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## Fighting Hidden Discrimination: Disparate Impact Claims Under the Fair Housing Act

Sean Milford

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## NOTE

# Fighting Hidden Discrimination: Disparate Impact Claims Under the Fair Housing Act

*Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375 (3d Cir. 2011).

SEAN MILFORD\*

### I. INTRODUCTION

Discriminatory practices in housing are a serious issue facing minority groups around the nation. The Fair Housing Act (“FHA”) makes discrimination on the basis of race unlawful, and violations of the FHA can be established by showing either intentional discrimination or that a policy has a disparate impact on a minority group.<sup>1</sup>

In *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, a group of residents of a neighborhood in the New Jersey Township of Mount Holly brought suit against the Township, claiming that a proposed plan to redevelop their neighborhood violated the FHA because it had a disparate impact on minority groups.<sup>2</sup> The redevelopment plan proposed by the Township would force most of the minority residents out of the Gardens neighborhood and, in many cases, out of the Township of Mount Holly entirely.<sup>3</sup>

The Third Circuit upheld the United States District Court for the District of New Jersey’s ruling that the residents of the neighborhood could make a prima facie case for discrimination under the FHA by showing that the redevelopment plan disproportionately affected the minority residents of the neighborhood.<sup>4</sup> This Note will provide a brief overview of the history of disparate impact claims under the FHA and outline why they are an important tool in fighting housing discrimination in the United States. The ruling of the Third Circuit preserves this important tool and will help to protect minority homeowners from future discriminatory redevelopment of their neighborhoods. The parties settled this case on November 13, 2013, before the Supreme Court could rule on its merits. Should the Supreme Court hold in a future case that disparate impact claims are not cognizable under the FHA,

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\* Law Student at the University of Missouri School of Law. I would like to thank Professor Rigel Oliveri and Jacki Langum for their inspiration for and help with this Note.

1. 42 U.S.C. § 3604(a) (2012).

2. 658 F.3d 375, 377 (3d Cir. 2011).

3. *Id.*

4. *Id.* at 382.

the Court would strike a serious blow against homeowners fighting to preserve and redevelop their neighborhoods and towns.

## II. FACTS AND HOLDING

The appellants in this case were an association of residents, organized as the Mount Holly Gardens Citizens in Action, and twenty-three current and former residents of the Gardens neighborhood in the Township of Mount Holly, New Jersey.<sup>5</sup> In October of 2008, the residents filed suit in New Jersey District Court against the Township of Mount Holly alleging violations of the Fair Housing Act (also known as Title VIII of the Civil Rights Act of 1968), the Civil Rights Act of 1866, and the Equal Protection Clause of the Fourteenth Amendment.<sup>6</sup>

The Gardens neighborhood, located in the Township of Mount Holly in Burlington County, New Jersey, consists of 329 homes and is predominantly inhabited by African-American and Hispanic residents.<sup>7</sup> The neighborhood is overwhelmingly poor; almost every resident there earned less than 80% of the median income for the area, and most were classified as having “very low” or “extremely low” incomes according to data from the 2000 census.<sup>8</sup> According to data from the 2000 census, about half the residents of the Gardens neighborhood rented their homes, while the remaining half were homeowners.<sup>9</sup> Many were long-time residents of the Gardens: 81% of homeowners had lived in their homes for at least nine years, while 72% of renters had lived in their homes for at least five years.<sup>10</sup> The Gardens had a total population of 1,031 residents.<sup>11</sup> Of these residents, 19.7% were non-Hispanic Whites, 46.1% were African-Americans, and 28.8% were Hispanic.<sup>12</sup> This racial makeup gave the Gardens the highest concentration of minority residents in the Township of Mount Holly.<sup>13</sup>

The Gardens neighborhood had several problems that, over time, negatively affected its livability.<sup>14</sup> There was little interest on the part of many homeowners in the upkeep of common areas in the structures, which were laid out in attached rows of eight to ten individual houses.<sup>15</sup> Many other owners were simply absentee landlords whose tenants had little interest in

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5. *Id.* at 377.

6. *Id.* at 380-81.

