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# Recent Case Law, Disparate Impact, and Restrictive Zoning

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# RECENT CASE LAW, DISPARATE IMPACT, AND RESTRICTIVE ZONING

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**ABSTRACT**

The Fair Housing Act ("FHA")[1] prohibits housing discrimination, including the refusal to sell or rent housing based on race, color, religion, sex, familial status or national origin,[2] and any policy or conduct that "otherwise make[s] unavailable or den[ies], a dwelling [based on these impermissible factors]."[3] In 2015, the Supreme Court interpreted the "otherwise make unavailable" language of the Act to mean that the FHA includes not only claims for intentional discrimination, but also claims for disparate impact.[4] Under the disparate impact doctrine, a defendant may be liable for facially neutral rules or policies that disproportionately favor one racial group over another.[5]

Zoning law often disfavors Blacks and Hispanics by limiting housing supply and increasing housing costs.[6] Zoning codes generally

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[1] 42 U.S.C. §§ 3601-3619.

[2] 42 U.S.C. § 3604(a). The FHA also prohibits discrimination based on gender, religion, or familial status. *Id.*

[3] 42 U.S.C. § 3604(a).

[4] *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 534-35 (2015) (explaining why "otherwise make available" language supports disparate impact claims).

[5] *Id.* at 531-33, 540-42 (explaining disparate impact concept).

[6] *See* A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L.J. 1535, 1561 (2021) (race-neutral zoning laws that "make it harder to build affordable housing . . . disproportionately affect[] Blacks and Latinos"); Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law and Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 CAL. W. L. REV. 185, 197

limit the number of houses or apartments that can be built on a parcel of land.[7] By restraining the overall supply of residences, these "minimum lot size"[8] regulations make housing more costly.[9] Zoning codes also make housing expensive in a variety of other ways; for example, zoning codes typically separate houses from apartments, thus limiting the supply of apartments.[10] Because studies show that Blacks and Hispanics, on average, have lower incomes than Whites,[11] minimum lot size requirements also tend to exclude Blacks and

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(1997) (historically, zoning regulations "effectively kept lower and working-class Blacks and Latinas/os from White neighborhoods via minimum lot size requirements, minimum home cost requirements, and segregation or outright prohibition of multifamily rental units"); Maya Brennan et al., *How Zoning Shapes Our Lives*, HOUSING MATTERS (June 12, 2019), https://housingmatters.urban.org/articles/how-zoning-shapes-our-lives#:~:text=Restrictive%20zoning%20limits%20the%20housing%20supply%20and%20raises,and%20more%20than%204%20percent%20to%20home%20prices (explaining the relationship between zoning and housing costs); Chasity Henry, *Knot Today: A Look at Hair Discrimination in the Workplace and at Schools*, 46 T. MARSHALL L. REV. 56, 56 (2021) (Blacks tend to have lower incomes than Whites); John Mitchell, *Suspending Prisoners' Social Security Benefits: Yet Another Blow to Financially Vulnerable African American and Hispanic Families*, 20 SEATTLE J. FOR SOC. JUST. 149, 149 (2021) (showing similar results as to Hispanic households).

[7] *See* Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 2 (2016) ("A dominant feature of American metropolitan areas is large lot zoning — the policy through which only house lots of a minimum size are permitted"). *See also id.* at 6 (citing examples from various metropolitan areas).

[8] *Id.* at 2 (using term in title).

[9] *Id.* at 9-10.

[10] *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (upholding such separation because apartments near houses "come very near to being nuisances"); Robert L. Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581, 582 (2003) (after the early twentieth century, "many city planners treated apartments . . . [as] noxious"). I note that anti-apartment laws and minimum lot size laws are not the only regulations that raise housing costs. *See, e.g.*, Michael Lewyn & Shane Cralle, *Planners Gone Wild: The Overregulation of Parking*, 33 WM. MITCHELL L. REV. 613, 618 (2006-2007) (government requires landlords to provide tenants with parking; these regulations increase housing costs for nondrivers by forcing landlords to bundle the cost of parking together with rent).

