OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

May 11, 2005

TO: Michael Faden
Senior Legislative Attorney

VIA: Marc Hansen, Chief *Marc Hansen*
General Counsel Division

FROM: Clifford L. Royalty *CLR*
Associate County Attorney

RE: *Chapter 27, Human Rights and Civil Liberties - Disparate Impact Claims*

In the context of the County Council's ongoing consideration of Bill 36-04, you have requested our opinion concerning "disparate impact" claims. Your request states, in pertinent part,

1. What is the standard in the 4th Circuit for discrimination in lending cases?
2. Does the Code already provide a cause of action for disparate impact in lending? Is this express or implied?
3. Is the disparate impact language [in Bill 36-04] redundant?

Summary of Opinion

The Fourth Circuit has ruled that disparate impact claims against private entities may be grounded upon evidence that a lending practice impacts one race more than another or perpetuates segregation. In response to such evidence, a defendant must prove that the challenged practice is justified by business necessity. Also, Chapter 27 of the County Code impliedly recognizes disparate impact claims. Therefore, adding a provision to Chapter 27 that expressly authorizes disparate impact claims as to lending practices would imply that disparate impact claims may not be asserted as to the other forms of discrimination prohibited by Chapter 27.

Analysis

Disparate Impact Claims in Lending Cases

Disparate impact is a theory of liability whereby an aggrieved party may prove

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discrimination by showing that some policy or practice has a discriminatory effect.[1] The theory appears to have been first adopted by the Supreme Court in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There the Court addressed an action filed under a federal employment discrimination law, Title VII of the Civil Rights Act of 1964, which prohibits employers from engaging in certain employment practices "*because of* an individual's race, color, religion, sex, or national origin." *42 U.S.C. § 2000e-2*. (Emphasis added). The Court interpreted Title VII as proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. In the words of the Court, "Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation." *Id.* at 432. Subsequent case law has elaborated upon the theory. For example, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court explained, again with respect to Title VII, that disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* at 335. Under such a "disparate-impact theory," no "[p]roof of discriminatory motive" is required. *Id.*

Title VII does not expressly provide for disparate impact claims; the courts have simply accepted such claims as a mechanism for furthering congressional intent. Disparate impact theory, thus, has not been confined to Title VII actions. The theory has been imported into other anti-discrimination laws, including two federal statutes that prohibit discriminatory lending practices, the Fair Housing Act of 1968 (42 U.S.C. §§ 3601-3619) and the Equal Credit Opportunity Act (15 U.S.C. §§ 1691, *et. seq.*). *See, e.g., Simms v. First Gibraltar Bank*, 83 F.3d 1546 (5th Cir.), *cert. denied* 519 U.S. 1041 (1996); *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330 (N.D. Ind. 1987). *See also, United States v. Bankert*, 186 F. Supp. 2d 663 (E.D. N.C. 2000) (with respect to the application of the FHA to the sale of a home).

Like Title VII, the Fair Housing Act ("FHA") "should be broadly construed to effectuate [its] statutory purpose." *Edward v. Johnston County Health Department*, 885 F.2d 1215, 1222 (4th Cir. 1989). In recognition of the "parallel objectives" of Title VII and the FHA, both the federal Department of Housing and Urban Development and the United States Court of Appeals for the Fourth Circuit have determined that the statutory purpose of the FHA may be effectuated through disparate impact claims. *Policy Statement of Discrimination in Lending,* 59 FR 18266 (1994); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 987 (4th Cir. 1984). The Fourth Circuit has ruled that a "facially neutral housing-related policy may nonetheless violate [the Fair Housing Act] if it has a disproportionate impact on minorities." *Edward v. Johnston County Health Department*, 885 F.2d at 1223. "Such an impact may take one of two forms: (1) a facially neutral decision may have 'a greater impact on one race than another,' or (2) it may

[1] In fact, disparate impact is sometimes referred to as "discriminatory effects." *See Simms v. First Gibraltar Bank*, 83 F.3d 1546 (5th Cir. 1996).

'perpetuate[] segregation and thereby prevent[] interracial association . . . .'" *Id.* (quoting *Betsey v. Turtle Creek Associates*, 736 F.2d at 987, n. 3). "[W]hen confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice." *Betsey v. Turtle Creek Associates*, 736 F.2d at 988.[2] Although the *Edwards* and *Betsey* decisions specifically address housing, rather than lending, claims, we expect that the Fourth Circuit would apply the same standards to a discriminatory lending claim under the FHA. *But cf. Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642 (1989); *Williams v. 5300 Columbia Pike Corp.*, 1996 U.S. App. Lexis 31004 (4th Cir. 1996) (unpublished decision).