7. *Id.* at 377-78. The homes in the Gardens neighborhood are mainly two-story brick structures built in the 1950s. *Id.* at 378.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

maintaining the condition of the homes they were renting.<sup>16</sup> The neighborhood was also overly crowded, which led some residents to pave their yards, leading to drainage problems.<sup>17</sup> Over time, many homes fell into disrepair and were abandoned, left to decay.<sup>18</sup> Because the homes were attached, the deterioration of one home often led to the decay of attached homes.<sup>19</sup> Combined with the dense population, the high number of abandoned properties led to a high crime rate in the Gardens.<sup>20</sup> In 1999, the Gardens, while containing only 1.5% of the land area in Mount Holly, produced 28% of the Township's crimes.<sup>21</sup>

The deterioration of the Gardens neighborhood led to the proposal of a series of plans, beginning in 2000, aimed at redeveloping the neighborhood and remedying its high crime and vacancy rates.<sup>22</sup> The initiatives led to the renovation of some homes, but the problems in the Gardens continued.<sup>23</sup> A study to determine whether the Gardens should be designated for redevelopment was commissioned by the Township of Mount Holly in 2000.<sup>24</sup> The study determined that, due to "blight, excess land coverage, poor land use, and excess crime," the neighborhood presented a "significant opportunity for redevelopment."<sup>25</sup>

The redevelopment plans proposed included replacing much of the housing stock in the Gardens with market-rate housing, unaffordable to the vast majority of the current residents.<sup>26</sup> The first plan, named the Township Area Redevelopment Plan and proposed in 2003, called for demolishing all of the homes in the Gardens and replacing them with 180 market-rate homes.<sup>27</sup> This plan was followed two years later by the West Rancocas Redevelopment Plan, which also called for the destruction of many of the existing homes in the Gardens.<sup>28</sup>

This new plan called for the construction of 228 new units, but did allow for the optional rehabilitation of some of the existing homes so that a small number of residents would be able to remain in the neighborhood.<sup>29</sup> The West Rancocas plan also called for 10% of the new homes to be designated as affordable housing, possibly allowing for more current residents to stay in

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 378-80.

23. *Id.*

24. *Id.* at 379.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

the Gardens.<sup>30</sup> Three years later, in 2008, the West Rancocas plan was revised.<sup>31</sup> The revised plan eliminated any rehabilitation of current homes that was previously contemplated and raised the number of proposed new units to 520, of which only fifty-six would be designated as affordable housing.<sup>32</sup> Of these fifty-six, only eleven would be offered to existing residents of the Gardens.<sup>33</sup>

The residents of the Gardens raised objections to every redevelopment plan, fearing that they would not be able to afford to live in the neighborhood, nor anywhere else in the Township, once redevelopment took place.<sup>34</sup> At a meeting about the redevelopment in 2005, a planning expert testified that the West Rancocas plan was not a sufficient plan because it only allowed for possible rehabilitation of existing homes rather than encouraging or requiring rehabilitation.<sup>35</sup> The expert also testified that 90% of the existing residents of the Gardens would be unable to afford the new homes.<sup>36</sup>

Despite the objections of residents, the Township began purchasing homes in the Gardens and proceeding with its plan to redevelop the neighborhood.<sup>37</sup> A relocation plan, called the Workable Relocation Assistance Plan (“WRAP”), was developed to provide financial assistance to the residents of the Gardens.<sup>38</sup> Homeowners in the Gardens would receive \$15,000 and a \$20,000 no-interest loan to help in the purchase of a new home.<sup>39</sup> The Township of Mount Holly offered to buy homes from residents in the Gardens for between \$32,000 and \$49,000.<sup>40</sup> The estimated cost of the new market-rate homes in the redevelopment plan was between \$200,000 and \$275,000, leaving them well outside the range of affordability for a majority of the African-American and Hispanic residents of the Township, even with the financial assistance and no-interest loans offered by the Township.<sup>41</sup>

Residents of the Gardens who were renting their homes were offered up to \$7,500 in relocation assistance, but this assistance could not be used to return to the Gardens once it had been redeveloped.<sup>42</sup> The proposed market-rate rent for the new units in the redevelopment plan was \$1,230 per month, far higher than the majority of those currently renting in the Gardens could

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 379-80.

39. *Id.* at 380.

40. *Id.*

41. *Id.*

42. *Id.*

afford.<sup>43</sup> The Township paid for the relocation of sixty-two families, forty-two of which moved outside of the Township of Mount Holly.<sup>44</sup>

The plan called for redeveloping the neighborhood in phases, but the Township began acquiring and demolishing any home it could purchase.<sup>45</sup> By August of 2008, the Township had demolished seventy-five homes and purchased 148 more, leaving them vacant.<sup>46</sup> By the following summer, 110 more houses had been demolished by the township.<sup>47</sup> The destruction of such a large number of houses in the neighborhood had a negative effect on the quality of life of the remaining residents, who were “forced to cope with noise, vibration, dust, and debris.”<sup>48</sup> Because the homes were attached to each other, the destruction of one home often led to problems with adjacent homes.<sup>49</sup> Interior walls were exposed to the elements, and holes were created in the roofs of the homes left standing after the demolitions.<sup>50</sup> The signs of destruction were visible among the remaining homes: “hanging wires and telephone boxes, ragged brick corners, open masonry joints, rough surfaces, irregular plywood patches, and damaged porches, floors, and railing.”<sup>51</sup> There was little incentive for the remaining residents to attempt to rehabilitate the neighborhood amidst all the destruction, and many of the remaining residents fled the Gardens.<sup>52</sup> Only seventy homes remained under private ownership by June 2011, and fifty-two properties owned by the Township were in the process of being demolished.<sup>53</sup>