[11] *See* Henry, *supra* note 6, at 29 (stating that median household income for white households is over $76,000, while median household income for black households is just under $46,000); Mitchell, *supra* note 6, at 109 (median income for Hispanic households just over $50,000).

Hispanics from the municipalities and neighborhoods with the strictest limits.[12]

Because zoning raises housing costs, one might think that the disparate impact doctrine can easily be used to limit zoning. The purpose of this article is to examine recent case law to determine whether this is accurate. Part I of the Article describes the background of disparate impact law under the FHA, and Part II focuses on the most recent disparate impact case law in cases involving the types of zoning restrictions discussed above.

[12] *See* Aoki, *supra* note 6, at 197 (mentioning minimum lot size requirements as one example of a race-neutral zoning law with discriminatory results).

## I. EARLY DISPARATE IMPACT CASE LAW

The FHA was enacted in 1968.[13] Not long after the FHA's enactment, lower courts began to address the disparate impact concept. For example, in the 1974 case, *United States v. City of Black Jack, Missouri*,[14] the federal government brought an FHA claim challenging a zoning code that prohibited the construction of any new multifamily dwellings[15] in a "virtually all-white" suburb[16] of St. Louis.[17] The Eighth Circuit held that, to establish a prima facie case under the FHA, the federal government was not required to show that the suburb intended to discriminate.[18] Instead, the government need only show "that [the suburbs' actions] ha[ve] a discriminatory effect."[19] The court endorsed the disparate impact theory because "clever men may easily conceal their motivations, but more importantly, because . . . the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[20] Once a prima facie case of discrimination was established, the suburb could prevail only if it demonstrated that its zoning was "necessary to promote a compelling governmental interest."[21] The Eighth Circuit found that no such compelling state interest existed and, accordingly, rejected the suburb's zoning.[22]

Other circuit court decisions, even those upholding disparate impact claims, allowed municipalities somewhat more discretion. For example,[23] in the 1988 case, *Huntington Branch, N.A.A.C.P. v. Town*

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[13] *See* United States v. West Peachtree Tenth Corp., 437 F.2d 221, 222 (5th Cir. 1971) (referring to "Fair Housing Act of 1968").
[14] 508 F.2d 1179 (8th Cir. 1974).
[15] *Id.* at 1181.
[16] *Id.* at 1183.
[17] *See St. Louis Suburb Ends 12-Year Housing Fight*, NEW YORK TIMES (Feb. 25, 1982), at 26, https://www.nytimes.com/1982/02/25/us/st-louis-suburb-ends-12-year-housing-fight.html (describing Black Jack as "suburb of St. Louis" and "predominantly white community").
[18] *See* 508 F.2d at 1185 ("The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated.") (Footnote omitted).
[19] *Id.* at 1184.
[20] *Id.* at 1185.
[21] *Id.*
[22] *Id.* at 1186-88.
[23] *Cf.* Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 119 (2017) (cases after *Black*

*of Huntington*,[24] a variety of plaintiffs challenged a town's prohibition of multifamily housing in all but a tiny fraction of that municipality.[25] The U.S. Court of Appeals held that the disparate impact approach was applicable to FHA claims, primarily because courts had upheld disparate impact claims under similarly worded civil rights statutes.[26] The court also noted that discriminatory intent may be difficult to prove, because "clever men may easily conceal their motivations."[27]

But rather than adopting the *Black Jack* court's "compelling governmental interest" test,[28] the Second Circuit held that once a prima facie case of disparate impact was shown,[29] the court should focus on "(1) whether the reasons [for the policy] are bona fide and legitimate and (2) whether any less discriminatory alternative can serve those ends."[30] Applying this test, the court found that the town's justifications could be met by less restrictive means.[31] For example, the town argued that restricting multifamily zoning to a small part of the town would encourage multifamily development in that neighborhood; the court responded that this goal could be achieved through less discriminatory means, such as tax abatements for development in that area.[32]

