



**Housing and Development Law Institute**

***Presents:***

***When to Worry About Rulings  
Like Disparate Impact***

**Presented to SERC-NAHRO Annual Conference  
*June 27, 2017 1:30 PM – 2:35 PM***

# BIOGRAPHY OF LISA L. WALKER –Trainer & Speaker

HDLI, 630 Eye St., NW, Washington, DC 20001; lwalker@hdli.org (email); (202) 289-3400 (office)



Since July 2002 Lisa Walker has been the Executive Director and General Counsel of the Housing and Development Law Institute (“HDLI”), a legal think tank and training organization in the public and affordable housing industry.

Ms. Walker designed and implements HDLI’s successful interactive fair housing training program, directed toward the unique job responsibilities and challenges of public housing and redevelopment agencies, their management companies, and development partners. She has trained more than 4,500 front-line, maintenance, managerial, executive, and legal staff of housing agencies and developers of all sizes, including The CT Group, (D.C.), Dwayne Henson Investments, Inc. (TX), KG Residential, LLC (TX), HFI Management Company (TX), LBK Limited (TX), Dallas Hous. Auth. (TX), Fort Worth Hous. Auth. (TX), Abilene Hous. Auth. (TX), Candletree Apartments (TX), Denton Housing Authority (TX), Integrated Housing Solutions LLC (TX), Monarch Properties (TX), Orion Residential Properties (TX), Overton Park Townhomes (TX), Pace Realty (TX), Tarrant County Housing Assistance (TX), Seattle Housing Authority (WA), Housing Authority of the City of Los Angeles (CA), Los Angeles County Community Development Commission (CA), Housing Authority of the County of Ventura (CA), Housing Authority of the City of Ventura (CA), and Housing Authority of the City of Oxnard (CA), Lucas Metro Housing Authority (OH), Orlando Housing Authority (FL), Tampa Housing Authority (FL), Sanford Housing Authority (FL), Pinellas County Housing Authority (FL), Owensboro Housing Authority (KY), Bowling Green Housing Authority (KY), Beaver Dam Housing Authority (KY), Housing Authority of Henderson (KY), Housing Authority of Madisonville (KY), Charleston Housing Authority (SC), Newark Housing Authority (NJ), NorthBend/Coos/Curry Counties Housing Authority (OR), Henry County Housing Authority (IL), Richland County Housing Authority (IL), St. Mary’s County Housing Authority (MD), Altoona Hous. Auth. (PA), Harrisburg Housing Authority (PA), Denver Hous. Auth. (CO), Syracuse Housing Authority (NY), Milford Hous. Auth. (CT), Roanoke Hous. Auth. (VA), Warner Robbins Hous. Auth. (GA), Public Housing Association Directors Association (PHADA-nationwide), Pacific Northwest Regional Council, and states of Michigan (MI), Indiana (IN), and Nebraska (NE) affiliates of the National Association of Housing and Redevelopment Officials (NAHRO). Ms. Walker also has a broad knowledge of federally-assisted public and affordable housing programs, applicable federal regulations (such as those implemented by HUD and the Justice Department), and the fair housing obligations implicit therein. HDLI is certified as a fair housing trainer by the Texas Department of Housing and Community Affairs (TDHCA).

Prior to joining HDLI, Ms. Walker was a partner at Whiteford, Taylor & Preston, L.L.P, a large regional law firm servicing the Washington, D.C.-Maryland-Virginia corridor. As a commercial litigator, Ms. Walker handled the business disputes of corporations, partnerships, organizations, and individuals in the areas of contracts, employment, torts, intellectual property, and product liability, among other areas. Developing a particular interest in and knowledge of fair housing issues, Ms. Walker actively represented the Housing Authority of Baltimore City and City of Baltimore in *Thompson v. HUD*, major federal public housing reform litigation, and with respect to a wide variety of fair housing issues.

Ms. Walker is licensed to practice law before the United States Supreme Court, the federal Fourth and Fifth Circuit Courts of Appeals, and the state and federal courts of Maryland and the District of Columbia. Ms. Walker holds a Bachelor of Science degree in Finance from the University of Maryland, College Park, where she received a four-year academic scholarship from the university. She holds a Juris Doctor from the University of Maryland School of Law, where she received a three-year academic fellowship and was a member of the competitive Moot Court Board. She has been active in local and national bar associations, on nonprofit boards of directors, as well as a number of other service and civic organizations. Ms. Walker serves as *pro bono* counsel to the Miss Black U.S.A. Pageant & Scholarship Foundation, Inc. She also is a frequent speaker, trainer, and presenter at industry meetings across the country.