Citizens in Action filed a suit in New Jersey state court in October of 2003, alleging violations of state redevelopment laws, procedures, and anti-discrimination laws.<sup>54</sup> The New Jersey Superior Court dismissed some counts and granted summary judgment to the Township on other counts, ultimately holding that the anti-discrimination claims were not ripe because the redevelopment plan had not yet been implemented.<sup>55</sup> This holding was affirmed by the Appellate Division, and a petition for certiorari was denied by the Supreme Court of New Jersey.<sup>56</sup>

In May of 2008, the residents filed suit in the District Court for the District of New Jersey, alleging the anti-discrimination claims that had not been

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

ripe in their previous lawsuit.<sup>57</sup> The residents alleged that the Township had violated the FHA, the Civil Rights Act of 1968, and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>58</sup> The residents of the Gardens sought declaratory and injunctive relief to stop the redevelopment of the Gardens neighborhood.<sup>59</sup> In addition, the residents sought damages and compensation that would allow them to secure housing elsewhere in the Township.<sup>60</sup> The Township filed motions to dismiss, which the District Court converted into motions for summary judgment.<sup>61</sup> After allowing the parties time to brief the motions, the District Court granted summary judgment to the Township.<sup>62</sup> The District Court held that there was no prima facie case for discrimination under the FHA.<sup>63</sup> The District Court further held that even if there were a prima facie case for discrimination, the association and residents had shown no alternative course of action that the Township could have taken to lessen the impact of the redevelopment on the residents.<sup>64</sup> The residents appealed, and a motion by the residents to stay redevelopment was granted by the Third Circuit pending the appeal.<sup>65</sup>

Under the FHA, it is unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>66</sup> A home may be made “otherwise unavailable” under the FHA by an action that limits the availability of affordable housing.<sup>67</sup> The FHA can be violated by an intentional discriminatory practice or a practice that has a disparate impact on a protected class of people.<sup>68</sup>

The Third Circuit found on appeal that the residents had submitted sufficient evidence to establish a prima facie case for discrimination under the FHA.<sup>69</sup> The court held that the district court had erred in granting summary judgment to the Township on this point.<sup>70</sup> In addition, the court held that there was sufficient evidence to create a genuine issue of material fact as to the feasibility of an alternative course of action that the Township could have taken to lessen the impact of the redevelopment on the residents.<sup>71</sup> The Third Circuit vacated the summary judgment of the District Court and held that,

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57. *Id.*

58. *Id.* at 380-81.

59. *Id.* at 381.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. 42 U.S.C. § 3604(a) (2012).

67. *Mt. Holly*, 658 F.3d at 381.

68. *Id.*

69. *Id.* at 382.

70. *Id.* at 382-83.

71. *Id.* at 387.

when there is evidence that a practice disproportionately burdens a particular protected class, a prima facie case for discrimination under the FHA exists.<sup>72</sup>

### III. LEGAL BACKGROUND

The FHA is an important tool to protect the right of all Americans to secure housing. As part of that protection, 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, color, religion, sex, familial status, or national origin.”<sup>73</sup>

In *Resident Advisory Board v. Rizzo*,<sup>74</sup> the Third Circuit held that a dwelling could be made otherwise unavailable within the meaning of the FHA<sup>75</sup> by actions that limit the availability of affordable housing.<sup>76</sup> In *Rizzo*, residents of Philadelphia filed suit against the mayor alleging that they were unable to secure housing outside of racially segregated areas of the city.<sup>77</sup> In deciding the case, the Third Circuit noted that “a Title VIII claim must rest, in the first instance, upon a showing that the challenged action by defendant had a racially discriminatory effect.”<sup>78</sup> Thus, the court held that a discriminatory effect alone could establish a prima facie case for discrimination under Title VIII, absent any discriminatory intent.<sup>79</sup> *Rizzo* further held that, once a prima facie case for discrimination has been established, the burden shifts to the defendant to show that it has a legitimate, non-discriminatory reason for its actions and that “no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.”<sup>80</sup>

The Supreme Court of the United States in *Hazelwood School District v. United States* confronted the issue of how to measure a disparate impact claim.<sup>81</sup> In *Hazelwood*, the State of Missouri filed suit against the Hazelwood school district alleging discriminatory practices in the district’s hiring of teachers.<sup>82</sup> The school district argued that statistical disparities in the percentage of African-American teachers employed by the district compared with the percentage of African-American teachers employed in the labor market area was not enough to constitute a prima facie case of a pattern or practice of racial discrimination.<sup>83</sup> The United States District Court for the Eastern District of Missouri agreed and ruled that the government had failed

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72. *Id.* at 387-88.