Most post-*Huntington* disparate impact claims, however, were unsuccessful. Between 1970 and 2013, plaintiffs received positive

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*Jack* "pulled back somewhat" from the *Black Jack* court's "compelling governmental interest" test); Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under The Fair Housing Act*, 63 AM. U. L. REV. 357, 367-74 (2013) (describing numerous cases); Metro. Dev. Co. v. Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (holding that in disparate impact cases, courts should balance the strength of plaintiff's evidence, the evidence (if any) of discriminatory intent, the strength of the public interest favoring municipal policy, and whether the plaintiff sought to compel government action or prevent government interference).

[24] 844 F.2d 926 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988).

[25] *Id.* at 928 (zoning code limited multifamily housing to "small urban renewal zone").

[26] *Id.* at 935 (noting comparisons with Title VII and Title VIII of the Civil Rights Act).

[27] *Id.* (quoting *Black Jack*, 508 F.2d at 1185).

[28] *See* United States v. Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974).

[29] *See* Huntington Branch, N.A.A.C.P. v. Huntington, 844 F.2d 926, 939 (2d Cir. 1988).

[30] *Id.*

[31] *Id.*

[32] *Id.*

outcomes in less than twenty percent of all FHA disparate impact claims considered by federal appellate courts.[33] Courts have become even more hostile to disparate impact claims in recent decades; plaintiffs prevailed in 13% of disparate impact claims (three out of twenty-three federal appellate cases) in the 1990s, and only 8.3% of such claims (three out of thirty-six cases) in the 2000s.[34]

For example, in *Reinhart v. Lincoln County*,[35] a county enacted a land use plan that allowed higher-density housing on only ten percent of the land covered by the plan.[36] The plaintiffs claimed that this regulation (among others) would make houses less affordable to members of racial minorities.[37] The U.S. Court of Appeals for the Tenth Circuit held that to establish a prima facie case, plaintiffs needed to show that the defendant's "policy caused a significant disparate effect on a protected group."[38] The court found that increases in housing cost caused by the policy did not establish such a prima facie case, because "it may be that no members of protected groups could afford houses in the [plaintiffs'] development even if the former development regulations stayed in place."[39] Instead, the court required "evidence indicating before-and-after costs of dwellings and the percentages of protected and nonprotected persons who will be priced out of the market as a result of the increase."[40] Because the plaintiffs had failed to provide such evidence, the court dismissed their claim without addressing the justification for the county's plan.[41]

The Supreme Court finally addressed FHA disparate impact claims in the 2015 case of *Texas Department of Community Affairs v.*

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[33] *See* Seicshnaydre, *supra* note 23, at 393-94.
[34] *Id.*
[35] 482 F.3d 1225 (10th Cir. 2007).
[36] *Id.* at 1226.
[37] *Id.* at 1227.
[38] *Id.* at 1229 (citation omitted).
[39] *Id.* at 1230.
[40] *Id.* at 1230-31.
[41] *Id.* at 1231. The court added that if a prima facie case had been established, the burden shifted to the defendant to show a legitimate reason for its policy. *Id.* at 1229 (citation omitted). If the defendant had done so, the court would then have applied a balancing test similar to that suggested in *Arlington Heights* (court weighs degree of disparate impact, strength of defendant's justification, and whether the plaintiff seeks to compel government action or whether to merely avoid interference with individual property owners) (citation omitted). *Id. See also* Zasloff, *supra* note 23, at 120 (describing *Arlington Heights* decision).

