

## REAL ESTATE

# Does The Fair Housing Act Cover Disparate Impact Discrimination?

By Andrew Lieb

In the coming months we will learn whether The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, protects against disparate impact discrimination in housing when the US Supreme Court issues its decision within the seminal case of *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*

The *Texas* case is not just important for discrimination attorneys, but this case will impact the practice of all attorneys representing parties within residential real estate transactions (both sales and leases), lenders and brokers as well as land use counsel and municipal attorneys. Specifically, if disparate impact discrimination is actionable, attorneys will need to determine if an act that is facially neutral (i.e., no discriminatory purpose) nonetheless has a statistically significant adverse impact on a protected class (i.e., discriminatory effect), but if disparate impact is not actionable attorneys will nonetheless have to determine whether a relevant

local law provides such protection (i.e., The Fair Housing Act is merely the floor of protection for housing discrimination) before abstaining from such an analysis.

The Fair Housing Act protects against acts of discrimination directed at a member of one of seven protected classes, to wit: race, color, religion, sex, handicap, familial status and national origin (notating that state and local laws add more protected classes). While The Fair Housing Act expressly makes it illegal to intentionally treat someone differently based on such individual's existence within one of its seven protected classes, the Act does not expressly address secondary effects of discrimination occurring by way of seemingly neutral conduct. This later type of discrimination is known as disparate impact discrimination and it is a protected form of discrimination within many local housing discrimination statutes, such as New York City's Human Rights



Andrew Lieb

Law, but not in others, such as Suffolk County's Human Rights Law.

The US Supreme Court is set to determine if disparate impact discrimination is protected as the law of the land having heard oral arguments in the *Texas* case on January 21, 2015. The factual question before the court is

whether a Texas state agency distributed housing credits for rentals to lower-income African-American families in a racially segregated manner and thereby kept these African-American families from living within white communities.

Both the district court and the U.S. Court of Appeals for the Fifth Circuit found a violation of The Fair Housing Act due to the existence of disparate impact discrimination. Before the court is an issue of statutory interpretation. Should the court rule that disparate impact discrimination is not part of The Fair Housing Act, it will be taking a strict constructionist view of the statute and likely focusing on the words "because of" that are set

forth in the statute when talking about the basis for prohibited conduct. Should the court rule that disparate impact is a form of discrimination, the court will be taking a more activist role in that it will be looking to the statutory purpose of The Fair Housing Act, which was first drafted to effectuate "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States" and that of The Fair Housing Act's sister-titles, Title VII and Title IX, addressing equal employment opportunities and equal educational opportunities respectively, where disparate impact discrimination is actionable.

Stay tuned.

*Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as a Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.*