

Fair Housing and Disparate Impact

2016 Annual Housing Conference

Mark Shelburne

Novogradac & Company LLP

mark.shelburne@novoco.com

919.889.2596

@housingMark

The Next 75 Minutes....

- Who am I?
 - an attorney (sort of) and consultant
 - Novogradac & Company for 18 months
 - N.C. Housing Finance Agency for 13 years
- Will discuss some of fair housing concepts
- Also cover housing for persons with disabilities
- First will start with multiple choice questions

1. The Supreme Court's 2015 holding in TDCHA v. ICP (Texas case) was:



ty areas.
pact.

2. Which of the following is/are **explicit** objective(s) of federal housing funding?

- A) constructing and/or rehabilitating affordable homes
- B) supporting efforts to revitalize communities
- C) reducing segregation of protected classes
- D) all of the above

3. Which U.S. Departments have requirements relating to community, integrated supportive housing?

- A) Justice
- B) Health and Human Services
- C) Housing and Urban Development
- D) All of the above

4. Olmstead was:

- A) a defendant in the 1999 Supreme Court case interpreting the ADA
- B) the landscape architect who designed Central Park
- C) both

5. What does HCBS stand for?

- A) Housing Condition Baseline Study
- B) Home and Community Based Services
- C) Heuristic Continuity Benefit Supplement
- D) Holistic Cooperative Belief Standards

Disclaimer





Protected Classes



Race



Color



Religion



Sex



Handicap



Familial Status



National Origin

Fair Housing Act Components

Each apply at project and program level

Intentional Discrimination – most common

Disparate Impact – liability without proof of intent

Affirmatively Furthering – applicable when accept HUD funding

11

ICP vs. TDHCA Supreme Court



Justice Kennedy

- Affirmed disparate impact liability
- Did not say TDHCA had violated fair housing
- Claims must have more than statistical disparities, need to prove “causal connection”
- For programs it’s “difficult to establish causation because of the multiple factors that go into... decisions about where to construct or renovate”
- Remanded for review based on HUD’s rule...

HUD's Disparate Impact Rule

“A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of [protected class status].”

Three-Step Burden Shifting Approach

1

The charging party must make a *prima facie* showing of a disparate impact.

2

If so, the respondent must then show a “legally sufficient justification”.

3

The charging party may still prove the interests could be served by another practice with a less discriminatory effect.

ICP vs. TDHCA District Court

- Dismissed claim, did not make prima facie case
- Plaintiff failed to:
 - “point to a specific, facially neutral policy” responsible for the disparate impact,
 - prove “a causal link” between the policy and statistical disparity, and
 - demonstrate that “other factors” are not responsible, such as zoning and developers’ preferences
- Indicates the difficulty of these cases

**Most disparate
impact activity is
in administrative
complaints, not
the courts**

**HUD investigates
to determine if
discrimination**

**HUD is required
to encourage
conciliation, are
often settled**

**Process does not
involve the same
safeguards /
legal protections
for defendants**

Use of Arrests/Convictions

Example of disparate impact's importance

- Statistically, interaction with justice system varies based on protected class status
- HUD guidance: basing adverse housing decisions on criminal records may have a disparate impact
- Specifically, owners cannot
 - consider arrests, or
 - have blanket prohibitions on convictions
- Other decisions or practices also may be illegal

Affirmatively Furthering

- AFFH means ***more than not*** discriminating
- A basic purpose of federal funding is to eliminate barriers, desegregate, expand choice/opportunity
- HUD changed its approach with 2015 rule
- Does not mandate specific outcomes
- Agencies must undertake “meaningful actions” as a condition of accepting federal resources

AFFH Process

- HUD will provide data, supplemented by local info
- Used to prepare an “Assessment of Fair Housing”



Patterns of integration
and segregation;



Racially and ethnically
concentrated areas of
poverty;



Disparities in access to
opportunity; and



Disproportionate
housing needs

- Extensive public participation required
- Jurisdictions must take meaningful actions

	Fair Housing In General	Affirmatively Furthering
Applicable...	regardless of any subsidy.	when using certain federal subsidies (e.g., HOME).
Meaning for owners and managers:	Cannot intentionally discriminate, or use policies/practices which have a disparate impact.	Must actively market housing to those in protected classes who are the least likely to apply for occupancy.
Example:	screening criteria	marketing plan
Meaning for agencies:	Same requirements as for owners and managers.	Must use all program resources to advance desegregation.
Example:	<i>ICP v. TDHCA</i> case; exclusionary zoning	opportunity area siting preference; a unit set-aside for PWD
How enforced:	Either through HUD administrative complaints or in federal court.	Same as the other column, plus HUD review of agencies' compliance.