73. 42 U.S.C. § 3604(a) (2012).

74. 564 F.2d 126, 126 (3d Cir. 1977).

75. § 3604(a).

76. *Rizzo*, 564 F.2d at 130.

77. *Id.* at 137.

78. *Id.* at 148.

79. *Id.*

80. *Id.* at 149.

81. 433 U.S. 299 (1977).

82. *Id.* at 303.

83. *Id.* at 305.



to establish a pattern or practice of discrimination.<sup>84</sup> The Eighth Circuit disagreed with the District Court and reversed, holding that the statistical disparity was enough to establish a prima facie case of a pattern or practice of racial discrimination.<sup>85</sup> The Supreme Court vacated the judgment of the Eighth Circuit, holding that it should have remanded the case to the District Court for further factual findings.<sup>86</sup> However, the Supreme Court agreed with the Eighth Circuit's analysis of the disparate impact issue, noting that, "[w]here gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination."<sup>87</sup>

The Second Circuit considered how to measure a disparate impact claim under the FHA in *Huntington Branch, N.A.A.C.P. v. Town of Huntington*.<sup>88</sup> In *Huntington*, a group of black residents of the city, together with the town branch of the N.A.A.C.P. and a local housing authority, brought suit against the town, asking them to rezone a parcel on which they wished to construct a multi-family subsidized apartment complex.<sup>89</sup> The parcel on which the residents sought to build the apartment building was in a virtually all-white neighborhood, directly adjacent to a small urban renewal zone with a majority-minority population.<sup>90</sup> When considering the town's refusal to rezone the parcel to allow the construction of the apartment building, the Second Circuit rejected the lower court's reliance on absolute numbers of residents affected by the town's action, and instead looked at proportional statistics.<sup>91</sup> While the majority of those unable to secure housing in the proposed apartment building were white, a larger proportion of minority residents of the town were affected.<sup>92</sup> The *Huntington* court held that this disproportionate harm to minority residents created a prima facie claim of discriminatory effect under the FHA.<sup>93</sup>

In *Hallmark Developers, Inc. v. Fulton County*, the Eleventh Circuit also considered how to measure a disparate impact claim under the FHA.<sup>94</sup> In *Hallmark*, the plaintiff, a landowner and developer, brought suit against Fulton County, Georgia, alleging that its denial of a request for rezoning constituted a violation of the FHA.<sup>95</sup> The developer intended to construct a housing development where the majority of the units would be designated as affordable.<sup>96</sup> The land on which he intended to construct the development needed to

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84. *Id.* at 304.

85. *Id.*

86. *Id.* at 313.

87. *Id.* at 307-08.

88. 844 F.2d 926 (2d Cir. 1988).

89. *Id.* at 928.

90. *Id.*

91. *Id.* at 938.

92. *Id.*

93. *Id.*

94. 466 F.3d 1276, 1286 (11th Cir. 2006).

95. *Id.* at 1279.

96. *Id.*

be rezoned from agricultural to mixed use before the development could go forward.<sup>97</sup> When the county denied the developer's application to rezone the land, he filed suit alleging that the denial had a disparate impact on minorities, who were the most likely tenants of the new development.<sup>98</sup> The developer produced an expert witness to testify that the denial of rezoning had a disparate impact on minorities.<sup>99</sup> The District Court refused to credit the testimony of this witness, holding that it was "inherently speculative."<sup>100</sup> The Eleventh Circuit affirmed the ruling of the District Court, but stated that, typically, "a disparate impact is demonstrated by statistics."<sup>101</sup> Additionally, the Eleventh Circuit stated that "it may be inappropriate to rely on absolute numbers rather than on proportional statistics."<sup>102</sup>

Ultimately, by allowing claims to be brought under the FHA for discriminatory effect absent an explicit discriminatory intent, courts have interpreted the FHA as a broad, remedial statute designed to prevent and eliminate any sort of discrimination against protected classes.<sup>103</sup> In considering whether a prima facie claim under the FHA exists, courts have held that the analysis should include an examination of the statistical disparities in the impact of the challenged action.<sup>104</sup>

#### IV. INSTANT DECISION

In *Mt. Holly*, the Third Circuit held that the residents of the Gardens neighborhood had provided sufficient evidence to establish a prima facie case for discrimination under the FHA.<sup>105</sup> The Third Circuit reversed the decision of the District Court because it found that the District Court had misapplied the standard for deciding whether the appellants had established a prima facie case under Title VIII and because it did not draw all reasonable inferences in the appellants' favor.<sup>106</sup>

First, the Third Circuit considered how a claim for discrimination may be made under the FHA.<sup>107</sup> The court noted that the FHA may be violated either by intentional discrimination or by a practice that has a disparate impact on a protected class, as is the case here.<sup>108</sup> The court then considered

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97. *Id.*

98. *Id.* at 1282.