Another federal law that is frequently enlisted in support of lending discrimination claims is the Equal Credit Opportunity Act ("ECOA"). The ECOA prohibits invidious discrimination as to "any aspect of a credit transaction." *15 U.S.C. § 1691(a)*. While the Fourth Circuit has not yet entertained a disparate impact claim under the ECOA, other courts have done so. *See Faulkner v. Glickman*, 172 F. Supp 2d 732 (D. Md. 2001); *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330 (N.D. Ind. 1987). One of those courts is the United State District Court for the District of Maryland which, in *Faulkner v. Glickman*, noted that a "credit applicant may prove discrimination in violation of the ECOA by relying on . . . the different approaches used in the employment discrimination context . . . " including "disparate impact analysis." 172 F. Supp. 2d at 737 (relying on *AB&S Auto Service v. Southshore Bank of Chicago*, 962 F. Supp. 1056 (N.D. Ill. 1997)). The federal body that administers the ECOA, the Board of Governors of the Federal Reserve System, has reached the same conclusion. *See 12 C.F.R. § 202.6.*

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[2] The "business necessity" standard is, of course, inapplicable to FHA claims against public entities. In *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1972), the Fourth Circuit identified four factors to determine whether the FHA has been violated by a public entity. Those factors, which the court borrowed from a Seventh Circuit decision, are:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent . . .; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. 682 F.2d at 1065 (quoting *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied* 434 U.S. 1025 (1978)).

Disparate Impact Claims are Impliedly Cognizable under Chapter 27 of the County Code

In combination with the foregoing authorities, the language of Chapter 27 persuades us that disparate impact claims are cognizable under the County Code. Section 27-1(a) states

> The County Council finds that discrimination *because of* race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, genetic status, presence of children, family responsibilities, source of income, or sexual orientation adversely affects the health, welfare, peace, and safety of the community. (Emphasis added).

This portion of the Chapter 27 policy statement mirrors federal law, particularly Title VII and the FHA, in prohibiting discrimination *because of* the listed characteristics. Indeed, Chapter 27 makes explicit its symbiosis with federal law; Section 27-1(b) states

> The prohibitions in this article are substantially similar, but not necessarily identical, to prohibitions in federal and state law. The intent is to assure that a complaint filed under this article may proceed more promptly than possible under either federal or state law. It is not County policy, however, to create a duplicative or cumulative process to those existing under similar or identical state or federal laws. Once a complaint is fully adjudicated under a similar or identical state or federal law, the complaint should not be reprocessed under this article if the effect is duplicative or cumulative.

The breadth of Chapter 27 is further expressed through § 27-7, which permits "any person subjected to a *discriminatory act or practice* in violation of this article, or any group or person seeking to enforce this article may file with the executive director a written complaint . . . ." (Emphasis added).

The foregoing language, especially that given emphasis, strongly suggests that Chapter 27 was intended to be read and applied expansively so as to effect its goal of eradicating every manifestation of invidious discrimination. Like the federal anti-discrimination laws, Chapter 27 addresses the consequences of discriminatory acts and practices, not simply the motivation for those acts and practices. We find the reasoning of the federal courts persuasive and, thus, conclude that Chapter 27 implies the viability of disparate impact claims under the County Code.[3]

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[3] The legislative history that we reviewed reveals nothing to the contrary. Nor are we aware that the Commission on Human Rights, or its case review boards, have adopted any practices that are inconsistent with disparate impact theory. If we were to become aware of either

The Disparate Impact Language in Bill 36-04 is Redundant

However, this implication may be rebutted. Bill 36-04 expressly adopts the disparate impact theory and proposes to apply it *only* to discriminatory lending practices. *See Bill 36-04, § 27-12(c)*. Under a fundamental, and aged, rule of statutory construction, often expressed in the Latin, "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another), the insertion of express disparate impact theory language in Chapter 27 as to one form of discrimination implies that disparate impact theory is inapplicable to the other forms of discrimination prohibited by Chapter 27. *See Baltimore Harbor Charters v. Ayd*, 356 Md. 366, 780 A.2d 303 (2001); *Johns v. Hodges*, 62 Md. 525 (1884). Of course, Chapter 27 could be amended to clarify that all forms of discrimination may be proved through evidence of disparate impact. But that amendment would require the introduction of a new bill because the amendment would exceed the scope of the advertisement for Bill 36-04.

We trust that this memorandum has fully responded to your inquiry. If not, please feel free to contact us.

cc: Charles W. Thompson, Jr., County Attorney
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Odessa Shannon, Director, Office of Human Rights
Joseph Beach, Assistant Chief Administrative Officer
Sonya Healy, Legislative Analyst

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legislative history or administrative practices that are at odds with this opinion, we would be compelled to reassess the matter.