AFFH and LIHTCs

- **Does AFFH apply to the LIHTC program?**
 - yes if agency also is a HUD participating jurisdiction
 - will involve allocator regardless for analysis
 - question is what applies on a federal level
- **ICP sued Treasury to issue AFFH regulations**
- **DoJ: Section 42 “does not contemplate or require” Treasury’s involvement in project siting**
- **May take years to resolve, unless settled**

Direction of Federal Policy

- Three federal agencies each moving towards integrated housing for persons with disabilities

Justice:
enforcement of
ADA/Olmstead

DHHS: Home
and Community
Based Services

HUD: disparate
impact, AFFH,
& Section 811

- Clear, inexorable direction
- Research-based best practices





***Olmstead* Background**

- ***Olmstead* is a 1999 Supreme Court decision interpreting Title II of the ADA**
- **Holding requires every state to:**
 - eliminate unnecessary segregation and
 - provide services in the most integrated setting
- **Focus is on overall housing and service systems more than individual projects**
- **Must enable PWD “to interact with non-disabled persons to the fullest extent possible”**

Integration Mandate

- In many states the predominant housing option is not integrated (institutional)
- Living in a community setting is not a realistic possibility for persons with disabilities

Public entities must take affirmative steps to remedy this history of segregation and prejudice in order to ensure that individuals have an opportunity to make an informed choice.

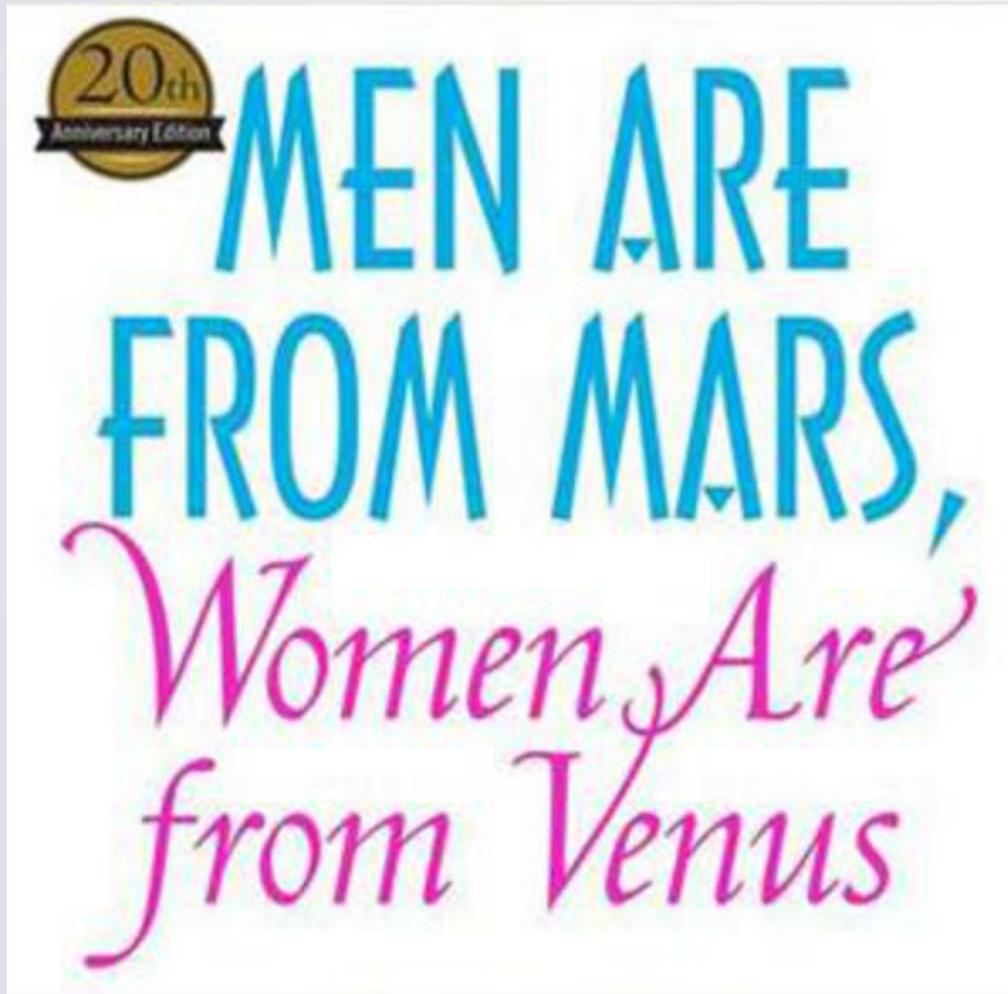
- Similarity to language used for race is deliberate