99. *Id.*

100. *Id.* at 1283.

101. *Id.* at 1286.

102. *Id.* (quoting *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988)).

103. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

104. *See, e.g., Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

105. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011).

106. *Id.* at 377.

107. *Id.* at 381.

108. *Id.*

whether the policy challenged by the residents in the instant case had a disparate impact on a particular racial group.<sup>109</sup> If such a prima facie case is established, the court noted that it must then look to whether the defendant, in this case the Township, has a legitimate, non-discriminatory reason for its actions.<sup>110</sup> If the defendant does have a legitimate reason for its actions, it must then establish that there was no less discriminatory alternative that it could have adopted.<sup>111</sup> Lastly, if the defendant has shown that there was no alternative to its action, the burden shifts to the party challenging the action, who must then show that “there is a less discriminatory way to advance the defendant’s legitimate interest.”<sup>112</sup> In analyzing the case in this manner, the court relied on precedent set by the Third Circuit in *Rizzo*.<sup>113</sup>

To determine whether a disparate impact existed, the Third Circuit looked to statistics concerning the residents of the Gardens neighborhood.<sup>114</sup> The court quoted *Hazelwood*, stating that “a prima facie case may be established where gross statistical disparities can be shown.”<sup>115</sup> The court noted that, according to census data from before the redevelopment began, “22.54% of African-American households and 32.31% of Hispanic households in Mount Holly will be affected by the demolition of the Gardens.”<sup>116</sup> Comparatively, only 2.73% of the White households in the Township would be affected.<sup>117</sup> These percentages mean that African-Americans would be eight times more likely to be affected by the redevelopment project than Whites, and Hispanics would be eleven times more likely to be affected than Whites.<sup>118</sup> Additionally, the court noted that 79% of White households in the county would be able to afford the new market-rate housing in the redeveloped Gardens, while only 21% of African-American households would be able to afford the new housing.<sup>119</sup>

The Third Circuit held that the District Court had erred in failing to consider these statistics when deciding whether the residents had established a prima facie case for discrimination.<sup>120</sup> In holding that the District Court should not have rejected the statistics, the Third Circuit looked to the holdings in both *Rizzo* and *Huntington*.<sup>121</sup> The Court noted that both the *Rizzo* and *Huntington* courts had used statistics as the basis of a disparate impact

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109. *Id.*

110. *Id.* at 382.

111. *Id.*

112. *Id.*

113. *Id.* (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977)).

114. *Id.*

115. *Id.* (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (internal quotation marks omitted)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

claim.<sup>122</sup> The Third Circuit held that the statistics presented by the residents “should have been taken in the light most favorable” to the residents.<sup>123</sup> Because the statistics in this case showed that African-Americans and Hispanics were much more likely to be affected by the redevelopment of the Gardens than Whites, the court held that a prima facie case for discrimination under the FHA had been established.<sup>124</sup>

In finding that the residents had established a prima facie case under the FHA, the Third Circuit noted several ways in which the District Court had erred in its ruling.<sup>125</sup> The Third Circuit held that the District Court was in error when it said that the residents’ statistical analysis was flawed because it did not take into account that fifty-six units in the Revised West Rancocas Plan would be designated as affordable housing.<sup>126</sup> The District Court should have considered evidence presented by the residents that, although those fifty-six units were labeled as affordable, they would be too expensive for almost all of the residents of the Gardens.<sup>127</sup>

The Third Circuit also held that the District Court was in error when it “rejected a reasonable inference in favor of the Residents by looking at the absolute number of African-American and Hispanic households in Burlington County that could afford homes.”<sup>128</sup> Instead, the Third Circuit held that the District Court “should have looked to see whether the African-American and Hispanic residents were disproportionately affected by the redevelopment plan.”<sup>129</sup> The Third Circuit noted that the *Huntington* court had stated that “it may be inappropriate to rely on absolute numbers rather than on proportional statistics.”<sup>130</sup>

Additionally, the Third Circuit found that the District Court had erred by conflating disparate treatment with disparate impact.<sup>131</sup> The District Court said that, because the minority inhabitants of the Gardens would be treated the same as the non-minority residents, the residents had failed to show a greater adverse impact on minorities.<sup>132</sup> Instead, the Third Circuit said that the District Court should have considered whether minorities were disproportionately impacted by the redevelopment, rather than whether they were simply treated differently than Whites.<sup>133</sup> The Third Circuit noted that, under the FHA, a prima facie case of discrimination may be established simply by

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 383-86.