*Inclusive Communities Project*.[42] The Court noted that lower courts unanimously endorsed the disparate impact theory,[43] and agreed with this view on three grounds.[44] First, the Court pointed out that it had interpreted similarly-worded statutes to allow disparate impact claims.[45] Just as the FHA makes it unlawful to "refuse to sell or rent . . . or *otherwise make unavailable* or deny, a dwelling to any person because of race [or other prohibited considerations],"[46] Title VII of the Civil Rights Act of 1964[47] makes it unlawful to "fail or refuse to hire or discharge any individual, or *otherwise to discriminate* . . . because of such individual's race [or other prohibited considerations],"[48] and the Age Discrimination in Employment Act ("ADEA")[49] makes it unlawful to "fail or refuse to hire or discharge any individual, *or otherwise discriminate* . . . because of such individual's age . . . ."[50] Because Title VII and the ADEA are worded similarly to the FHA, and the Court had upheld disparate impact claims under both statutes, it logically followed that a disparate impact claim was also appropriate under the FHA.[51] In particular, the Court focused on the "otherwise" language in all three statutes, describing them as "catchall phrases looking to consequences, not intent."[52]

Second, the Court found that the FHA's 1988 amendments supported its decision.[53] By 1988, nine federal Courts of Appeals had endorsed FHA disparate impact liability.[54] The legislative history of the 1988 amendments suggests that Congress was aware of this precedent, and yet Congress made no effort to prohibit disparate impact claims.[55] Moreover, the 1988 amendments seemed to

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[42] 576 U.S. 519 (2015).
[43] *Id.* at 535.
[44] *See infra* notes 45, 53, 60 (and accompanying text).
[45] 576 U.S. at 530-33.
[46] 42 U.S.C. § 3604(a) (emphasis added).
[47] 42 U.S.C. §§ 2000e-2000e17.
[48] 42 U.S.C. §§ 2000e-2(a)(1) (emphasis added).
[49] 29 U.S.C. §§ 621-634.
[50] 29 U.S.C. § 623(a)(1) (emphasis added).
[51] *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys., 576 U.S. 519, 530-33 (2015).
[52] *Id.* at 535.
[53] *Id.* at 536-38.
[54] *Id.* at 536 (citations omitted).
[55] *Id.* at 536-37.

presuppose the existence of a disparate impact claim.[56] For example, one such amendment[57] provided that nothing in the FHA "limits the applicability of any reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a [residence]."[58] Since occupancy restrictions might not be motivated by discriminatory intent, Congress would not have bothered to exempt them from FHA liability unless it had believed that they might be actionable under the disparate impact doctrine.[59]

Third, the Court held that the disparate impact doctrine was "consistent with the FHA's central purpose"[60] because it allowed courts to strike down arbitrary restrictions that harmed racial minorities[61] and "plays a role in uncovering discriminatory intent . . . [and in particular,] unconscious prejudices and disguised animus that escape easy classification as [discriminatory intent]."[62]

But the Court limited the disparate impact doctrine in ways that protected at least some land use regulation.[63] In particular, the Court held that if an FHA plaintiff established a prima facie case of disparate impact, a public or private defendant could rebut the prima facie case by showing that its policy served a valid interest.[64] Even if the defendant does so, the plaintiff may still prevail if it shows that an alternative practice "has less disparate impact and serves the [entity's]

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[56] *Id.* at 537-38.
[57] 42 U.S.C. § 3607(b)(1).
[58] 576 U.S. at 537 (citation omitted).
[59] *Id.* at 537-38.
[60] *Id.* at 539.
[61] *Id.* at 539-40.
[62] *Id.* at 540.
[63] *Id.* at 541.
[64] *Id.* (explaining that defendants may show that a policy "is necessary to achieve a valid interest").

legitimate needs."[65] Thus, the Court reaffirmed lower court precedent allowing FHA disparate impact claims.[66]

## II. POST-INCLUSIVE COMMUNITIES CASE LAW

After the Supreme Court upheld the disparate impact doctrine in *Inclusive Communities*,[67]some commentators suggested that the days of anti-housing zoning were numbered.[68] For example, one article, published in 2017, suggests that "[e]xclusionary zoning that clusters housing by type . . . is ripe for invalidation."[69] Two post-*Inclusive Communities* district court decisions have held that municipal zoning decisions limiting multifamily housing violate the disparate impact doctrine;[70] however, both cases are so narrowly written as to suggest that such zoning is invalid only under the narrowest of circumstances.

