Fair Housing
Post-Inclusive Communities

Monday, December 12, 2016
Our Guest

• Brian J. Connolly
  – Otten Johnson Robinson Neff + Ragonetti PC, Denver
    • (303) 575-7589
    • bconnolly@ottenjohnson.com
And Your Co-Hosts

- Prof. Daniel R. Mandelker, FAICP
  - Washington University School of Law

- Dwight Merriam, FAICP
  - Robinson & Cole LLP
What is the Fair Housing Act, who does it protect, and who must comply with it?

• Seven protected classes
  - Race, ethnicity, national origin, religion, sex, familial status, and disability

• Compliance required for private actors, state and local governments
What are the ways in which local governments can be found liable under the Fair Housing Act?

- Disparate treatment
- Disparate impact
- Failure to reasonably accommodate (disability only)
What is disparate impact?

- Facialy neutral policy or practice having a discriminatory effect
Does the Fair Housing Act contemplate disparate impact liability for local governments?

- 11 circuit courts of appeal thought so before 2015
- “[I]t shall be unlawful—(a) To refuse 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.” 42 U.S.C. § 3604
What were the facts leading up to the case of Texas Department of Housing and Community Affairs v. Inclusive Communities Project?

- Low Income Housing Tax Credit program under the Internal Revenue Code
- State-level statutory criteria for distribution of credits
What were the issues before the Supreme Court in *Inclusive Communities*?

- Does the Fair Housing Act contemplate disparate impact liability?
How did the Supreme Court rule in *Inclusive Communities*?

- Majority opinion (Justice Kennedy + 4) and two dissents (Justice Alito + 3, Justice Thomas)
- “Otherwise make unavailable or deny” refers to disparate impact
- Comparisons to Title VII and the ADEA
- Congress had an opportunity to amend the FHA but didn’t
Did the Supreme Court provide any limitations on its holding in *Inclusive Communities*?

- Statistical disparity is not enough
- Must show causation
- “Valid interest” is a defense
- Heightened pleading
- Avoid quotas
How did the Inclusive Communities case get resolved after the Supreme Court’s decision?

• ICP did not make out a successful *prima facie* case of disparate impact
• ICP could not point to a specific facially-neutral policy causing a disparate impact
How have lower courts been addressing disparate impact claims after the *Inclusive Communities* decision?

- Uneven application of disparate impact analysis
- Bar for disparate impact claims seems to be higher
What are the practical implications of the *Inclusive Communities* decision?

- Disparate impact survives, but does it have any teeth anymore?
How can local governments ensure that they are complying with their obligations under the Fair Housing Act?
Q and A

FAIR HOUSING
IT’S NOT
AN OPTION
IT’S THE
LAW

39TH ANNIVERSARY OF THE FAIR HOUSING ACT

2007