Outcomes

- If PWD have inadequate choice, state enters into settlement agreement or goes to court
- Terms include more community-based housing
- DoJ's perspective on "integrated" can be narrow
 - not just group or adult care homes
 - includes 100% targeted supportive housing
 - such projects do not further choice or integration
- Ultimately a legal, not policy question



What are HCBS & the Rule?



Services

nationwide

unknown to housers

gs", where people

ces

last year

28

All Settings (Housing)

In order to qualify for HCBS, the setting must:

- Be integrated and support full community access
- Be selected by individuals from different options
- Ensure rights of privacy, dignity and respect, and freedom from coercion and restraint
- Optimize autonomy and independence in life
- Facilitate choice regarding services and providers

What HCBS Really Means

- Many specifics and grey areas to work out
- Will apply “retroactively” (housing concept)
- Does not matter when built
- Some PWD may be faced with choice of
 - being ineligible for services, or
 - finding somewhere else to live
- Such a prospect is unacceptable



Fair Housing

- Everything discussed earlier about
 - integration and
 - access to opportunitiesapplies equally to persons with disabilities
- Main difference from other protected classes is similar across the country
- Other laws apply, such as Section 504

HUD 811 Demonstration

- Collaboration between state housing and HHS/Medicaid agencies
- Only operating assistance, capital from other affordable housing programs
- Integrated into properties, no more than 25% of units targeted to PWD
- Participation in supportive services is voluntary, cannot be required as condition of tenancy

Reasonable Accommodations

- Some on-site staff understandably want to treat everyone the same
- Doing so may violate federal law for PWD requesting accommodations/modifications
- Have to consider each one
- Can be very complex
- A continuing challenge
- Need constant training



Federal Mandates Together

- Not as ominous as it sounds
- Will involve adapting some:
 - state priorities/practices,
 - business models, and
 - project operations
- Policy considerations:
 - what kind of projects and programs to fund
 - “first rule of holes” (stop digging)



Policy Implications

“Explanations exist; they have existed for all time; there is always a well-known solution to every human problem --- neat, plausible, and wrong.”

- H.L. Mencken, *Prejudices: Second Series*, 1920

1. The Supreme Court's 2015 holding in TDCHA v. ICP (Texas case) was:

- A) HFAs should award more LIHTCs in opportunity areas.
- B) The Fair Housing Act recognizes disparate impact.
- C) Treasury must issue fair housing guidance.
- D) BBQ is better in North Carolina than Texas.



2. Which of the following is/are **explicit** objective(s) of federal housing funding?

- A) constructing and/or rehabilitating affordable homes
- B) supporting efforts to revitalize communities
- C) reducing segregation of protected classes
- D) all of the above

3. Which U.S. Departments have requirements relating to community, integrated supportive housing?

- A) Justice
- B) Health and Human Services
- C) Housing and Urban Development
- D) All of the above



4. Olmstead was:

- A) the defendant in the 1999 Supreme Court case interpreting the ADA
- B) the landscape architect who designed Central Park
- C) both



5. What does HCBS stand for?

- A) Housing Condition Baseline Study
- B) Home and Community Based Services
- C) Heuristic Continuity Benefit Supplement
- D) Holistic Cooperative Belief Standards

Your Feedback

Please contact me with any questions or comments

Send any compliments to Michael Novogradac:



Complaints go to Art Vandelay:



Fair Housing and Disparate Impact

2016 Annual Housing Conference

Mark Shelburne

Novogradac & Company LLP

mark.shelburne@novoco.com

919.889.2596

@housingMark

43