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[65] *Id.* at 533 (citation omitted). I note that the Court's language closely tracked that of a regulation issued by the federal Department of Housing and Urban Development. *Id.* at 527 (explaining that under regulation, defendant may rebut prima facie case of disparate impact by showing that defendant's "practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" and plaintiff may rebut this showing "upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect") (citations omitted); MHANY Mgmt. v. County of Nassau, 819 F.3d 581, 618-19 (2d Cir. 2016) (discussing that the three-part test is based on HUD regulation, because federal courts should defer to agency's reasonable interpretations of FHA).

[66] *See* 576 U.S. at 535 (noting that lower courts had generally endorsed disparate impact theory).

[67] *Id.* at 530-33.

[68] Andrea J. Boyack, *Side by Side: Revitalizing Urban Cores and Ensuring Residential Diversity*, 92 CHI.-KENT L. REV. 435, 462-63 (2017). Numerous articles in the popular press have followed suit. *See, e.g.*, Jerusalem Demsas, *America's Racist Housing Rules Really Can be Fixed*, VOX (Feb. 17, 2021), https://www.vox.com/22252625/america-racist-housing-rules-how-to-fix (suggesting that "it's time to sue the suburbs" and discussing disparate impact doctrine).

[69]*See*, e.g., Boyack, *supra* note 68, at 462-63; Scott Beyer, *Could The Fair Housing Act Help Abolish Restrictive Zoning?*, MKT. URBANISM REP. (Oct. 30, 2018), https://marketurbanismreport.com/blog/could-the-fair-housing-act-help-abolish-restrictive-zoning (suggesting that all land use restrictions have disparate impact against minorities by increasing housing costs).

[70] *See infra* Sections II(A)-(B) and accompanying text.

### A. Avenue 6E v. City of Yuma: Proving a Prima Facie Case

In *Avenue 6E Investments, Inc. v. City of Yuma*,[71] a company purchased land that was zoned for a minimum lot size of eight thousand square feet, and asked the city to reduce the minimum lot size to six thousand square feet.[72] The company intended to construct moderately-priced, entry-level homes rather than low-income housing;[73] nevertheless, neighborhood residents complained that "lower-priced homes would increase crime and lower property values."[74] In response to these complaints, the city rejected the company's rezoning application, and the company responded by filing suit under the FHA.[75] The trial court granted the city's motion for summary judgment, and the U.S. Court of Appeals for the Ninth Circuit reversed based on *Inclusive Communities* and remanded the case to the trial court.[76]

On remand, the city renewed its motion for summary judgment,[77] and the court denied the motion.[78] The court began by holding that the company had established a prima facie case that the rezoning denial had a disproportionately negative impact on

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[71] 217 F. Supp. 3d 1040 (2017).
[72] *Id.* at 1044.
[73] *Id.*
[74] *Id.* On remand, the court noted that this language was "racially charged . . . [and thus] bolsters Plaintiffs' disparate impact claim." *Id.* at 1055.
[75] *Id.* The company also alleged a discriminatory intent claim under the FHA and a variety of constitutional claims. *Id.* at 1045-46. The constitutional claims were dismissed. *Id.* The court did not directly address the discriminatory intent claim on remand. *Id.* at 1043 (motion for summary judgment was limited to disparate impact claim).
[76] *Id.* In particular, the trial court found that the plaintiffs could not establish a prima facie case of disparate impact as long as there were other housing opportunities that were similar to the plaintiffs' proposed development. *Id.* at 1045. The court held that this test was not good law after *Inclusive Communities*. *Id.* at 1046.
[77] *Id.*
[78] *Id.* at 1058.

