American University Business Law Review

Volume 6 | Issue 3 Article 3

2017

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THE MULTIFACETED MANIFESTATIONS OF THE POOR DOOR: EXAMINING FORMS OF SEPARATION IN INCLUSIONARY HOUSING

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INTRODUCTION

Despite the 2008–2009 recession, American metropolitan areas have experienced tremendous growth.[1] While demand for real estate in places like New York, San Francisco, and Washington, D.C., has exploded, the housing stock in many of these popular regions has often failed to keep pace.[2] As a result, housing costs have dramatically increased, outpacing the stagnant wage growth of low–income workers.[3] Due to these economic dynamics, entire metropolitan areas are becoming financially inaccessible for low–income individuals.[4] Consequently, local governments face mounting pressure from both residents and business leaders to address this affordability crisis by facilitating the creation of more accessible housing options.[5]

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1. *See* Claire Cain Miller, *More New Jobs Are in City Centers, While Employment Growth Shrinks in the Suburbs*, N.Y. TIMES (Feb. 24, 2015), https://www.nytimes.com/2015/02/24/upshot/more-new-jobs-are-in-city-centers-while-employment-growth-shrinks-in-the-suburbs.html (stating that well-paying jobs are increasingly found in large urban centers, while working-class jobs are more predominantly located in the outer suburbs). *But see* Alan Berube, *Political Rhetoric Exaggerates Economic Divisions Between Rural and Urban America*, BROOKINGS (Aug. 3, 2016), https://www.brookings.edu/blog/the-avenue/2016/08/03/political-rhetoric-exaggerates-economic-divisions-between-rural-and-urban-america/ (arguing that the divisions between rural and urban economies are exaggerated and that the two are deeply intertwined).

2. *See* Mark Gimein, *Why the High Cost of Big–City Living is Bad for Everyone*, NEW YORKER (Aug. 25, 2016), http://www.newyorker.com/business/currency/why-the-high-cost-of-big-city-living-is-bad-for-everyone (arguing that, despite decades of conventional thinking regarding the inevitable demise of cities, a strong desire to access high–paying jobs and urban amenities has fueled a wave of migration to a few "imperial" urban in recent years); *see also,* Alexi Barrionuevo, *Lack of New Construction Pushes Bay Area to the Brink of a Bubble*, CURBED (Feb. 24, 2016, 10:30 AM), http://www.curbed.com/2016/2/24/11102278/bay-area-housing-crisis-bubble (explaining that despite the fact that 64,000 new jobs have been created in San Francisco, less than 5,000 new homes have been constructed); Justin Fox, *Sometimes a Nimby Is a Just a Nimby*, BLOOMBERG (May 5, 2016, 8:00 AM), https://www.bloomberg.com/view/ articles/2016-05-05/sometimes-a-nimby-is-a-just-a-nimby (demonstrating local resistance's view that new construction is selfish and negatively impacts the communities, which explains why it has been so difficult to construct new homes).

3. *Home Prices Rising Faster than Wages: Report*, CNBC (Mar. 24, 2016, 6:45 AM), http://www.cnbc.com/2016/03/24/home-prices-rising-faster-than-wages-report.html.

4. *See* Justin Fox, *Urban Living Becomes a Luxury Good*, BLOOMBERG (May 24, 2016, 1:32 PM), https://origin-www.bloombergview.com/articles/2016-05-24/urban-living-becomes-a-luxury-good (positing that living in urban centers is increasingly becoming a luxury good, because high demand — in conjunction with the tepid growth in supply — has fueled an intense rise in housing costs, which is making downtown real estate an exclusive product only attainable for wealthy people).

5. *See, e.g.*, Patrick Sisson, *Why the Rent Is Too Damn High: The Affordable Housing Crisis*, CURBED (May 19, 2016, 12:47 PM), http://www.curbed.com/ 2016/5/19/11713134/affordable-housing-policy-rent-apartments.

In response, municipalities are implementing an array of solutions, including programs that promote inclusionary housing.[6] Inclusionary housing is a mechanism that compels private stakeholders to engage in otherwise economically irrational behavior.[7] These inclusionary housing programs encourage residential projects to provide some lower–cost housing by creating a distinction between "affordable" and "market–rate" dwellings.[8] Furthermore, these programs may require participating developers to build affordable units on the same street or floor as market–rate units.[9]

Real estate developers are further motivated to participate in inclusionary housing programs because they either provide business incentives or are an unavoidable cost of constructing certain projects within a housing zone.[10] However, developers still have the discretion to forgo the program's economic incentives or avoid building in the municipality if the regulations are too onerous.[11] Given this degree of discretion for developers, small changes and uncertainty can upset this regulatory ecosystem by discouraging developer participation en masse.[12]

To account for these various considerations, this Comment will analyze Montgomery County's Moderately Priced Dwelling Units ("MPDU") program, which is one of the first and most extensively implemented inclusionary housing programs.[13] Consequently, this analysis will provide

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6. *See, e.g.*, Brian Johnson, *Here's How DC's Inclusionary Zoning Program Works*, GREATER GREATER WASH. (Sept. 1, 2015), https://ggwash.org/view /39157/ heres-how-dcs-inclusionary-zoning-program-works (discussing how DC's inclusionary housing program provides local residents with more affordable options).

