

DISPARATE IMPACT: RELEVANT NUMBERS AND POPULATIONS

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ABSTRACT

Disparate impact cases are being filed against cities with increasing frequency, citing the U.S. Federal Housing statutes as the basis for the complaints. This paper looks at the claims made, information offered in support of the claims, and the countering arguments made by the defendants. In particular, this paper reviews two recent cases and the analyses made on behalf of the defendants, using methods endorsed by the U.S. Department of Housing and Urban Development as most appropriate for disparate impact claims.

Keywords: discrimination, statistical analysis, econometrics, demography

Introduction

Disparate impact is a claim that the actions of a defendant have or will harm a member of a protected class. Federal housing law states that members of this class should enjoy full and equal access and enjoyment of housing. Specifically, the Fair Housing Act states:

*§ 3604. Discrimination in the sale or rental of housing and other prohibited practices
As made applicable by section 3603 of this title and except as exempted by sections 3603
(b) and 3607 of this title, it 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.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

...
(f) (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter¹

This paper examines two cases recently decided (June, 2009) that relied on the Fair Housing Act to make a claim of disparate impact against cities because of their actions.

The first case², filed against the City of Dallas, resulted from a series of incidents in which the City invoked its SAFE program to enforce housing ordinances at a multifamily property. The “Support, Abatement, Forfeiture, Enforcement” Program (SAFE) was established within the City of Dallas Police force, and includes Building Code and Fire Code Inspectors, to enlist the cooperation of property owners in abating crime at their properties and to rehabilitate

¹ Fair Housing Act, as amended in 1988

² AHF Community Development, L.L.C. v. City of Dallas ET AL, In the United States District Court for the Northern District of Texas, Dallas Division, Cause No. 3-06CV 1035D

properties that are havens for criminal activity. The City of Dallas works with property owners to bring properties up to code with the goal of reducing crime and making it more difficult for criminals to reside at or operate out of particular properties. Housing that has had three or more significant crimes are identified as properties of particular interest to the City and to the courts.

The City starts by working with property owners to improve conditions and to abate crime. If the property owner is unable or unwilling to bring properties up to code, the SAFE team is brought in to conduct code inspections and to help the owners understand their responsibilities to the residents and to the surrounding property owners. A single inspection typically is not sufficient to bring a property back up to code, so several inspections may be necessary.

In 1996, the SAFE team was asked to conduct an inspection of Bent Creek Apartments in the Northern part of the City of Dallas, after discussions with the property owners failed to resolve many of the issues at the apartments. The SAFE team did so, with police wearing flak jackets accompanying the inspectors during the first inspection. Multiple code violations were discovered during this inspection, and several further inspections were required before the property was fully brought into compliance.

The owners of Bent Creek filed suit against the City, claiming that the inspection was discriminatory and had a disparate impact on minorities, both Blacks and Hispanics. The disparate impact claim was based on the observation that there were more Blacks and Hispanics than whites at the Apartments and so the impact of the inspection would be to disproportionately deny minority residents the "fair and free enjoyment of housing opportunities". For this case, the claims were specifically aimed at protecting the minorities who were living at the Apartments at the time the inspections were conducted.

The second case³, was quite different, though based on the same law. In 2006, the city of Brandon, Mississippi passed an ordinance requiring new homes built in Brandon to have a minimum square footage. The Homebuilders of Mississippi and the Homebuilders of Jackson, Mississippi filed suit against the city, claiming that the ordinance would result in larger homes being built which would necessarily be more expensive. They argued that since minorities earn less income than whites, the ordinance would necessarily have a disparate impact because it would deny equal opportunity to purchase housing in Brandon. For this case, the disparate impact theoretically would be on future potential purchasers of homes in Brandon, not people currently residing in homes (since their status in existing homes was unaffected by new homes that might be built in the future).

In both cases, the claims dealt only with one narrowly defined group and only with the alleged direct effects on that one group. In both cases, experts for the plaintiffs presented arguments that focused on only these groups and presented only on a simplistic analysis demonstrating that these narrowly defined minorities were allegedly impacted more than whites in the same narrowly defined groups by the actions of these two cities.