Hispanics,[79] based on testimony by the company's expert.[80] The expert testified that homes with lots that are six thousand square feet near the company's land typically sold for between $121,000 and $171,000, while nearby homes on the larger lots required by the city's existing zoning sold for between $258,000 and $386,000.[81] The expert also testified that persons purchasing a home in the first price range were roughly forty-five percent Hispanic, while persons purchasing homes in the more expensive range were roughly thirty percent Hispanic.[82] The court held that this testimony was sufficient to show a prima facie case of disparate impact.[83] The court added that the company:

> [D]id not just show that the denial of a request to lower the density increases housing costs and that Hispanics are generally less wealthy than whites in Yuma. Rather, [the company] provided statistical evidence—based on a pool of qualified home purchasers within the relevant market area and during the relevant time frame—regarding the racial makeup of those priced out of the market as a result of the [zoning-related] price increase . . . ."[84]

Thus, to establish a prima facie case of race-related disparate impact discrimination, plaintiffs must be able to find a pool of homebuyers who would benefit from plaintiffs' proposed zoning and show that this pool of homebuyers was racially different from a pool of homebuyers governed by existing municipal zoning. These elements will often be difficult to show. For example, suppose an FHA plaintiff wants to build homes on two thousand square foot lots, and the relevant

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[79] *Id.* at 1048. The court also held that a genuine issue of material fact precluding summary judgment existed as to the other two prongs of the *Inclusive Communities* test: whether (a) the city had a legitimate basis for denying the rezoning request, and (b) whether a less discriminatory alternative existed to the rezoning denial. *Id.* at 1058. However, the court's discussion of both issues was partially related to the plaintiff's proposal to allow a low-density buffer between its property and nearby property–a problem that seems to me to be unlikely to recur in other cases, and thus not worth discussing above. *Id.* at 1057-58.

[80] *Id.* at 1048-50.

[81] *Id.* at 1048-49.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 1050.

neighborhood or municipality has no areas zoned for such small homes. In that situation, plaintiff might not be able to prove that the smaller homes will cost less than the homes required by existing zoning, nor will the plaintiff be able to prove the racial makeup of persons buying these hypothetical homes.[85] It logically follows that the *Avenue 6E* case may not be relevant to most zoning-related FHA lawsuits.

### B. MHANY Management v. Nassau County

The case of *MHANY Management v. County of Nassau*[86] arose out of Nassau County's sale of a government building to a private developer.[87] The building was located in the Village of Garden City, a Long Island municipality which, in response to public pressure, rezoned the land to "Residential-Townhouse," a classification designed to allow primarily single-family dwelling units rather than multifamily housing.[88] The County then auctioned off the property to a developer of single-family houses.[89] Two organizations and several individual plaintiffs sued Garden City under the FHA, asserting that the shift from multifamily zoning to Residential-Townhouse zoning was racially discriminatory.[90]

The U.S. Court of Appeals for the Second Circuit issued a decision shortly after the *Inclusive Communities* decision was issued.[91] The court mentioned, without much discussion, that plaintiffs had

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[85] I note that this does not mean that a plaintiff must identify "with specificity those who would have purchased a home within Plaintiffs'" proposed development." *Id.* at 1052. However, the court emphasized that the plaintiff "used a pool of qualified persons–those who did in fact purchase homes in Yuma in the predicted price range." *Id.*

[86] 819 F.3d 581 (2d Cir. 2016).

[87] *Id.* at 589.

[88] *Id.* at 590-97 (describing municipal zoning process).

[89] *Id.* at 597.

[90] *Id.* at 598. In addition, plaintiffs also alleged claims under the Fourteenth Amendment and a variety of non-FHA statutes; these claims were upheld by the trial court but were not addressed in the Second Circuit's decision. *Id.* Nassau County was a defendant as well; however, the court dismissed the FHA claim against the County. *Id.* at 625 (holding that trial court properly dismissed FHA claim against County, but reversing dismissal of non-FHA claims).

