

# Memorandum



CITY OF DALLAS

DATE July 31, 2015

TO Housing Committee Members: Scott Griggs, Chair, Carolyn King Arnold, Vice-Chair, Monica R. Alonzo, Tiffinni A. Young, Mark Clayton, and Casey Thomas, II

SUBJECT Recent Developments in Fair Housing

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On Monday, August 3, 2015, you will be briefed on Recent Developments in Fair Housing. A copy of the briefing is attached.

Please let me know if you have any questions.

A handwritten signature in black ink, appearing to read 'Warren Ernst'.

WARREN ERNST  
City Attorney

- c: The Honorable Mayor and Members of the City Council  
A. C. Gonzalez, City Manager  
Rosa A. Rios, City Secretary  
Craig Kinton, City Auditor  
Daniel F. Solis, Administrative Judge  
Ryan S. Evans, First Assistant City Manager  
Eric D. Campbell, Assistant City Manager  
Jill A. Jordan, P. E., Assistant City Manager  
Mark McDaniel, Assistant City Manager  
Joey Zapata, Assistant City Manager  
Jeanne Chipperfield, Chief Financial Officer  
Sana Syed, Public Information Officer  
Elsa Cantu, Assistant to the City Manager – Mayor and Council

# Recent Developments in Fair Housing

Housing Committee

August 3, 2015

Robin Bentley, Senior Assistant City Attorney  
Beverly Davis, Assistant Director, Fair Housing &  
Human Rights

# Purpose of Briefing

- Purpose is to summarize two recent major developments in fair housing law:
  - Supreme Court decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*
  - New HUD final rule *Affirmatively Furthering Fair Housing*

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

# Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act)

- Prohibits discrimination in the sale, rental, advertising, brokerage, or financing of housing based on race, color, religion, sex, national origin, disability, or familial status.
- **Question examined by the Supreme Court:** Can a violation of the Fair Housing Act be shown by evidence that a policy has a **disparate impact** (a statistically disproportionate adverse impact against a protected group, even without the intent to discriminate)

# Parties

- **ICP** – Dallas nonprofit fair housing advocate
- **TDHCA** – state agency charged with administration of the IRS's low income housing tax credit (LIHTC) program
  - **LIHTC**: developers are awarded dollar-for-dollar credits against federal income taxes, which can be sold to finance low income housing.

# Case History

- ICP sued TDHCA in 2008 arguing that the agency's allocation of LIHTCs in Dallas resulted in a disparate impact on African-American residents under the Fair Housing Act.
  - ICP alleged that TDHCA was disproportionately approving LIHTC projects in minority concentrated neighborhoods in Dallas and disproportionately disapproving them in predominantly Caucasian neighborhoods.
  - Per ICP, this created a concentration of low income units in minority areas, a lack of units in other areas, and maintained and perpetuated segregated housing patterns.

# Case History

- 2012 – District Court rules in ICP’s favor. TDHCA appealed to 5<sup>th</sup> Circuit.
  - All 11 circuit courts, including 5<sup>th</sup>, had already held that disparate impact claims could be brought under the FHA. 5<sup>th</sup> Circuit had not, however, adopted a burden of proof for disparate impact claims. The district court had used the 2<sup>nd</sup> Circuit’s disparate impact standards.
- 2013 – While the ICP case was pending, HUD issued regulations regarding burdens of proof in disparate impact housing discrimination cases.

# 2013 HUD Regulation

24 C.F.R. § 100.500(c)

- A practice has a discriminatory effect if it actually **or predictably** will result in a disparate impact, or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.
- The challenged practice may still be lawful if it (i) is necessary to achieve a substantial, legitimate, nondiscriminatory interest, and (ii) those interests cannot be served by another practice that has a less discriminatory effect.

# 2013 HUD Regulation

24 C.F.R. § 100.500(c)

- BURDENS OF PROOF:
  - The **plaintiff** has the burden of proving that a challenged practice caused or predictably will cause a **discriminatory effect**.
  - If plaintiff is successful, then the **defendant** has the burden of proving that the challenged practice is necessary to achieve one or more **substantial, legitimate, nondiscriminatory interests** of the defendant.
  - If the defendant is successful, the **plaintiff** may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a **less discriminatory effect**.
    - 2<sup>nd</sup> Circuit Court rule pushed this burden to the defendant.

# Case History

- 5<sup>th</sup> Circuit held that disparate impact can be the basis for a claim under the FHA, then adopted the HUD burden of proof regulations and remanded back to district court to apply the new standards.
- TDHCA appealed to Supreme Court.

# Supreme Court Opinion

- June 25, 2015 - the Supreme Court ruled that disparate impact claims are cognizable under the Fair Housing Act, and upheld the 2013 HUD regulations regarding burdens of proof in disparate impact cases.

# Supreme Court Opinion

- However, the Court added guidelines to the HUD burden of proof standards:
  - Statistics without a policy isn't enough.
    - “A claim that relies on statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.”
  - A policy without a connection isn't enough.
    - “If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability.”
    - “A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.”
  - Policies are not contrary to the disparate-impact requirement unless they are “artificial, arbitrary, and unnecessary barriers.”