126. *Id.* at 383.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (quoting *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir. 1988)).

131. *Id.*

132. *Id.*

133. *Id.*

showing that a policy impacts a protected class disproportionately, without the need to show that the policy treats the protected class any differently.<sup>134</sup>

The Third Circuit next rejected the Township's argument that a finding of disparate impact would halt the redevelopment of minority neighborhoods around the country.<sup>135</sup> The court noted that the Township's approach led to the conclusion that the FHA could only be violated when a policy "treats each individual minority resident differently from each individual White resident."<sup>136</sup> Instead, noted the court, precedent established that a prima facie case can be made by showing that the policy "disproportionately affects or impacts one group more than another – facially disparate treatment need not be shown."<sup>137</sup> The court again cited *Rizzo*, noting that in that case, the White and African-American residents on the waiting list for public housing were treated the same, each harmed by the blockage of the public housing project.<sup>138</sup> Nevertheless, the *Rizzo* court found a violation of the FHA because the policy had a disproportionate impact on African-Americans.<sup>139</sup>

In holding that the residents had established a prima facie case of discrimination, the Third Circuit noted that the FHA was meant to be interpreted in a broadly remedial fashion.<sup>140</sup> Allowing a plaintiff to make a prima facie case any time a segregated neighborhood is redeveloped in the midst of a shortage of affordable housing is "a feature of the FHA's programming, not a bug."<sup>141</sup> The court noted that this seemingly low bar for establishing a prima facie case encouraged a thorough inquiry into the motives behind any challenged redevelopment policy and furthered the antidiscrimination goals of the FHA.<sup>142</sup> Because simply establishing a prima facie case is not enough to create liability under the FHA, the Third Circuit noted that the District Court should not have been worried about the expansiveness of the disparate impact analysis.<sup>143</sup> A thorough inquiry into a defendant's motivations behind a policy is "precisely the sort of inquiry required to ensure that the government does not deprive people of housing because of race."<sup>144</sup>

The Third Circuit next noted that the District Court's holding seemed to be based on the concern that the Township of Mount Holly would be powerless to rehabilitate and redevelop its blighted neighborhoods if it found a disparate impact in this case.<sup>145</sup> The court rejected this line of reasoning, noting

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134. *Id.* at 384.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 142 (3d Cir. 1977)).

139. *Id.*

140. *Id.* at 385.

141. *Id.* at 384-85.

142. *Id.* at 385.

143. *Id.*

144. *Id.* (internal quotation marks omitted).

145. *Id.*

that it “distorts the focus and analysis of disparate impact cases under the FHA.”<sup>146</sup> The Third Circuit held that, once the residents had established a prima facie case of disparate impact, the District Court must then determine whether the residents’ rights were being taken away because of their race, and whether the Township could have achieved its objectives in a less discriminatory way.<sup>147</sup>

After holding that the residents had established a prima facie case of discrimination, the Third Circuit addressed the issue of whether the Township had shown a legitimate reason for its discriminatory policy.<sup>148</sup> The Third Circuit agreed with the Township’s contention that alleviating blight is a legitimate interest and moved to the question of whether the Township had shown that there was no less discriminatory alternative to its redevelopment plan.<sup>149</sup> Only when the Township showed that there was no less discriminatory alternative would the burden shift back to the residents to provide evidence of just such an alternative.<sup>150</sup>

In determining whether the Township had shown that there was no less discriminatory alternative to its plan, the Third Circuit applied the standard of reasonableness.<sup>151</sup> The court held that the question should be whether the less discriminatory alternatives proposed by the residents are unreasonable or “impose an undue hardship under the circumstances of this specific case.”<sup>152</sup> The court then considered several alternatives to the Township’s redevelopment plans that were proposed by the residents.<sup>153</sup>

First, the residents argued that a more gradual redevelopment plan, which did not consist of the wholesale acquisition and destruction of homes, would have allowed existing residents to relocate elsewhere in the neighborhood while their homes were being redeveloped, then move back once the construction was completed.<sup>154</sup> Further, the residents proposed an alternative plan consisting of “targeted acquisition and rehabilitation of some . . . homes, the combination of some homes to make larger homes, . . . and selective demolition and new construction, including the construction of more affordable units.”<sup>155</sup> The Township, in contrast, argued that these proposed plans were extremely costly and not feasible alternatives to the Township’s chosen redevelopment plan.<sup>156</sup> In considering these alternatives, the Third Circuit held that the question of whether they were reasonable created a genuine is-