7. *See* Jolie Milstein, *Affordable Housing Will Only Work With For–Profit Developers in the Mix*, OBSERVER (Sept. 6, 2016, 7:30 AM), http://observer.com/ 2016/09/affordable-housing-will-only-work-with-for-profit-developers-in-the-mix/ (arguing that developers in New York City need a profit motive to build more affordable housing).

8. *See generally,* Johnson, *supra* note 6.

9. *See, e.g.*, *id.* (discussing how New York's poor door ban implemented such a prohibition on housing separation in the context of apartment buildings).

10. *See* Scott Beyer, *Inclusionary Housing Is Rent Control 2.0*, FORBES (May 27, 2015, 3:22 AM), http://www.forbes.com/sites/scottbeyer/2015/05/27/inclusionary-zoning-is-rent-control-2-0/#3b6dfe692c10 (arguing that inclusionary housing programs reflect rent control in that they both function as an obligatory business expense for developers).

11. *Id.*

12. *See* Benjamin Powell & Edward Stringham, *The Economics of Inclusionary Zoning Reclaimed: How Effective are Price Controls?,* 33 FLA. ST. L. REV. 471, 472–73 (2005) (arguing that inclusionary zoning puts a high burden on private developers, which can discourage participation under certain circumstances).

13. Andrew Rice, *The Suburban Solution*, N.Y. TIMES (Mar. 5, 2005), http://www. nytimes.com/2006/03/05/magazine/the-suburban-solution.html.

some clarity to real estate professionals and help municipalities determine the prudent regulatory path forward. To properly assess whether Montgomery County's inclusionary housing program violates the Fair Housing Act ("FHA"), Section II addresses: (1) the MPDU program's statutory structure and demographic context; (2) the relationship between the FHA's Doctrine of Disparate Impact and municipal zoning ordinances such as Montgomery County's MPDU program; (3) the legal standards for bringing a disparate impact claim against a municipality for housing discrimination; and (4) an alternative approach of housing separation through New York's 421–a program. Section III examines potential avenues for bringing a FHA disparate impact claim under each the New York's 421–a program and the MPDU program. Finally, this Comment concludes that the MPDU program is vulnerable to a housing discrimination lawsuit and therefore should adopt the same street stipulation — a provision resembling New York's 421–a program.

II. THE DEVELOPMENT OF INCLUSIONARY HOUSING PROGRAMS

In the 1960s, the government began to develop a way to provide housing to low income individuals through a series of public housing initiatives.[14] Unfortunately, this large–scale government intervention resulted in tragedy. These idealistic housing projects often became uninhabitable havens for drugs, crime, and violence.[15]

In response, the government adopted a more conservative and neo–liberal approach in the 1970s and 80s.[16] Many believed this hands–off regulatory approach was a better solution to deal with systemic problems such as high concentrations of poverty, weak funding, and housing projects that are detached or segregated from urban life.[17] Thus, instead of

14. Jamelle Bouie, *How We Built the Ghettos*, DAILY BEAST (Mar. 13, 2014, 2:40 PM), http://www.thedailybeast.com/articles/2014/03/13/how-we-built-the-ghettos.html (discussing the construction of public housing projects in the context of racial segregation).

15. *See* J.S., *Why the Pruitt–Igoe Housing Project Failed*, ECONOMIST (Oct. 15, 2011), http://www.economist.com/blogs/prospero/2011/10/american-public-housing (discussing the unhealthy and dangerous conditions in a St. Louis housing project).

16. *See generally*, Kiran Sandhu & Stanislaw Korzeniewski, *The Impact of Neo–Liberal Ideology on Housing Policy and Practice*, 1 ITPI J. (2004) (explaining that according to the 1980s neo–liberal housing approach, "[t]he state's role in production, ownership finance marketing and regulations should be rolled back and its activities should be restricted to those of market enablement").

17. *See* Jasmine Coleman, *Why is America Pulling Down the Projects?*, BBC NEWS (Apr. 14, 2016), http://www.bbc.com/news/magazine-35913577 (discussing the pervasiveness of drugs and crime in D.C. housing projects due to neglect and planning failures); *see also* Howard Husock, *How Public Housing Harms Cities*, CITY J., https://www.city-journal.org/html/how-public-housing-harms-cities-12410.html (last visited Sept. 25, 2017) (describing the differences between urban housing and

engaging in direct intervention, the statutory initiatives created during that time merely attempted to influence or control the behavior of private actors.[18]

Current inclusionary housing regulations reflect this shift in housing law.[19] In general, inclusionary housing regulations function as a government–sponsored effort to ensure that new residential development includes affordable options.[20] To comply, developers must set aside some units to sell or rent at a reduced cost when constructing market–rate apartments or subdivisions.[21] Consequently, through this legal framework, municipalities can delegate the job of providing affordable housing to private developers.[22]

A. The MPDU Program's Legal and Demographic Context

Like other mandatory inclusionary housing initiatives, the MPDU program requires private developers of market–rate subdivisions to set aside some units for low–income individuals.[23] Its goals include expanding affordability and rectifying past instances of racial housing discrimination.[24] This is accomplished under section 25A of the Montgomery County Code, which provides that the County determines the number of affordable units a developer must build through a ratio.[25] While the ordinance is applicable throughout the County, its requirements for providing affordable options are confined to a specific subset of private development, namely, those buildings with thirty–five or more dwelling units.[26] Officials may not grant a building permit to a developer unless he

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segregated housing projects).