[91] The Second Circuit's decision was issued on March 23, 2016, *id.* at 581, less than a year after *Inclusive Communities* was issued in June of 2015. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, 576 U.S. 519, 519 (2015).

established a prima facie case,[92] but remanded to the trial court for consideration of whether plaintiffs met their burden of establishing "an available alternative practice that has less disparate impact and serves Defendants' legitimate nondiscriminatory interests."[93]

On remand, [94] the trial court divided the case into two separate issues: (1) whether the plaintiffs' proposed alternative rezoning plan was in fact less discriminatory than Garden City's zoning,[95] and (2) whether this alternative would be effective in meeting the defendants' interests.[96]

As to the first issue, the court found that multifamily zoning would "have provided for a significantly larger percentage of minority households than the pool of potential renters in the [City's] zoning."[97] The court relied on expert testimony asserting that under multifamily zoning, the plaintiffs would have been able to build up to seventy-eight units of "Section 8 [low-income] housing."[98] Because eighty-eight percent of households on the local Section 8 waiting list were Black and Hispanic, such zoning would have allowed over sixty additional minority families to live in Garden City.[99] Thus, the plaintiffs' proposed zoning would have had a more positive impact upon Black and Hispanic householders than Garden City's homeowner-oriented zoning.

Because the court relied on the possibility of subsidized low-income housing, its decision on this issue is of limited precedential impact. If the plaintiffs had proposed to build market-rate middle-

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[92] 819 F.3d at 620 (noting without extended discussion that the restriction on multifamily housing "decreases the availability of housing to minorities") (citation omitted).

[93] *Id.* at 619. In a decision that preceded *Inclusive Communities*, the district court entered judgment for the plaintiffs on both the disparate impact claim and an FHA discriminatory intent claim. *Id.* at 599 (decision issued in 2014).

[94] MHANY Mgmt. v. County of Nassau, No. 05-cv-2301(ADS)(ARL), 2017 WL 4174787, at *1 (E.D.N.Y. Sept. 19, 2017).

[95] *Id*. at *4 (discussing the plaintiffs' alternative zoning plan of designating that part of Garden City as a multifamily area).

[96] *Id.* at *7.

[97] *Id.* at *4.

[98] *Id.* at *5 (citation omitted). "Section 8 housing" is federally subsidized housing for lower-income households. *Cf.* Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs., 739 A.2d 238, 245-46 (Conn. 1999) (discussing how the Section 8 program enables lower-income tenants to rent housing from private landlords).

[99] *MHANY Mgmt.*, 2017 WL 4174787, at *5.

income housing rather than government-subsidized housing for the poor, the plaintiffs might have been unable to prove that such housing would be disproportionately occupied by Blacks or Hispanics.[100] Thus, the court might have found that the proposed zoning plan would have had the same racial impact as the stricter zoning endorsed by the municipal defendant.

Since the Second Circuit found that Garden City had legitimate interests in limiting traffic and preventing overcrowding in public schools,[101] the court went on to address whether multifamily zoning would be effective in meeting those interests.[102] The court held that multifamily zoning would meet the city's interest to avoid school overcrowding, because multifamily development would in fact generate *fewer* school children than the single-family houses supported by Garden City.[103]

The court also held that multifamily zoning would meet the city's interest in limiting traffic, by comparing the multifamily zoning with the property's prior use as governmental offices.[104] The court found that even though multifamily housing generated slightly more

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[100] For example, suppose that the single-income housing favored by the city cost $900,000, and the middle-income housing favored by plaintiffs cost $600,000. If the overwhelming majority of Blacks and Hispanics could not afford the $600,000 houses, the court might have held that allowing such housing would not be less discriminatory than prohibiting such housing.

[101] MHANY Mgmt. v. County of Nassau, 819 F.3d 581, 620 (2d Cir. 2016) ("Defendants identified legitimate, bona fide governmental interests, such as increased traffic and strain on public schools."). Garden City also claimed that it had interests in creating townhouses, creating a transition zone between single-family homes and commercial districts, and maintaining neighborhood character. *MHANY Mgmt.*, 2017 WL 4174787, at *5-6. However, the courts found that these interests were "either not actual interests, or were not legitimate, substantial, or non-discriminatory interests." *Id.* at *5.

