



## COMMERCIAL REAL ESTATE INSIGHT & NEWS

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### SJC Clarifies “Disparate Impact” Housing Discrimination in Massachusetts

BY KATHERINE GARRAHAN AND CHRISTOPHER MERCURIO • JULY 14, 2016

The Massachusetts Supreme Judicial Court (“SJC”) recently held that “disparate impact” liability is a recognizable claim under Massachusetts housing discrimination law. Disparate impact discrimination refers to policies or practices appearing neutral on their face, but resulting in disproportionately negative impact on a protected group, even if unintentional. In *Burbank Apartments Tenant Association v. William M. Kargman*, 474 Mass. 107 (2015), the SJC considered the relationship among the United States Department of Housing and Urban Development (“HUD”) Section 8 program, the federal Fair Housing Act (“FHA”), and the Massachusetts antidiscrimination statute, M.G.L. c. 151B, §4 and found allegations against a Boston landlord insufficient to support a housing discrimination claim.

In *Burbank*, a tenant association sued over a landlord’s decision not to renew a development’s Section 8 subsidies through a HUD Housing Assistance Payment (“HAP”) contract when the landlord’s HUD-based mortgage and affordability restriction expired. The owner had rather decided to convert units to market rate while also accepting subsidies under HUD’s tenant-based “Enhanced Voucher” subsidy program from eligible tenants. The tenant association claimed that the decision to switch HUD programs was discriminatory based upon the disparate impact the change would have on members of otherwise protected classes of citizens – in this case, people of color, those with disabilities, seniors, female-headed households, recipients of public and rental assistance, and families with children.

In *Burbank*, the SJC looked to *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015) to evaluate “disparate impact” fair-housing discrimination claims under federal and Massachusetts law. In *Inclusive Communities*, the Supreme Court described its public policy rationale for limiting disparate impact liability, including potential unintended consequences of causing segregated housing patterns, preventing abusive claims, undermining the free-market, limiting practical business and profit-making options, and interfering with public health and safety priorities and community redevelopment goals. To that end, the Supreme Court held that claims must (1) demonstrate “robust” causality that a disputed practice caused or will cause a discriminatory effect, and (2) show that alternative method(s) are available to the landlord which would serve business needs and produce less disparate impact on protected tenants. The Supreme Court further held that even when

disparate impact discrimination is found, the judicial remedy imposed must meet constitutional requirements, and be limited to eliminating the offending arbitrary practice.

Consistent with Inclusive Communities, the SJC held that landlords are not required to provide the best possible assistance, or any particular form of assistance, but only that landlords not discriminate. The SJC concluded that actions by housing entities which are otherwise consistent with law, regulation, and contract may be the basis of discrimination claims only if plaintiffs meet robust causality requirements as set out in Inclusive Communities, and in this case the plaintiffs failed to sufficiently plead disparate impact discrimination. The SJC gave as an example of why Burbank's pleadings were not sufficiently rigorous: the case lacked specific allegations that the landlord's actions led to disproportionate differences between the project-based and tenant-based subsidies on protected classes, such as unreasonable rent which would disproportionately disadvantage protected tenants. The SJC was particularly persuaded by the fact that the owner's acceptance of Enhanced Vouchers resulted in all existing tenants remaining in their homes.

The SJC's finding that the landlord did not violate any state or federal antidiscrimination laws may be less significant than its refusal to adopt a *per se* rule that shields owners from disparate impact liability when acting in accordance with relevant statutes, regulations, and contracts. The SJC's holding means that property owners should consider the statistical impact of their housing development decisions on protected tenants in order to avoid disparate impact claims. For plaintiffs, Burbank in conjunction with Inclusive Communities impose heightened pleading requirements to show quantifiable disparate impact on protected tenants, as well as a demonstration of available alternatives that produce less disparate impact, while also serving a landlord's legitimate business needs.

For more on regulations regarding housing discrimination by landlords, check out "[Do U.S. Fair Housing Policies Require Renting to Criminals](#)" [HERE](#).