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146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 386.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 387.

sue of material fact, requiring further investigation.<sup>157</sup> Only after the details of the alternatives had been fully considered could the District Court reconsider motions for summary judgment.<sup>158</sup>

The Third Circuit held the District Court had erred in granting summary judgment for the Township by failing to draw all reasonable inferences in favor of the residents.<sup>159</sup> The court held that, because the statistics in this case show that minority groups are disproportionately impacted by the redevelopment policy of the Township, the appellants have established a prima facie case of discrimination under the FHA.<sup>160</sup> Additionally, the Third Circuit held that further factual investigation was needed to determine whether the alternative development plans proposed by the residents were reasonable.<sup>161</sup>

## V. COMMENT

In holding that the residents could establish a prima facie case of discrimination under the FHA, the Third Circuit rightly held that a plaintiff may show a violation of the FHA through a policy that has a disparate impact on a minority group.<sup>162</sup> In doing so, the Third Circuit followed the purpose of the FHA – to be a broadly remedial statute – and strengthened its protection of minority groups facing housing discrimination.<sup>163</sup>

By holding that disparate impact alone, absent disparate treatment, is enough to establish a prima facie case for discrimination under the FHA, the Third Circuit correctly followed precedent on this issue. The Third Circuit noted that the *Rizzo* court had been faced with this very question and had held that a violation of the FHA may be found by showing a discriminatory effect on a minority group, without showing any discriminatory treatment of that group.<sup>164</sup>

In determining whether a challenged policy has a discriminatory effect on a minority group, the Third Circuit again looked to precedent, this time from the Supreme Court.<sup>165</sup> In *Hazelwood*, the U.S. Supreme Court held that statistical disparities in the impact of a challenged policy on minority groups, if great enough, were alone enough to show disparate impact.<sup>166</sup> The Third Circuit built its decision around this holding, using statistics to show that the

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157. *Id.*

158. *Id.*

159. *Id.* at 387-88.

160. *Id.*

161. *Id.* at 387.

162. *See id.* at 384.

163. *Id.* at 385.

164. *Id.* at 384 (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 142 (3d Cir. 1977)).

165. *Id.* at 382.

166. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

impact of the challenged policy in this case would disproportionately affect Hispanic and African-American residents of the Gardens.<sup>167</sup>

The Third Circuit rightly rejected the Township's argument that allowing disparate impact claims under the FHA would hinder redevelopment efforts in minority neighborhoods.<sup>168</sup> The Third Circuit emphasized, in response to this argument, that allowing a prima facie case for disparate impact would only have the effect of placing more scrutiny on the motivations of a challenged developer.<sup>169</sup> The Third Circuit noted that this is exactly the purpose of the FHA, and courts should not be concerned with allowing a broad application of what is meant to be a broadly remedial statute.<sup>170</sup>

In allowing for disparate impact claims under the FHA, the Third Circuit has solidified an important tool in the fight against housing discrimination. It is highly unlikely that a redevelopment policy will be facially discriminatory, so it is important that the discriminatory effects of a policy can be challenged, absent any obvious discriminatory intent.<sup>171</sup> Without the ability to challenge the effects of a policy, developers will have no incentive to tailor their redevelopment plans carefully to avoid having a discriminatory impact on the neighborhood residents. Without the availability of disparate impact, cities will be able to redevelop minority neighborhoods with far less consideration of possible alternatives to redevelopment that may have a less negative impact on those residing in the neighborhoods.

Additionally, allowing discrimination to be shown by impact rather than intent is consistent with the legislative history of the FHA. The purpose of the Act is to end discrimination. Requiring that intent be shown would "strip the statute of all impact on *de facto* segregation."<sup>172</sup> The Senate rejected an amendment to the FHA that would have required proof of discriminatory intent to establish a claim for discrimination under the FHA.<sup>173</sup> Clearly, the rejection of such an amendment demonstrates that the FHA, as passed, does not require proof of discriminatory intent to establish a claim for discrimination.

There are also parallels between the FHA and Title VII of the Civil Rights Act of 1964, which deals with employment discrimination.<sup>174</sup> Both statutes were enacted to end discrimination and are part of a "coordinated scheme of federal civil rights laws."<sup>175</sup> Both statutes have been construed expansively to serve their goal of ending discrimination.<sup>176</sup> The Supreme

167. *Mt. Holly*, 658 F.3d at 382.

168. *Id.* at 384.

169. *Id.* at 385.

170. *Id.*

171. *See id.*

172. *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988).

173. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977).

174. *Huntington Branch*, 844 F.2d at 935.

