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SCOTUS Fair Housing Disparate Impact Decision
IMPACTS AFFORDABLE HOUSING

BY JAIMIE ROSS
PRESIDENT

In a wave of momentous decisions, the Supreme Court, in Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., No. 13-1371 (June 25, 2015), held that policies and practices that have the effect of discrimination, even if not intentional, violate the civil right to housing opportunity guaranteed by the Federal Fair Housing Act. This is commonly known as the "disparate impact" theory of liability.

The effectiveness of the Fair Housing Act lies in its ability to prohibit all forms of discrimination—policies and practices that either intentionally discriminate or that have the effect of discriminating. Among other discriminatory acts, the Fair Housing Act makes it unlawful to "refuse to sell or rent...or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, [national origin, or handicap]."

Fair Housing Act violations are most commonly thought of in the context of refusing to rent or to sell property to a person or a family based on the color of their skin. Too often overlooked is that the most egregious cause of segregation in the housing market is the result of land use planning and permitting laws. Local governments in Florida allow large swaths of land to be developed through master plans that create mini towns or villages, some so large they have their own community schools and all the infrastructure associated with a municipality, but no requirement that affordable housing be part of the mix. This exclusionary land use, practiced regularly throughout Florida, can easily be shown to have a disparate impact on protected classes....it makes unavailable the high opportunity dwelling units (and often the better schools) that come with the new development.

On the heels of the Supreme Court decision, HUD adopted its final rule on affirmatively furthering fair housing. It is a compelling time for Florida jurisdictions to adopt inclusionary housing policies to promote housing choice in areas of opportunity. Inclusionary housing policies come in many forms, from repealing minimum square foot regulations, to allowing accessory dwelling units in all residentially zoned areas, to mandating that affordable homes be included when land is rezoned for redevelopment or new market rate housing.

In regard to the impact of the Supreme Court decision in terms of tax credit allocations to properties, the Court made clear that government entities and private developers cannot be liable under a disparate-impact theory if they can show that a policy is necessary to achieve a valid goal. The Fair Housing Act "does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities".

There is no suggestion, even remotely, that state housing finance agencies shouldn't invest in low income neighborhoods if that is a legitimate priority. The Court stated that the "FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation".

Advocates for using tax credits to help preserve project based properties in Florida have no reason to fear that the Court's upholding of the disparate impact doctrine would prevent or inhibit the FHFC from allocating tax credits for preservation. Using tax credits for preservation is more cost effective than new construction, which means more people can be served. Florida's federally subsidized housing is a precious housing resource; without it, Florida's most vulnerable populations find themselves without a place to call home. I suggest that is a powerfully important priority. HNN