³ Homebuilders Association of Mississippi, Inc.; Homebuilders Association of Jackson, Inc., and R&S Developers, LLC v. City of Brandon, Mississippi, In the United States District Court for the Southern District of Mississippi, Jackson Division, Civil Action No. 3:07-cv-716-WHB-LRA

In the next two sections, I look at two fatal problems with these allegations and the analyses proffered. The first problem is the need for a statistical analysis not just of the alleged impact but also the corresponding business reasons for the actions of the cities. The second problem is the lack of analysis of the impact of these actions on other members of these protected classes outside the very narrow definition used by the plaintiffs.

The Business Case - the First Response of the Defendants

The Fair Housing Act states that members of minority groups (and certain others) are protected against impediments to acquiring or enjoying housing. The Department of Housing and Urban Development (HUD) administers claims under the Act and published a manual describing how investigators should prosecute these claims⁴. There are three basic stages to the processing of claims. The claimants (plaintiffs) must establish a prima facie case of disparate impact on a protected class. If the plaintiffs are able to establish a prima facie case, the burden shifts to the defendants to show that there is a business reason for action that outweighs the impact and which in itself is not discriminatory. If the defendants are successful in establishing a business reason, the plaintiffs have one more opportunity to argue that there are other remedies to the business problem that would have less of a disparate impact.

In both cases, plaintiffs claimed to establish a prima facie case for disparate impact as part of their original complaint filed in Federal court. Whether the courts would accept these claims was a matter to be debated. In both cases, the defendants responded by arguing against the prima facie case and at the same time preparing a defensive argument establishing a business reason for the actions of the city.

The City of Dallas - Ordinances and Code Requirements

Like many other cities in the U.S., Dallas has adopted programs designed to improve neighborhoods and to enforce upkeep of properties under the theory that well-maintained properties are a deterrent to crime. In cities like x, y, and z, there are programs in place that are designed to assist and/or require property owners to maintain properties at levels established by the city codes. These programs were inspired under the "Broken Windows Theory" which hypothesizes that poorly maintained properties, with broken windows, unkempt and overgrown grounds, poor or broken lighting, and similar afflictions are breeding grounds for criminal activity. Summaries that describe these programs in other cities can be found in New York City, Los Angeles, Washington DC, Chicago, San Diego, Newark and Salt Lake City.

The City of Dallas implemented such a program in 1991. In documents produced by SAFE describing its operations, the authority for the existence of this unit is:

Chapter 125 of the Texas Civil Practices and Remedies Code defines a criminal nuisance as... Any property maintained as a place to which persons habitually go for (criminal purposes) and/or any multiunit residential property (improved real property with at least 3 dwelling units) to which the property owner knowingly maintains as a place where persons habitually go and has failed to make reasonable attempts to abate the following criminal acts:

⁴ HUD Complaint Intake Manual: Title VIII Complaint Intake, Investigation, and Conciliation Handbook (8024.01)

- *Capital Murder or Murder*
- *Aggravated Sexual Assault or Sexual Assault*
- *Aggravated Robbery or Robbery*
- *Aggravated Assault*
- *Unlawfully Carrying a Weapon*⁵

The Apartments were known as a locus of continuing drug activity, with a free market for sales of drugs operating in a stand of trees on the edge of the property. Criminal activities that accompany the drug trade, particularly assaults and other violent crimes were common, and at least one murder had been associated with the property. The owners of the property had been contacted by SAFE and after several efforts to persuade the owners to bring the property up to code, the SAFE team moved in to enforce inspections and repairs. This led to the filing of the disparate impact case.

The HUD complaint intake document requires a statistical analysis to demonstrate that a program like the SAFE program is implemented in a racially neutral manner. For SAFE to be implemented in a racially neutral manner, we had to demonstrate that SAFE was engaged in what it nominally was designed to do - being implemented in areas where there were abatable crimes. Further, once we established that the police were going to where the crimes were being committed, there was no further indication that the police were pursuing property owners who were in minority groups at a disproportionate rate.

Data, Assumptions, and Tests

We acquired two sets of data for this analysis. The first was the set of all activities and sorties by the police in the City of Dallas from 2000 through 2007. This file included a large number of activities that were not criminal in nature, such as lost and found records, so the set we received was reduced to only the reports of abatable crimes that the city had recorded. Each record had on it the nature of the crime and the address where the crime was reported. In addition to the address, the file also included a GPS location for the crime, so for large areas covered by an address we could further pinpoint the location.