# Supreme Court Opinion

- Finally, the opinion contained advice for future courts in dealing with disparate impact claims:
  - When courts find disparate impact liability, their remedial orders should concentrate on eliminating the offending practice.
  - Courts should avoid interpreting disparate impact liability to be so broad as to inject racial considerations into every housing decision.
  - If fear of disparate impact litigation causes developers to stop investing in low income housing, then the FHA would have undermined its own purpose.
  - Governments must be able to achieve legitimate objectives.

# Practical Application

- When considering a policy or project, staff must ask two questions:
  - Will this policy/project result in a disparate impact against a protected class?
  - Will this policy/project create, increase, reinforce, or perpetuate segregated housing patterns?
- If the answer to either is yes, staff must articulate and document what “substantial, legitimate, nondiscriminatory interests” are being served by the policy or project. Staff should also proactively investigate less-discriminatory alternatives to accomplish the same interest, and document those investigations.
  - It is still unclear how the “artificial, arbitrary, and unnecessary” test will play out in future court cases.

Questions?

# **Affirmatively Furthering Fair Housing Rule**

# Affirmatively Further Fair Housing

- Fair Housing Act requires HUD (and entities receiving HUD funds) to affirmatively further fair housing policy.
- CDBG regulations require cities to certify in writing that they are affirmatively furthering fair housing.

# Old Definition of AFFH

- Affirmatively furthering fair housing (AFFH) defined in CDBG regulations as:
  - Preparing an Analysis of Impediments to Fair Housing Choice (AI).
  - Taking appropriate actions to overcome the effects of impediments.
  - Keeping records reflecting the analysis and showing actions taken.
- 2010 report by U.S. Government Accountability Office found that the old process lacked sufficient guidance, clarity, and oversight by HUD.

# AFFH Rule

- In response to GAO report, HUD developed the new AFFH rule.
- Published in the federal register on July 16, 2015, and takes effect 30 days later (August 17). Will be phased in over time.
- Outlines a new planning process to assist HUD recipients in their obligation to affirmatively further fair housing

# AFFH Definition

“Affirmatively furthering fair housing means taking **meaningful actions**, in addition to combating discrimination, that **overcome patterns of segregation** and **foster inclusive communities** free from barriers that restrict access to opportunity based on protected characteristics.

Specifically, affirmatively furthering fair housing means taking **meaningful actions** that, taken together, address significant **disparities** in housing needs and in access to opportunity, replacing **segregated living patterns** with truly integrated and balanced living patterns, transforming **racially and ethnically concentrated areas of poverty** into areas of opportunity, and fostering and maintaining **compliance with civil rights and fair housing laws**.

The duty to affirmatively further fair housing extends to **all** of a program participant’s activities and programs relating to housing and urban development.”

# AFFH Definition

- Confirms that obligation to affirmatively further fair housing does not just apply to federally funded programs/activities, but instead applies to ALL of a city's programs/activities related to housing and urban development.
  - Bond funds, TIF funds, tax abatements, other economic development incentives
- Does not just apply to housing units, but also to non-housing elements (zoning, transportation, employment, education, community facilities, etc.)

# Assessment of Fair Housing (AFH)

- The new rule replaces the AI with an Assessment of Fair Housing (AFH). Under the new rule HUD provides nationally uniform data related to fair housing issues and requires use of a HUD-developed Assessment Tool.
- Unlike with the Analysis of Impediments, HUD will review cities' assessments, prioritization, and goal setting.

# Assessment of Fair Housing (AFH)

- City must use HUD data, local data, community participation and Assessment Tool to look at its programs, jurisdiction, and region, and identify goals to affirmatively further fair housing and to inform fair housing strategies.
- Details of AFH analysis are included in Appendix One.

# Assessment of Fair Housing (AFH)

- AFH is due 270 calendar days prior to program year for which a new consolidated plan is due. Our current consolidated plan runs through the end of FY 17-18. October 1, 2018 less 270 days = January 4, 2018 as our AFH due date. Revision due at least every five years.
- New rule encourages collaboration by HUD grantees, and permits submission of a regional AFH by a collective of HUD recipients.

# Status of Current AI

- Our VCA required that the City submit a new AI to HUD by May 1, 2015.
- The AI was submitted by that deadline.
- Comments have been received from several agencies.
- Staff is working through those comments and will revise the AI and resubmit to HUD once changes have been made.

Questions?

# Appendix One

# Assessment of Fair Housing (AFH)

- **STEP ONE: Assessment:**
  - City will identify (1) integration and segregation patterns based on race, color, religion, sex, familial status, national origin, and disability within the jurisdiction and region, (2) racially or ethnically concentrated areas of poverty within the jurisdiction and region, (3) significant disparities in access to opportunity for any protected class within the jurisdiction and region, and (4) disproportionate housing needs for any protected class within the jurisdiction and region.
  - Using the Assessment Tool provided by HUD, the AFH will identify the contributing factors for each of the four situations described above.

# Assessment of Fair Housing (AFH)

- **STEP TWO: Priorities and Goals:**
  - Once contributing factors identified, City must prioritize them and justify such prioritization. Highest priority is given to those factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance.
  - Next, City must identify goals to overcome the effects of the prioritized contributing factors, including metrics and milestones to measure fair housing results.

# Assessment of Fair Housing (AFH)

- **STEP THREE: Strategies and Actions:**
  - Strategies and actions to implement the goals and priorities identified in the AFH should be included in the consolidated plan and action plan.
  - Strategies and actions must affirmatively further fair housing and may include, but are not limited to, enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, including HUD-assisted housing.