## When To Worry About Rulings Like Disparate Impact

June 27, 2017 1:30 PM – 2:35 PM

Prepared by:  
**Lisa L. Walker**  
HDLI CEO/General Counsel  
January 2016



Copyright ©2017 Housing and Development Law Institute www.hdli.org

### Today We Will Cover:

- 1 • Background
- 2 • HUD's Final Rule & Regs
- 3 • Supreme Court Case
- 4 • How to Avoid DI Liability

Copyright ©2017 Housing and Development Law Institute www.hdli.org

# BACKGROUND

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## BACKGROUND

There are two ways to prove housing discrimination:

1. **Intentional discrimination** – proof that the housing provider intends to discriminate against a protected group of people  
**Most Common**
2. **Disparate impact or discriminatory effect** – no proof of housing provider's intent; rather, the policy or practice has a discriminatory effect on the protected group

Copyright ©2017 Housing and Development Law Institute www.hdli.org

# THE SUPREME COURT CASE

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## THE TEXAS CASE

*Texas DHCA v. Inclusive Communities Project (ICP)*, 576 U.S. \_\_\_, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (6/25/65)

- Tax credit allocation case.
- Community group challenged the Texas allocating agency's (TDHCA) criteria that resulted in arguably **disproportionate LIHTC development in areas with high minority concentration**.

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## THE TEXAS CASE

- The group argued that it was more difficult for it to assist minorities in higher income communities without tax credits there.
- The group used statistics to prove its case. No evidence of intent by TDHCA.
- TDHCA argued it was forced to follow IRS rules that required preference for awarding LIHTCs in Qualified Census Tracts, which are low-income areas

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## THE TEXAS CASE

- While the case was pending, in 2013 HUD adopted a new AFFH regulation before the case was decided making clear that plaintiffs can establish fair housing violations with merely proof of discriminatory effects.

*"A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."*

24 CFR Part 100, Subpart G

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## HUD's Three-Step Burden Shifting Approach

24 CFR Part 100.500

<p><b>1</b> The plaintiff (or charging party) must make a <i>prima facie</i> showing that a challenged practice caused or predictably will cause a discriminatory effect.</p>	<p><b>2</b> If the discriminatory effect is shown, the burden of proof shifts to the respondent to justify its actions.</p>	<p><b>3</b> If burden is satisfied, the plaintiff must prove that these substantial, legitimate, nondiscriminatory interests could not be served by another practice that has a less discriminatory effect.</p>
---	---	---

Copyright © 2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

### THE TEXAS CASE

The trial court agreed with the plaintiff:

- Found that LIHTC housing was disproportionately allocated to minority communities
- Concluded that concentration of LIHTC units in minority communities made it more difficult for plaintiff to find housing for its clients in non-minority areas

Copyright © 2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## THE TEXAS CASE

The trial court further found:

- The organization's goals were bona fide and legitimate
- TDHCA failed to demonstrate a "compelling government interest" or "that there was no less discriminatory alternative"

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## THE TEXAS CASE

- TDHCA appealed the case.
- On appeal, the Fifth Circuit Court of Appeals agreed with the trial court that disparate impact can be the basis for a claim under the FHA.
- The Fifth Circuit adopted HUD's disparate impact rule.
- Remanded the case back to the 5<sup>TH</sup> Circuit to apply HUD's burden-shifting analysis. 5<sup>th</sup> Circuit likewise remanded to the Dct.

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)



## THE TEXAS CASE

- One of the Fifth Circuit judges filed a **concurring opinion** finding there was **insufficient evidence of disparate impact** shown
- Texas appealed
- The US Supreme Court granted *certiorari*

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## THE TEXAS CASE

- The US Supreme Court considered only one question in the Texas case: *Is disparate impact a basis to establish a fair housing claim?*
- **Majority Decision:** Yes. On June 25, 2015, the Supreme Court, by a five-to-four margin, upheld the application of disparate impact under the Fair Housing Act. Plaintiffs can use proof of a disparate impact to establish a fair housing claim.
- Affirmed Fifth Circuit's remand to District Court using the HUD standard.

Copyright ©2017 Housing and Development Law Institute www.hdli.org

# IMPORTANT LIMITATIONS ON LIABILITY

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## LIMITATIONS ON LIABILITY

- The SCT recognized that there must be *“important and appropriate means of ensuring that disparate-impact liability is properly limited.”*
- The SCT placed new limits on when and how these cases can be brought. *(Not found in HUD’s rule)*

*(These may be bases for early dismissal of a DI lawsuit . . .)*

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## LIMITATIONS ON LIABILITY

The SCT acknowledged there are a number of limitations on liability. It said that:

- Even when there is a connection, governments *“must not be prevented from achieving legitimate objectives”*
- Policies are *“not contrary to the disparate-impact requirement unless they create ‘artificial, arbitrary and unnecessary barriers’”*

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## LIMITATIONS ON LIABILITY

- The SCT held that a *“racial imbalance does not, without more, establish a prima facie case of disparate impact,”* and that a plaintiff cannot maintain a disparate-impact claim by *pleading a mere “statistical disparity.”* ***Must show NEXUS/CAUSATION***

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## LIMITATIONS ON LIABILITY

The SCT recognized that a defendant should not be liable for alleged racial disparities it *“did not create.”*

It held that *“[i]t may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units.”*

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## LIMITATIONS ON LIABILITY

The SCT said that:

- “[R]evitalization of communities that have long suffered the harsh consequences of segregated housing patterns” are a legitimate objective.