18. *See, e.g.*, TIM IGLESIAS & ROCHELLE E. LENTO, THE LEGAL GUIDE TO AFFORD ABLE HOUSING DEVELOPMENT 13 (2d ed. 2011) (stating that federal programs such as the Low–Income Housing Tax Credit worked to modify the behavior of private actors).

19. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 265 (3d ed. 2015) (discussing how programs designed to promote affordable housing such as inclusionary housing regulations have shifted from the federal government to the state and local level).

20. *See id.* at 283 ("Inclusionary zoning requires or encourages developers to designate a portion of the housing they produce for low–or moderate–income individuals.").

21. *Id.*

22. *Id.*

23. *Id.* at 287.

24. Rice, *supra* note 13.

25. *See* Moderately Priced Housing Law, Montgomery County Code, Md., Code § 25A–5(c)(3) (2017) (requiring that "the number of moderately priced dwelling units is a variable percentage not less than 12.5% of the total number of dwelling units at that location").

26. *Id.* § 25A–2(5) (stating that "all subdivisions of 35 or more dwelling units

or she signifies that the building will comply with the ordinance's stipulations.[27]

The Montgomery County Code provides specific requirements regarding the conditions of affordable units and the cost for residents under the MPDU program.[28] However, it also gives developers a high degree of autonomy to determine the placement of the affordable units within the larger development project.[29] Consequently, developers often group the required affordable units together on a side street — away from the subdivision's market–rate dwellings.[30]

Despite the MPDU's shortcomings, it has contributed to the increased racial diversity of Montgomery County.[31] According to the Census Bureau, the County's white population declined from 49.3% in 2010 to 45.2% in 2015, whereas the Hispanic population increased from 17% in 2010 to 19% in 2015.[32] As a result, the majority of the current population identifies as a racial or ethnic minority.[33]

B. Federal Housing Discrimination Standards for Municipal Zoning Ordinances

In general, the FHA bans housing discrimination due to a person's race, religion, gender, or national origin.[34] The FHA specifically prohibits

include a minimum number of moderately priced units of varying sizes with regard to family needs").

27. *Id.* §§ 25A–5(a), (g)–(h) (stating that the County enforces these zoning regulations through written agreements between developers and the Department of Housing and Community Affairs)*; see also* IGLESIAS & LENTO, *supra* note 18, at 101 (discussing how the County's regulations require that the agreement be approved by both the Director of the County Department of Housing and Community Affairs and the County Attorney).

28. § 25A–5 (b) (requiring certain developers seeking a building permit to submit a written agreement approved by the County that establishes legal obligations — such as building a specified number of affordable units and to provide three or more bedrooms for affordable dwellings in single–family subdivisions).

29. *Id.* § 25A–5B (a)–(b) (stating that a developer of higher–density housing may fulfill its statutory obligations by building the allotted number of MPDUs on a separate parcel of land, which demonstrates the statute's flexible requirements regarding the placement and physical location of affordable units).

30. *See* Rice, *supra* note 13 (discussing how an especially large project in Potomac, Maryland complied with the MPDU program's requirements by dividing market–rate and affordable units into two separate subdivisions).

31. *See* MONTGOMERY CTY., MD., 2015 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 24 (2015) ("The MPDU program has resulted in economically and racially diverse communities throughout the County, expanded housing choice, and resulted in other desirable public outcomes.").

32. *See id.* at 6 (comparing the County's population between 2010 and 2015).

33. *See id.*.

34. The Fair Housing Act, 42 U.S.C. § 3604(a) (2012).

refusing "to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[35] Given this statutory language, the FHA provides potential plaintiffs wide latitude to bring a housing discrimination claim.[36]

Furthermore, the FHA clearly states that large commercial real estate entities may be found liable for these types of housing discrimination claims.[37] However, suing a municipality for discriminatory housing laws or practices has more complex legal foundations. Over several decades of statutory interpretation, federal regulations, and court opinions have shaped the legal infrastructure surrounding a municipality's liability for FHA violations.[38]

The primary regulatory body involved in this interpretative process is the Department of Housing and Urban Development ("HUD").[39] Municipalities receiving federal funds from HUD have a legal obligation to comply with the FHA and affirmatively further the interests of fair housing.[40] Consequently, a municipal government can be found liable in a HUD administrative hearing for enacting a discriminatory housing law.[41]

Similarly, courts have supported an individual plaintiff's ability to bring a housing discrimination claim against a municipality as a public actor for implementing discriminatory housing regulations and zoning ordinances.[42]

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35. *Id.*

36. *Id.* § 3604(b) ("To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."); *see* Trafficante v. Metropolitan Life Ins. Co., 409 US 205, 209 (1972) (describing the FHA's statutory language pertaining to prohibiting housing discrimin ation as "broad and inclusive").

37. § 3605(a) ("It shall be unlawful for any person or other entity whose business includes engaging in residential real estate–related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.").

38. *See generally* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461–62 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) (providing historical and legal background on the FHA's enactment and interpretation).

39. § 3608(a).

40. *See* 78 Fed. Reg. at 11,477 ("[R]ecipients of HUD funds already must comply with a variety of civil rights requirements. This includes the obligation . . . under the Fair Housing Act to affirmatively further fair housing in carrying out HUD programs; and HUD program rules designed to foster compliance with the Fair Housing Act and other civil rights laws.").