The second data set came from the Bureau of the Census, the summary data for all blocks in the City of Dallas including the population count for the block, the area of the block (the physical size), and the proportion of whites, Blacks, Hispanics, and other minorities. Note that there is no source of data, Federal or local, which tells us the race or ethnicity of individual property owners or renters. The closest we can come is the block level where there are counts of each group, but no individually identifiable data.

However, this isn't a severe impediment since it is possible to take the GPS coordinates on the Dallas City data and geocode each location into a corresponding city block in Dallas. We did this and created a nearly final dataset that had records for each of the 11,000+ blocks in the City of Dallas that had the number of crimes by type, the population size, the area, and the proportion of minorities. The last step was to remove from the analysis all blocks (and crimes) that had no residential population. This would include blocks in the downtown area of Dallas that had no residences, only offices or other types of properties that were not the proper venue for SAFE investigations. This gave us a basis for analysis at a granular level.

⁵ "Everything Anyone Would Possibly Want to Know About the Dallas Police Department's S.A.F.E. UNIT, City of Dallas Publication No. 04/05:51

Chart 1 gives us a chart of all records for residential blocks in Dallas, charted using the number of narcotics-related crimes by the number of assaults. As would be expected, there is a positive relationship between the two, where if you have more narcotics-related crimes you are likely to also have more assaults. On this chart, we identify the block that includes Bent Creek Apartments - it can be found in the upper right part of the chart, indicating a high level of both crimes.

Only four blocks out of 11,000 in the city have more than a combined 300 aggravated assaults and narcotics arrests during this period. In terms of areas with concentrated crime, the block where Bent Creek Apartments is located and the few units on the block are in the top .045% of blocks in the city for serious crime. While arguments were raised that the crimes could have occurred at other locations within the block (on the street or in other apartment complexes), a quick check of the records for this block indicated that almost all of the crimes in this block were at Bent Creek Apartments.

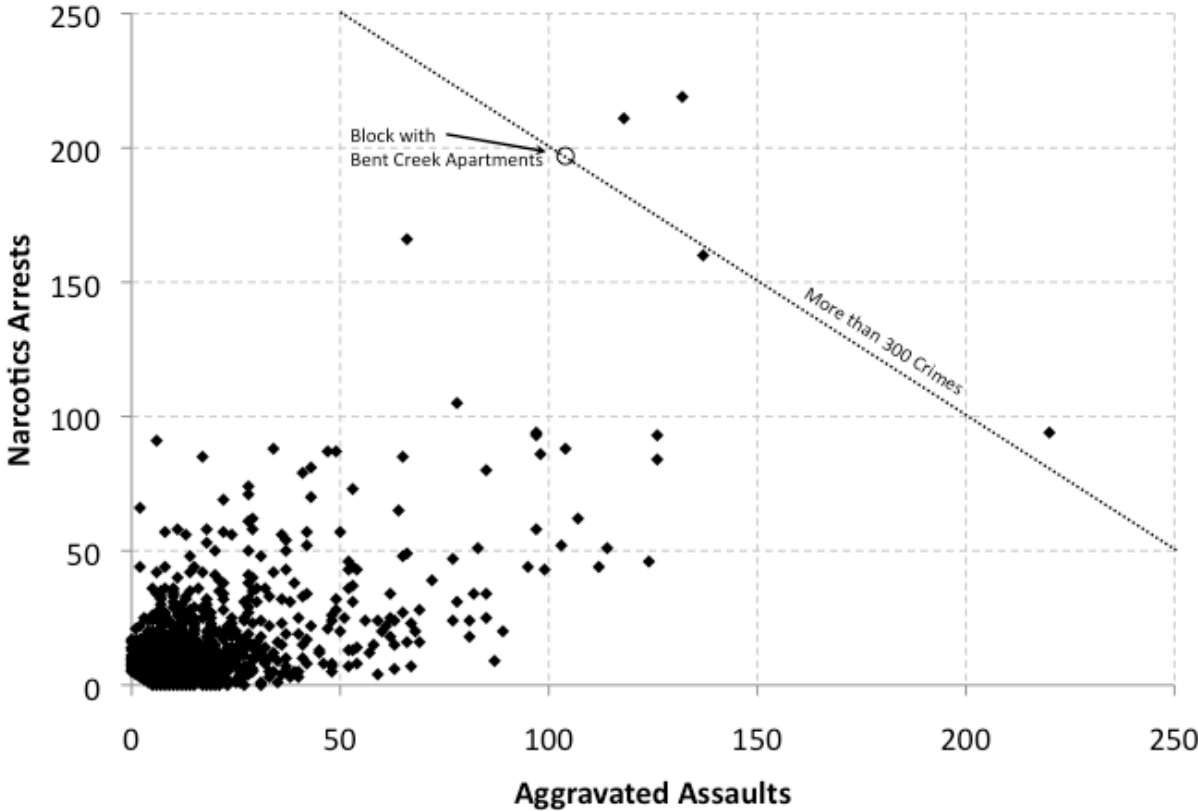
Plaintiffs argued that SAFE inspections were conducted in primarily Black areas, where the Census tracts had a high density of Blacks relative to Whites. They ignored crime as a determinant of where the SAFE team inspections were conducted. They also failed to consider that there were many other blocks in the city that had much higher density minority populations but which had not gone through the SAFE inspection process. They conducted no statistical analysis (a failing noted in the court's ruling, which stated that the plaintiffs had not made an appropriate analysis under the very rules cited by the plaintiffs).