175. *Id.*

176. *Id.*



Court has held that Title VII is violated by a showing that a challenged action is discriminatory in operation, not only in intent.<sup>177</sup> Because of the similar construction and purpose of the two statutes, a violation of the FHA should also be established by discriminatory effect, absent discriminatory intent.<sup>178</sup>

If the important tool that is the disparate impact claim were struck down, there would be no way to challenge a policy that resulted in a discriminatory impact that a developer claims was simply inadvertent, whether truthfully so or not. Residents of neighborhoods targeted for wholesale redevelopment, who are often underrepresented in the political and economic decisions that lead to redevelopment, would lose one of their only tools in the fight to preserve their neighborhoods.

The devastating effect that this underrepresentation in the political process has on communities can be observed around the country. One example of such a place, recently thrust into the national spotlight, is Ferguson, Missouri. Decades of housing discrimination, economic abandonment, and disparities in power have created a vast rift between the largely black populace and largely white power structure in Ferguson.<sup>179</sup> For the black residents of Ferguson, who are already cut out of the political power structure of their city, eliminating disparate impact claims would serve to almost entirely silence any input they could possibly have over the future of their neighborhoods.

If disparate impact claims are held cognizable under the FHA, cities will be better places to live for all residents, not only those whose homes are threatened with redevelopment. With the knowledge that even a policy that does not intend to discriminate could be challenged if it has a discriminatory effect, developers will have incentive to carefully tailor their plans and policies to achieve their objectives in the least discriminatory manner possible.<sup>180</sup> Cities will be forced to consider whether alternatives to wholesale redevelopment may better serve both their citizens and their broad policy objectives.<sup>181</sup>

The parties in *Mt. Holly* settled before the case was heard by the Supreme Court.<sup>182</sup> However, the Supreme Court has agreed to hear a case considering disparate impact during October Term 2014. When the Court hears this case, it should affirm the ability to bring a disparate impact claim under the FHA. The disparate impact claim is a key tool in fighting housing dis-

177. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-33 (1971).

178. *Huntington Branch*, 844 F.2d at 935.

179. In 2010, Ferguson was 69% Black. The mayor, police chief, and five of the six city council members are all currently white. Editorial, *The Death of Michael Brown: Racial History Behind the Ferguson Protests*, N.Y. TIMES, (Aug. 12, 2014), [http://www.nytimes.com/2014/08/13/opinion/racial-history-behind-the-ferguson-protests.html?\\_r=0](http://www.nytimes.com/2014/08/13/opinion/racial-history-behind-the-ferguson-protests.html?_r=0).

180. *See Mt. Holly*, 658 F.3d at 385.

181. *See id.*

182. Lyle Denniston, *New Fair Housing Case Settled*, SCOTUSBLOG (Nov. 13, 2013, 10:21 PM), <http://www.scotusblog.com/2013/11/new-fair-housing-case-settled/>.

crimination and an affirmation by the Supreme Court would aid in the broadly remedial goals of the FHA: the prevention and remedy of discrimination based on race.<sup>183</sup>

## VI. CONCLUSION

By upholding disparate impact claims under the FHA, the Third Circuit has strengthened an important tool in the fight to eradicate discrimination in housing. This decision will hopefully put cities and developers on notice that they must carefully design their redevelopment policies so as not to disproportionately impact minority groups. If the Supreme Court upholds disparate impact claims when it finally rules on such a case, cities will by necessity take a more holistic approach to redevelopment and renewal, considering the impact any plan would have on all residents. The cities may decide that rehabilitation and further investment into existing housing stock will better serve a neighborhood's residents than wiping out all traces of the neighborhood and starting over.

The FHA was created as part of a comprehensive scheme of federal civil rights laws designed to end discrimination wherever and however it appears.<sup>184</sup> In order to properly achieve this goal, the Supreme Court should not find that intent is necessary to make out a prima facie case of discrimination under the FHA.

The case brought by the citizens of Mount Holly Gardens against the Township was settled on November 13, 2013, just three weeks before it was to be argued before the Supreme Court.<sup>185</sup> However, the Supreme Court will soon make a determination of whether intent is required under the FHA. Such a determination may come as soon as the October 2014 Supreme Court Term, as the Court has granted certiorari on a case out of Texas that directly addresses whether disparate impact claims are cognizable under the FHA.<sup>186</sup> When the Supreme Court does finally make a ruling, it should follow the example of the Third Circuit, consider the broad purpose of the FHA, and uphold disparate impact claims.

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183. *Id.*

184. *See supra* Part V.

185. Denniston, *supra* note 182.

186. Inclusive Communities Project, Inc. v. Texas Dept. of Housing and Community Affairs, 747 F.3d 275 (5th Cir. 2014).