41. *See generally id.*

42. *See*, *e.g.*, Casa Marie, Inc. v. Super. Ct. of P.R., 988 F.2d 252, 257 (1st Cir. 1993) (holding a municipality liable for housing discrimination); United States v. City

For instance, in *United States v. Yonkers Board of Education*,[43] the municipality's regulations regarding the geographic placement of subsidized housing amounted to a form of race–based housing discrimination.[44] By almost exclusively placing low–income housing in heavily minority neighborhoods, the local government's zoning decisions had the effect of perpetuating racial segregation, which amounted to a form of illegal housing discrimination.[45]

Additionally, courts permit the use of the disparate impact doctrine and the disparate treatment doctrine as alternative methods of pursuing housing discrimination claims under the FHA.[46] The disparate impact doctrine focuses on whether the a practice has a "disproportionately adverse effect on minorities" while the disparate treatment doctrine focuses on whether there is a discriminatory intent.[47] In other words, disparate impact claims concentrate on discriminatory results of practices and policies, while deemphasizing the issue of discriminatory purpose.[48] In this way, disparate impact claims allow claimants to avoid the onerous burden of proving intent.[49] All that is necessary to demonstrate a discriminatory effect under the disparate impact doctrine, is a showing that (1) the ordinance perpetuates residential segregation or (2) the government action at issue disproportionately affects a protected class.[50]

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of Parma, 661 F.2d 562 (6th Cir. 1981) (same); Otero v. N.Y.C. Housing Auth., 484 F.2d 1122, 1133–34 (2d Cir. 1973) ("[A]n authority may not . . . select sites for projects which will be occupied by non–whites only in areas already heavily concentrated with a high proportion of non–whites, ... [Because] Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing").

43. 837 F.2d 1181 (2d Cir. 1988).

44. *Id.* (finding a § 3604 violation due to the practice of constructing subsidized housing in predominantly minority neighborhoods).

45. *See id.* at 1226 ("[T]he City may properly be held liable for the segregative effects of a decision to cater to this 'will of the people.'").

46. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015); *see also* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 65 (Tim Iglesias & Rochelle E. Lento eds., 2006) ("There are three principal theories by which a local land–use ordinance can be found to have violated the FHA: (1) intentional discrimination, (2) disparate impact, or . . . (3) failure to provide reasonable accommodation.").

47. *Inclusive Cmtys. Project*, 135 S. Ct. at 2513.

48. *See, e.g.*, *id.* (stating that a housing practice is discriminatory under disparate impact if it has a disproportionately adverse impact upon a protected class).

49. *Inclusive Cmtys. Project*, 135 S. Ct. at 2513.

50. *See* Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 936 (2d Cir. 1988) (holding that based on a local regulatory action relating to housing was discriminatory because it disproportionately affected a racial minority group in a negative manner); Trafficante v. Metropolitan Life Ins. Co., 409 US 205, 221 (1972) (finding that losing the social and economic benefits associated with living in a racially

For example, in *Huntington Branch, NAACP v. Huntington*,[51] plaintiffs filed suit against a municipality for discriminatory housing practices under the FHA's theory of disparate impact.[52] In *Huntington*, the primary issue was whether a predominantly suburban white community's regulatory practice of physically separating housing disproportionately occupied by racial minorities violated the FHA.[53] The court explained that under the disparate impact doctrine, the challenged practice must "actually or predictably [result] in racial discrimination" or, in other words, have a discriminatory *effect*, and therefore, it is unnecessary to show that it was made with a discriminatory *intent*.[54] A discriminatory effect arises where: (1) there is an adverse impact on a particular minority group and (2) there is harm to the community generally by the perpetuation of segregation.[55] The court held that the zoning ordinance had a discriminatory effect because it impeded integration by restricting low–income housing needed by minorities to an area that was already mostly inhabited by minorities, which significantly perpetuated segregation.[9]

On the other hand, the court in *Dews v. Sunnyvale*,[56] utilized both a disparate impact and disparate treatment analysis. In that case, the claim brought against a municipality centered on the discriminatory impact of its low–density zoning restrictions.[57] The court first considered whether there was a discriminatory effect under the disparate impact doctrine.[58] It found that there was a discriminatory effect where the zoning restrictions excluded racial minorities by prohibiting the construction of multi–family housing that would have been disproportionally occupied by African Americans.[59] The court then considered whether there was a discriminatory intent under the disparate treatment doctrine.[60] Under the

integrated environment is a valid injury for a plaintiff to allege).

51. 844 F.2d 926 (2d Cir. 1988).

52. *Id.* at 928.

53. *See id.* (discussing how the subject of the court's legal analysis pertained to whether the town's practice of placement housing projects — largely occupied by racial minorities — in a separate "urban renewal area" amounted to a discriminatory housing practice that contradicted the FHA's policy goal of promoting racial integration).

54. *Id.* at 934.

55. *Id.* at 937–38.

56. 109 F. Supp. 2d 526 (N.D. Tex. 2000).

57. *Id.* at 529.

58. *Id.* at 572–73.

59. *See id.* at 526 ("It is these zoning laws, allegedly enacted by the residents of Sunnyvale to preserve their rural lifestyle, which are being challenged by Plaintiffs on the grounds that they were enacted with . . . an effect which falls disproportionately on African–Americans looking for housing in the Dallas Metropolitan Area.").

