SJC ruling – although the statute might allow a claim for refusal to participate in a voluntary subsidy program, no such claim was “adequately pleaded” here.
 - For existing tenants, all of whom received Enhanced Vouchers, (i) the Owner’s decision had not created a prohibited “barrier” to tenancy, and (ii) the statute requires that owners not discriminate against subsidy recipients generally, not that they provide the best—or any particular -- form of rental subsidy.
 - For potential future tenants had a claim, no discrimination based on a technical reading of the statute, i.e., the statute bars discrimination against a tenant “holding” a subsidy. Since project-based subsidy attaches to units, not tenants, future tenants were not “holders” of project-based subsidy covered by the statute.

DISPARATE IMPACT

DISPARATE IMPACT DISCRIMINATION:

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Background

- ❑ *Burbank* applied developing concept of “**disparate impact**” (DI) liability.
 - DI Definition: a policy or practice which is neutral on its face but has a statistically significant negative effect on a group of persons protected by the non-discrimination law
 - No need to show **intent** for disparate impact claims
 - Example: 2-person/bdrm occupancy standard has harsher impact on families with minor children
 - **Vs. Disparate Treatment: Intentional** discrimination against protected class (“NO _____ NEED APPLY”).
 - **Problem**: Almost any policy can have a disparate impact on someone, so DI can threaten “routine” practices, otherwise nondiscriminatory business decisions

INCLUSIVE COMMUNITIES

INCLUSIVE COMMUNITIES PROJECT

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Background:

- ❑ **Inclusive Communities Project** (ICP), nonprofit developer of affordable housing, claimed that Texas agency's LIHTC policies had disparate impact on minority housing opportunities.
 - Agency followed IRS rules, tended to allocate LIHTCs to low-income neighborhoods with high minority concentrations
 - **ICP claim:** Agency's policies had disparate impact on minorities by frustrating goal of developing affordable housing in "high-opportunity" areas (higher income, better schools, etc.)
 - Texas district court: Found that agency's policies violated FHAct
- ❑ Federal courts broadly accepted DI liability under FHAct

SCOTUS: TEX. DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT, INC.

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HIGHLIGHTS OF KENNEDY'S MAJORITY OPINION (5-4)

- ❑ Upholds the existence of disparate impact under the Fair Housing Act
- ❑ But recognizes that broad application of DI can have **unintended and adverse consequences** that actually result in opposite of what Congress intended and **frustrate legitimate decisions** by government entities and housing providers.
 - Recommends “safeguards” to protect “against abusive disparate impact claims”

SCOTUS: TEX. DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT, INC.

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HIGHLIGHTS OF KENNEDY'S MAJORITY OPINION

Safeguards:

- ❑ **Stresses “Robust Causality Requirement”**
 - Mere statistical disparity is not sufficient to support disparate impact
 - As part of its prima facie case, plaintiff must demonstrate that the challenged practice is the cause of the disparate impact
 - Suggests that if multiple causes for disparity, no negative disparate impact
 - One time decision to build/not build may not be a “policy” at all

SCOTUS: TEX. DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT, INC.

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HIGHLIGHTS OF KENNEDY'S MAJORITY OPINION

Safeguards:

Legitimate Policy as Defense

- Business must be given “leeway to state and explain the **valid interest** served by their policies.”
- Recommends that housing providers in adopting a policy, make a statement explaining legitimate basis for their policy.

DI found where challenged practice shows an “arbitrary, artificial and unnecessary barrier” to fair housing

APPLICATION OF DISPARATE IMPACT ANALYSIS IN BURBANK DECISION

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Important preliminary decisions:

- ❑ State housing discrimination statutes, like Title VII, provide disparate impact claims
- ❑ Most significantly, the SJC declined to adopt a “per se” rule precluding disparate impact liability under fair housing statutes where a property owner has acted in accord with statute, regulation and contract absent evidence of intentional discrimination

APPLICATION OF DISPARATE IMPACT ANALYSIS IN BURBANK DECISION *CONTINUED*

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Important preliminary decisions:

□ Reasons:

- No explicit exemption under Fair Housing Laws based on compliance with federal programs and contracts
- Under Fair Housing Laws, violating statutes or regulations is not a prerequisite to disparate impact liability and even voluntary actions could have disparate impact on protected classes
- Housing discrimination laws require a review of housing decisions to determine what, if any, discriminatory negative impacts those actions “might have caused” to protected classes

APPLICATION OF DISPARATE IMPACT ANALYSIS IN BURBANK DECISION *CONTINUED*

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Disparate Impact Analysis

- ❑ Plaintiffs failed to meet the pleading requirements of Inclusive Communities
 - As a result of the Owner’s transition from project-based subsidy to Enhanced Vouchers, Plaintiffs could only point to “speculative prospective harm” for present tenants
 - For prospective future tenants, the claim that they might some day be able to live at Burbank with project-based subsidy was also too speculative to state a claim

- ❑ Most importantly, Plaintiffs did not meet the “robust causality” requirement because the Burbank Owners obtained more subsidy under the Enhanced Voucher program than had previously existed, showing that Plaintiffs did not and could not show negative impact on protected classes

APPLICATION OF DISPARATE IMPACT ANALYSIS IN BURBANK DECISION *CONTINUED*

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Disparate Impact Analysis

- ❑ Examples provided of where owners might be vulnerable to disparate impact claims:
 - If owners do something to “exacerbate” the differences between project-based and tenant-based subsidies
 - If owners take actions that alone or directly would exclude protected classes from certain neighborhoods
- ❑ Conclusion: After rejecting compliance with the law as a per se exemption from discrimination claims, the SJC, at least in the Burbank situation, essentially validated compliance with the law as a “safe harbor” in fact for owners
- ❑ A final note concerning whether owners must participate in some form of Section 8 subsidy program if requested by tenants to do so (and the voucher offered would cover the rent charged)
 - Not all courts agree with the SJC that refusal to participate in voluntary subsidy programs might subject owners to a claim of housing discrimination
 - It remains an open and unresolved question whether owners may, under Fair Housing Laws, decide not to accept any subsidy at all, including regular housing choice vouchers, if no law explicitly requires subsidy participation

FUTURE OF DISPARATE IMPACT: HUD'S DISPARATE IMPACT REGULATION

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February 2013: HUD adopts regulations defining DI claims under FHAct

- Plaintiff makes **prima facie** case for disparate impact
- Defendant rebuts with “**legally sufficient justification**”
- Plaintiff rebuts with evidence of “**less discriminatory alternative**”

April 2016: HUD issues crime-screening guidance

- Applying HUD' DI regs, OGC claims use of criminal history to screen tenants may have disparate impact on minorities
- Caveats:**
 - Do not use **arrest records** to screen tenants (convictions only)
 - No “**one-strike rules**”
 - Consider “**nature, severity, and recency**” of conviction

HEARTLAND OF DISPARATE IMPACT POST ICP

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Dismissed	Fair Housing Claim	Pending
ICP v. TDHCA	LIHTC Allocations	
Burbank Ten. Assn. v. Kargman	Section 8 Renewal	
<ul style="list-style-type: none"> • City of LA v. Wells Fargo • Merritt v. Countrywide Fin. Corp. • City of Miami v. Bank of America 	Predatory Lending	
Ellis v. City of Minneapolis	Code Enforcement	
	Zoning Practices	Mhany Mgmt. v. Nassau County
	Zoning Practices	Avenue 6E Invest. LLC v. City of Yuma
	Zoning Practices	Long Island Housing Serv. v. Nassau Cnty. Indus. Devel.
	Residency Preference	Winfield v. NYC

CONCLUSIONS:

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Who's in charge here?

- ❑ Fair housing laws have shaped property management issues for many years
- ❑ Right now, courts seem to be reluctant to co-opt owners' fundamental business decisions, at least when owners carefully comply with program requirements
- ❑ But at some "inflection points" – Who is admitted? What subsidies are used? – potential disparate impacts must be considered
- ❑ Keep a careful eye on future actions by HUD and courts – including changes from new administration and SCOTUS appointees

QUESTIONS?

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Thank You!

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