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## **DISTRICT COURT REMAND – As of Jan 2016**

“Although the DCT had held in a pretrial ruling that ICP had established beyond peradventure a prima facie case of disparate impact and was entitled to partial summary judgment, the court held that it had done so without the benefit of the SCT’s opinion.”

Considering the SCT decision, the district found there was no disparate impact liability.

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## **HDLI Recommendations of Steps a PHA Should Consider to Avoid DI Liability**

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## AVOIDING DISPARATE IMPACT LIABILITY

1. Make sure your PHA is aware of **all the protected classes (PCs) in your jurisdiction – federal, state, local** + economic status + sexual orientation, gender identity & marital status (HUD programs)

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## AVOIDING DISPARATE IMPACT LIABILITY

2. Appoint a **point person/coordinator** to stay focused on DI considerations for the agency.
3. *Ensure* that at least the coordinator understands DI liability. **Adequately train** them and others, as needed. **Refresher training is also important** as DI is more defined/limited/expanded by the lower courts.

*Or use knowledgeable outside counsel...*

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## AVOIDING DISPARATE IMPACT LIABILITY

4. **BE PROACTIVE.** Revisit all of your operational policies and actual practices with an eye toward uncovering disparate impacts on PCs.

- Admissions/screening
- Tenant selection and assignment
- Site selection
- Terminations/Evictions
- Denials of Requests for Accommodations
- Grievance/administrative review decisions
- Others

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## AVOIDING DISPARATE IMPACT LIABILITY

You are looking to see whether each policy or practice has a disproportionate effect on one or more protected groups of individuals as compared with the whole.

- *Perform Regular Statistical Analyses as precursor to your planning processes*
- *If you see exposure, analyze at least quarterly*

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## AVOIDING DISPARATE IMPACT LIABILITY

5. If there is a disparity, consider whether the practice is nonetheless **grounded in sound business considerations**. Establish the PHA's "legitimate needs."

Is there a **bone fide business reason** to nonetheless justify the policy/practice.

6. Establish there is **no less onerous alternative**.

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)

## DISPARATE IMPACT RESOURCES

Copyright ©2017 Housing and Development Law Institute [www.hdli.org](http://www.hdli.org)



## Disparate Impact Resources

- HUD's Disparate Impact Final Rule, accessible online at: <http://portal.hud.gov/hudportal/documents/huddoc?id=discrimatoryeffectrule.pdf>
- *HUD DI Regulations: 24 CFR Part 100, see new Subpart G*
- Supreme Court decision in *Texas DHCA v. Inclusive Communities Project (ICP)*, 576 U.S. \_\_\_, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (6/25/65), accessible online at: [http://www.supremecourt.gov/opinions/14pdf/13-1371\\_m64o.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1371_m64o.pdf)

Copyright ©2017 Housing and Development Law Institute www.hdli.org

## ONLINE HDLI TRAINING OFFERINGS

### **\*INTRODUCING\***

#### HDLI's Online Fair Housing Training

#### Give Your Staff the Training They Need:

- Full Course – Approx. 7 hours
- Individual Modules – From 20 minutes to 1 hour
  - Staff and Resident Development Courses
  - Trainee takes courses at his or her own pace
- Assessment tests given throughout to test comprehension
- Printable training certificates issued at end for those who pass
  - PHA receives final test results

## **ON-SITE HDLI TRAINING OFFERINGS**

- 1. ON-SITE Administrative Review Process Training**
  - Public Housing Grievances and Section 8 Reviews (approx. 7 hours)
- 2. ON-SITE Customized Fair Housing Trainings**
  - Basic Fair Housing Training (approx. 4 hours)
  - Advanced Fair Housing Training (approx. 7 hours)
  - Advanced 504 Reasonable Accommodations Training (approx. 4 hours)
- 3. ON-SITE "One Strike" Public Housing Evictions & Section 8 Terminations Training** (approx. 6 hours)

## **HDLI CONTACT INFORMATION**

Lisa L. Walker, Esq.

CEO & General Counsel

Housing and Development Law Institute

630 Eye St., N.W.

Washington, DC 20001-3736

Email: [hdli@hdli.org](mailto:hdli@hdli.org)

Phone: 202-289-3400

Website: [www.hdli.org](http://www.hdli.org)

WebStore: [www.hdlistore.org](http://www.hdlistore.org)