60. *Id.*

disparate treatment doctrine, there is a discriminatory intent where (1) the defendant's stated reasons for its decision are pretextual and (2) there is a reasonable inference that race was a significant factor in the refusal.[61] To determine whether there is a discriminatory intent, courts consider: "(1) discriminatory impact; (2) the historical background of the challenged decision; (3) the specific sequence of events leading up to the decision; (4) any procedural and substantive departures from the norm; and (5) the legislative or administrative history of the decision."[62] The court held that the zoning restrictions were done with discriminatory intent.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*,[63] the Court held that under the FHA, both the disparate impact and disparate treatment doctrines can support a discriminatory housing claim.[64] Here, a nonprofit organization made a housing discrimination claim against Texas regarding its interpretation of a low–income tax credit statute.[65] The Court found that the plaintiff could rely on statistical evidence to support that there was a discriminatory effect pursuant to its disparate impact claim.[66] Otherwise, plaintiffs would need to rely on the disparate treatment doctrine, which required plaintiffs to provide documentation regarding a practice's discriminatory intent, which was not present in that case.[67] The Court created a three part, burden–shifting test for a disparate impact claim.[68] First, the plaintiff must make a prima facie case that there is a disparate impact.[69] Specifically, the plaintiff must demonstrate that "a challenged practice caused or predictably will

61. *Id.* at 532.

62. *Id.* at 533.

63. 135 S. Ct. 2507 (2015).

64. *Id.* (affirming the validity of using disparate impact claims under the Fair Housing Act, which may consequently empower more potential litigants to file disparate impact claims against municipalities for engaging in discriminatory housing practices). *But see* Alana Semuels, *Supreme Court vs. Neighborhood Segregation*, ATLANTIC (June 25, 2015), https://www.theatlantic.com/business/archive/2015/06/supreme-court-inclusive-communities/396401/ (arguing that the long–term status of disparate impact is uncertain, because the Court's majority opinion cautioned against using race–based quotas as a remedy).

65. *Inclusive Cmtys. Project*, 135 S. Ct. at 2513.

66. *Id.* at 2514.

67. *See* Lyle Denniston, *Opinion Analysis: A Civil Rights Law Made Broader, But Not Too Broad*, SCOTUSBLOG (June 25, 2015 12:22 PM), http://www.scotusblog.com/2015/06/opinion-analysis-a-civil-rights-law-made-broader-but-not-too-broad/ (describing how the holding functioned as a compromise between Justice Kennedy and the more liberal wing of the Court, because it cautioned against excessive litigation but still preserved the fundamentals of disparate impact as a litigation strategy).

68. *Inclusive Cmtys. Project*, 135 S. Ct. at 2514.

69. *Id.*

cause a discriminatory effect."[70] Second, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[71] Finally, the burden shifts back to the plaintiff to prove that "the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[72] By validating the use of disparate impact in the context of the FHA, the Court provided two distinct, but equal causes of action for potential plaintiffs under the disparate impact and disparate treatment doctrines.[73]

C. Statutory Changes to New York's 421–a Program

New York City's 421–a Program provides tax incentives for developers to include affordable units in their market–rate apartment buildings.[74] The 421–a program is purely voluntary for developers; it offers optional tax benefits to developers in exchange for providing affordable options.[75]

Over the past few years, the 421–a program's lack of regulatory restrictions regarding a specific housing practice became a highly contested issue.[76] Until recently, developers receiving 421–a tax incentives could physically separate an apartment building's affordable units from its market–rate dwellings.[77] Although developers built both affordable and market–rate units within a single structure, the affordable units were placed in isolated floors and the residents had separate accommodations.[78] Here, the most infamous design feature is the separate entrance provided for low–income residents.[79] The separate entrances are now almost ubiquitously labeled "poor doors."[80] In response, many in the region condemned the

70. *Id.* (quoting 24 C.F.R. § 100.500(c)(1) (2014)) (internal quotations omitted).

71. *Id.* at 2515 (quoting § 100.500(c)(2)).

72. *Id.* (quoting § 100.500(c)(3)).

73. *See generally id.*

74. *See generally* N.Y. Real Prop. Tax Law § 421–a (McKinney 2015) (allowing developers of multi–unit residential buildings in cities with over a million people in the State of New York to forgo local taxes for up to three years for making twenty percent of the units affordable for low–income people).

75. *Id.* (stating that developers can renounce or terminate participation and providing tax exemptions for newly constructed multiple–unit residential buildings that include lower–cost housing options).

76. *See generally* Mireya Navarro, *'Poor Door' in a New York Tower Opens a Fight Over Affordable Housing*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/nyregion/separate-entryways-for-new-york-condo-buyers-and-renters-create-an-affordable-housing-dilemma.html?_r=4.

77. *Id.*

78. *Id.*

79. *Id.*

practice of building poor doors.[81]

Following public outcry, the New York Legislature enacted statutory changes with added language pertaining to poor doors.[82] Under this new provision in the 421–a statute, people living in these affordable units must share the same entrances and common areas with the occupants of market–rate units.[83] The provision also prohibits developers from isolating these affordable units to a specific floor or area of a building.[84] If a developer fails to comply with these requirements, it is not eligible to receive 421–a's tax incentives for providing mixed–income housing.[85]