[102] Garden City asked the court to find that plaintiffs could not prevail unless multifamily zoning was "as *equally* effective as [the City's] zoning in serving the Village's interests." *Id.* at *7 (emphasis added). The court disagreed, holding that the plaintiffs' alternative need only be somewhat effective in serving the defendant's interests. *Id.* at *8-9 (interpreting both HUD regulations and appellate precedent to mean that plaintiffs' alternative must serve defendant's legitimate interests but need not be as effective in serving those interests as the policy challenged by plaintiffs).

[103] *Id.* at *9-10.

[104] *Id.* at *1 (explaining that before rezoning, property at issue was zoned as "Public Use" or "P zone"). "[T]he Court will analyze whether either [party's proposed] zoning would have reduced the traffic in relation to the conditions under the P zone. . . ." *Id.* at *11.

traffic than single-family housing,[105] office buildings generated far more traffic than either type of housing.[106] Thus, "the elimination of government office buildings and the development of residential housing would have reduced traffic, whether the residences were single or multi family."[107] It follows that, because the plaintiffs' proposed zoning reduced traffic below prior levels, the plaintiffs met their burden of proving that their nondiscriminatory alternative in fact served Garden City's interest in reducing traffic.[108]

Thus, *MHANY* stands for the proposition that zoning that allows multifamily housing will satisfy government's interest in reducing traffic where prior to such zoning, property was zoned for office use. But, in cases where the same property was zoned for single-family housing or less dense multifamily housing, *MHANY* will not be on point. In fact, the court's suggestion that single-family housing generates slightly less traffic than multifamily housing suggests that plaintiffs who challenge restrictive zoning are unlikely to prevail where current laws zone property for single-family housing.

## III. CONCLUSION

In sum, post-*Inclusive Communities* case law has upheld challenges to restrictive zoning. However, the two most relevant decisions have been drafted so narrowly that they may aid very few FHA plaintiffs.

One of the cases, *Avenue 6E,* holds that restrictive zoning has a discriminatory effect where FHA plaintiffs can demonstrate that there is nearby housing that is (1) otherwise comparable to the zoning change that they seek, (2) less costly than housing governed by the zoning they challenge, and (3) more likely to be inhabited by Blacks or Hispanics.[109] Another case, *MHANY*, shows that restrictive zoning has a discriminatory effect where the plaintiffs' proposed zoning is likely to (1) lead to government-subsidized housing that (2) is likely to

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[105] *Id.* (citing testimony that "eliminating multi-family housing only reduced peak traffic by 3%.").
[106] *Id.* (citing study showing that "office use generated 50% more traffic than the planned multi residential use").
[107] *Id.*
[108] *Id.* at 12.
[109] *See Avenue 6E,* 217 F. Supp. 3d at 1048-50 (finding a prima facie case of disparate impact based on testimony to this effect).

be disproportionately used by Blacks or Hispanics.[110] It follows that where the plaintiffs seek to create market-rate housing, and cannot find data to show the likely costs of such housing, they will be unable to show that restrictive zoning has discriminatory effects.[111]

Once FHA plaintiffs have shown that existing zoning has a discriminatory effect and a defendant has responded by showing that the status quo is justified by the public interest in reducing automobile traffic, the burden shifts to the plaintiffs to show that less restrictive zoning is effective in holding down traffic.[112] *MHANY* shows that this burden may be met if the prior zoning is for a traffic-generating commercial use such as offices—but not if the prior zoning is for single-family housing. Thus, it is unclear how frequently *MHANY* will justify overturning the zoning status quo.

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[110] *See MHANY Mgmt.*, 2017 WL 4174787, at *4-5 (finding liability based on these facts).
[111] *Id.*
[112] *Id.* at *3-4.