III. ASSESSING THE VIABILITY OF A POTENTIAL DISPARATE IMPACT CLAIM AND THE COMPATIBILITY OF A POSSIBLE STATUTORY REFORM

A. Determining the Likelihood of a Successful Disparate Impact Claim Against Montgomery County Under the FHA

The FHA's legal structure may allow a plaintiff to bring a housing discrimination claim against Montgomery County based on the MPDU program's regulatory practices.[86] A concern for a potential Montgomery County plaintiff is that he or she may lack a substantial basis for arguing that there was a discriminatory intent in creating the MPDU program pursuant to the disparate treatment doctrine.[87] However, a plaintiff may be able to make a successful claim pursuant to the disparate impact doctrine.[88] Consequently, the primary legal issue to resolve involves a focus on applying the legal framework of disparate impact and investigating possible

80. *See*, *e.g.*, Justin Wm. Moyer, *NYC Bans 'Poor Doors' – Separate Entrances for Low-Income Tenants*, WASH. POST (June 30, 2015) (describing the poor door controversy and the statutory changes that followed outrage over the practice's perceived unfairness and cruelty).

81. *See id.* ("Though such a system might smack of Victorian England — or worse, the Jim Crow South or apartheid South Africa — plans for it existed in New York City until last week.").

82. *See id.* (describing how the Mayor of New York City added language in a bill that was passed by the state legislature).

83. *See* N.Y. Real Prop. Tax Law § 421–a(7)(d)(ii) (McKinney 2015) ("[A]fford able units shall share the same common entrances and common areas as market rate units, and shall not be isolated to a specific floor or area of a building.").

84. *Id.*

85. *Id.*

86. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015) (stating that disparate impact claims under the Fair Housing Act are often used against municipalities with discriminatory housing ordinances).

87. MONTGOMERY COUNTY, MD., 2015 ANALYSIS OF IMPEDIMENTS TO FAIR HOUS ING CHOICE, *supra* note 31.

88. *See generally* Dews v. Sunnyvale, 109 F. Supp. 2d 526, 531 (N.D. Tex. 2000).

avenues for making a successful claim on these grounds. The following sections will evaluate the three part *Inclusive Communities* test to demonstrate that MPDU is vulnerable to a housing discrimination claim.[89]

i. Plaintiff's Prima Facie Case of Disparate Impact

To make a successful disparate impact claim, the plaintiff must first make an initial showing that a housing practice has a discriminatory effect upon a protected class of individuals.[90] Particularly, the plaintiff must demonstrate that a housing practice either (1) institutes a form of segregation or (2) disproportionately effects a protected class in a negative manner.[91] These avenues for proving a discriminatory effect can be more concisely referred to as the segregation–based and disproportionate effect approaches.

The segregation–based approach is more advantageous in those circumstances where the discriminatory effect is less clearly defined.[92] Under this approach, the discriminatory effect is racial segregation, which impermissibly deprives litigants of the social and economic benefits of integration, while also compromising the dignity of the population being segregated.[93] Thus, this approach is centered around the generalized benefits of integration and the injury is interrelated and mutually connected to the act of physical separation based on race.[94] However, an argument under this approach may be difficult to make if there are not enough facts to demonstrate segregation is actually occurring.[95]

This segregation–based approach offers the strongest basis for establishing the plaintiff's prima facie disparate impact claim in a suit against Montgomery County. Montgomery County's zoning ordinance permits developers to separate affordable units from market–rate dwellings,

89. *See Inclusive Cmtys. Project*, 135 S. Ct. at 2514–15.

90. *See, e.g.*, *id.* (discussing how a plaintiff must demonstrate an adverse impact on a certain community).

91. *See* Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 937 (2d Cir. 1988) ("The discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation.").

92. *See* United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1186 (2d Cir. 1988) (showing how such an approach may be used); *see also* Casa Marie, Inc. v. Super. Ct. of P.R., 988 F.2d 252, 257 (1st Cir. 1993) (discussing the nature of this approach's burden of proof); United States v. City of Parma, 661 F.2d 562 , 565 (6th Cir. 1981).

93. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

94. *See generally id.*

95. *See Huntington*, 844 F.2d at 928 (finding that a practice satisfied the burden of proof under a discriminatory effects model, but it could not have met the requirements under the segregation–based approach, because the practice was less clearly connected to the outcome of increasing segregation).

two forms of housing with starkly different racial compositions.[96] Thus, these housing practices can foster racial segregation. This racial segregation deprives the occupants of both affordable and market–rate units from the social and economic benefits of integration.[97] Therefore, a plaintiff could establish a prima facie disparate impact claim under the segregation–based approach.

The disproportionate effect approach may also provide a successful, though more problematic, avenue for a successful prima facie disparate impact claim. This approach requires a showing on two fronts: the action at issue must (1) disproportionately impact a protected class and (2) place a negative burden on that class.[98] A potential plaintiff suing the County for its MPDU program has a strong basis for satisfying the first component, because there is strong statistical evidence supporting the notion that a disproportionate number of MPDU program participants are racial minorities, compared to the County at large.[99]

However, the grounds for proving the negative burden on the protected class are more difficult. The disproportionate effects approach requires a more concrete showing of an injury.[100] Essentially, the plaintiff must prove that the housing program resulted in a substantial harm to the protected class.[101] If the grounds for claiming a harm run in conjunction with clear social benefits, like greater social and economic opportunities, the argument could expose the plaintiff to a higher risk of judicial skepticism and pushback from the defense.[102]

If the disproportionate effect approach is used in a housing discrimination case against Montgomery County, a potential plaintiff would need to prove that separating MPDU units from market–rate

96. *See, e.g.*, *Trafficante*, 409 U.S. at 205 (holding that a regulation discriminatory under similar circumstances for depriving residents from enjoying the benefits of racial integration).

97. *See id.*

98. *See* Dews v. Sunnyvale, 109 F. Supp. 2d 526, 526 (N.D. Tex. 2000) (finding a practice discriminatory after the plaintiff demonstrated that the practice disproportionately impacted a protected class and placed a negative burden on that class).

99. *See* Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 79 (2001).

100. *See id.*

101. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 46, at 66 (stating that a showing of an adverse impact must be made, along with the statistical evidence).

102. *Cf.* Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 940 (2d Cir. 1988) (stating that if the defendant is a municipality, it can make a showing that the discriminatory practice serves an important government interest to invalidate the claim).

dwellings creates a substantial harm.[103] If the argument relies on demonstrating how the separation inflicts an economic or social harm, opposing counsel could respond by highlighting the economic benefits that the program provides to low–income residents.[104] However, while a municipality may provide a predominantly minority community with a form of social assistance like subsidized housing, it would still deprive them of racial integration's benefits.[105] When assessing the disproportionate effect, evidence of both a program's costs and benefits are more difficult to ascertain, making the harm more difficult to distinguish and accentuate.[106] While other arguments may be available, these constraints and risks make the disproportionate effect approach a less likely route for pursuing a claim against Montgomery County. Therefore, a potential plaintiff is more likely to utilize the segregation–based approach in a disparate impact claim.

ii. Defendant's Burden of Demonstrating Substantial, Legitimate, Nondiscriminatory Interest

After determining that a prima facie disparate impact claim has been established, the next step is to consider whether Montgomery County has a legitimate purpose for the housing separation.[107] In general, the County has a strong basis for satisfying its burden of proof because the MPDU program was intended to promote diversity and increase the area's economic accessibility.[108] Thus, the County may be able to argue that permitting housing separation in the MPDU program is essential for supporting its core mission.[109]

Furthermore, the County could claim that granting developers the discretion to engage in housing separation helps sustain demand for market–rate homes.[110] First, housing separation helps assuage the fears of those wealthy buyers who may be uncomfortable living in a mixed–income

103. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 46, at 66.

104. *Id.*

105. United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1186 (2d Cir. 1988).

106. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 46, at 67.

107. *Huntington*, 844 F.2d at 939 ("Once a plaintiff has made a prima facie showing of discriminatory effect, a defendant must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available.").

108. *See, supra* note 31 (stating that the intent behind the County's inclusionary housing program was to promote diversity and increase the area's economic accessibility).

109. *Id.*

110. *See generally* Beyer, *supra* note 10.

environment.[111] Second, mixed–income subdivisions could damage the perceived exclusivity and status of the market–rate units, which would in turn result in high–end buyers avoiding the project.[112] Consequently, the project would be less profitable, because the lack of demand may depress real estate values.[113] As a result, permitting housing separation creates higher profits for developers and a greater willingness for them to build subdivisions subject to the MPDU program's affordable housing requirements.[114]

iii. Plaintiff's Burden of Demonstrating a Less Discriminatory Alternative

Finally, the plaintiff can undermine Montgomery County's stated interest by presenting a less discriminatory alternative that still serves the County's interest. As will be described below, New York's 421–a program's poor door ban would be a suitable alternative to the MPDU program. Consequently, all three parts of the *Inclusive Communities* test have been met, which can support a successful housing discrimination claim under the FHA.

B. Comparing Montgomery County's MPDU Program to New York's 421–a Program

Given the MPDU program's vulnerability to a successful housing discrimination claim, it is worth considering whether an urban municipality's statutory solution to housing separation could work in a suburban context like Montgomery County. For the MPDU program to adopt a housing separation ban resembling the 421–a program's statutory changes, the statutory structures of both programs must be sufficiently compatible. If there is a strong enough resemblance between the two programs, it is likely that it would be possible to apply the poor door ban to the MPDU program.

Although there are clear distinctions between a tax incentive program and a zoning regulation, both programs promote forms of inclusionary housing.[115] Given this common goal, the programs share similar

111. *See id.*

112. *See* Emily Badger, *When Separate Doors for the Poor Are More Than They Seem*, WASH. POST (July 31, 2014) (discussing how some owners of market–rate units don't want to live near affordable units).

113. *Id.*

114. *See* Moderately Priced Housing Law, Montgomery County Code, Md., Code § 25A (2017).

115. *See* N.Y. Real Prop. Tax Law § 421–a (McKinney 2015) (outlining the exemptions for various types of new dwellings); Moderately Priced Housing Law, Montgomery County Code, Md., Code § 25A (2017) (assessing the need for

approaches to increasing the number of affordable units within a jurisdiction.[116] They are both market–oriented legal mechanisms that modify the private real estate market with regulatory incentives or requirements.[117]

These programs are also similar in the context of housing separation. By concentrating the occupants of affordable units on a separate side street, developers in Montgomery County create physical and social divisions between the occupants of subsidized units and market–rate units.[118] In this way, the MPDU program permits a form of separation that resembles the practice of creating poor doors in urban apartment buildings.[119] Additionally, housing separation in a suburban context can, in some ways, operate in a more subtle and nefarious manner because these settings offer more physical space to isolate and conceal low–income housing.[120]

Therefore, the parallels between the inclusionary housing regulations in New York and Montgomery County demonstrate that the recent changes to the 421–a program are compatible in Montgomery County. Thus, Montgomery County could similarly require developers to provide common entrances for both affordable and market–rate units. In this instance, a common point of entry would be the road providing access to the subdivision. Similar to the 421–a program requirement that affordable and market–rate apartments share the same floor,[121] the MPDU program can require developers to place affordable dwellings within the same cul–de–sacs as market–rate homes in an evenly distributed manner.

IV. MONTGOMERY COUNTY SHOULD IMPLEMENT A SAME STREET STIPULATION

Enacting regulatory changes to the MPDU program resembling New York's poor door ban is both a legally feasible and advisable option for Montgomery County. As described above, the similarities between these two forms of housing separation demonstrate that Montgomery County can

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moderately priced housing in Montgomery County, Maryland and offering alternative solutions for suitable housing for multiple income houses).

116. *See* SCHWARTZ, *supra* note 19, at 283 (discussing how both mandatory or incentives based inclusionary housing programs work off the statutory model of zoning ordinances).

117. *Id.*

118. *See generally* Rice, *supra* note 13 (highlighting the divide created between incomes in the community by offering housing at market rate with subsidies for the poor).

119. Moyer, *supra* note 80 (discussing how "poor doors" work to physically separate people of different class backgrounds).

120. *See generally id*.

121. *See* N.Y. Real Prop. Tax Law § 421–a(7)(d)(ii) (McKinney 2015).

use New York's methodology in a suburban context.[122]

While banning poor doors may look different in a suburban context, it still serves the same purpose of creating common entrances for subsidized and market–rate units.[123] By adding a same street stipulation in Chapter§ 25 of the Montgomery County Code, the County could ensure that there are common access points for all residents.[124] This same street stipulation would state, "[a]ffordable units shall share the same common entrances and common areas, including roads and sidewalks, as market rate units." For example, developers could then place affordable dwellings within the same cul–de–sacs as market–rate homes in a more evenly distributed manner.

Due to the greater number of physical factors at play when designing a subdivision, including the street design and the positioning of detached dwellings,[125] the County could add additional compliance requirements onto its current zoning approval process.[126] If a developer's plan fails to reasonably incorporate and integrate affordable units within the subdivision's design, the County would have the power to reject the application and ask for revisions. While considering this extra regulatory factor may slow down the housing approval process, it could also foster a more cooperative process between these private and public entities.

However, this oversight may stymie new development if businesses find these additional procedures prohibitively bureaucratic.[127] Therefore, the best solution may be to implement the statutory reforms with an additional oversight process, but make participation in the supplementary compliance process purely voluntary.[128] To encourage participation, Montgomery County could offer limited tax incentives to developers that satisfy the additional compliance requirements.

Additionally, given the Court's recent holding in *Inclusive Communities* and the limited budgets that local governments have available to pay legal fees, municipalities should prohibit housing separation as a precaution.[129]

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122. *See generally id.* § 421–a; Moderately Priced Housing Law, Montgomery County Code, Md., Code § 25A (2017).

123. *See generally* Rice, *supra* note 13.

124. *See generally* Moyer, *supra* note 80.

125. *See generally* Rice *supra* note 13.

126. *See generally* Moderately Priced Housing Law, Montgomery County Code, Md., Code § 25A (2017).

127. *Cf.* Jawhar Sircar, *The Bureaucracy Is Ailing*, TELEGRAPH, https://www.telegraphindia.com/1170914/jsp/opinion/story_172999.jsp (lasted visited Sept. 25, 2017) (describing how excessive bureaucracy can have negative business consequences).

128. *See generally id.*

129. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514–15 (2015).

Housing separation deprives the occupants of affordable units from the potential opportunity to socialize with people from more economically advantaged backgrounds and implies that they are undesirable neighbors.[130] Therefore, by permitting this practice, jurisdictions are, in effect, endorsing a regulation that imputes inferiority upon the occupants of those affordable units on a symbolic and actual basis.[131]

In this way, metropolitan areas, including urban centers and the surrounding suburbs, could empower low–income individuals to make their own decisions about where to live in a manner that may be more politically palatable.[132] That said, this type of solution would only work in a city with a strong real estate market and high demand for market–rate units.[133] Otherwise, this tax–based approach may just further exacerbate an area's housing problems by discouraging construction and restricting the overall housing supply.[134] It is important that housing policymakers devote more attention to this issue to avoid perpetuating the kind of segregation that many have fought hard to prevent.

CONCLUSION

Montgomery County's mandatory inclusionary housing program permits a form of housing separation. This practice raises issues pertaining to FHA compliance under the disparate impact doctrine. Montgomery County may be susceptible to a lawsuit, because the County permits a discriminatory housing practice that deprives a protected class of individuals from enjoying the benefits of integration.[135] Consequently, banning housing separation is a prudent legal precaution for local governments and fosters a less uncertain business environment. Instead, Montgomery County should implement a same street stipulation resembling New York's poor door ban.

130. Tanvi Misra, *Fair Housing Faces an Uncertain Fate*, ATLANTIC (Feb. 3, 2017), http://www.citylab.com/housing/2017/02/fair-housing-faces-an-uncertain-fate/515133/?utm_source=atlfb.

131. *See generally id.*

132. *See generally* Rice, *supra* note 13.

133. *See generally id.*

134. *See generally id.*

135. *See* SCHWARTZ, *supra* note 19, at 283.