The City's Defense

The city, as part of its defense, offered an analysis of where SAFE team inspections were conducted in relation to a business reason - reduction of major crimes. For all blocks, a logistic regression of SAFE inspections was conducted as a function of crimes, population density, and percent White, percent Black, and percent Hispanic. A test of the regression coefficients shows that the number of crimes being a very strong predictor of the likelihood of inspection. It is the only predictor that survives a test of significance: the percent of minorities plays no role once crimes have been taken into account.

The argument raised by the plaintiffs had to do with the activities of SAFE at the one location - Bent Creek Apartments. The City argued, citing the HUD guidelines, that SAFE was a program designed by the city and that the program operation for all inspections had to be considered. If the program widely had a disparate impact on minorities, then the plaintiffs might have legitimate prima facie claim. But as the program did not have a disparate impact and was targeted at crimes with no impact on minorities once crimes had been taken into consideration, any prima facie claim of disparate impact couldn't hold.

Chart 1: Distribution of Very Serious Crimes for all 11,000+ Blocks in the City of Dallas



The City of Brandon - Ordinances and Code Requirements

The City of Brandon, Mississippi adopted an ordinance in 2006 requiring a minimum size for single-family dwelling units being built as new construction in the city. Specifically, the sizes in Table 1 below were the new requirements.

Table 1: Requirements for New Construction in the City of Brandon, Mississippi

	<u>Zoning District</u>	<u>Minimum Floor Space</u>	<u>Minimum Lot Area</u>
1	R-1	1,800 sq. ft.	12,000 sq. ft.
2	R-1-A	2,000 sq. ft.	43,500 sq. ft.
3	R-1-B	1,600 sq. ft.	8,500 sq. ft.
4	R-2	1,600 sq. ft.	8,500 sq. ft.
5	R-3	1,400 sq. ft.	4,000 sq. ft. (Townhouses) 6,500 sq. ft. (Zero Lot Line Dwellings)

Plaintiffs' claims are summarized in the first two points on their complaint:

1. Brandon's zoning practices have necessarily and directly increased the cost of housing throughout Brandon, which will have an adverse and detrimental effect on Plaintiffs and on all members of Plaintiffs HBAM and HBAJ, **will have a disproportionate impact on minorities, and will operate to deny affordable housing to minorities and/or other groups protected under the Fair Housing Act.**
2. Plaintiffs will show that the consequence of Brandon's zoning action establishing minimum floor space requirements for all single family residentially zoned districts throughout Brandon will have a **disproportionate impact on minorities and disproportionately exclude minorities from housing opportunities in Brandon in violation of federal law.** ... Plaintiffs would further show that Brandon's amendments to its Zoning Ordinance establishing minimum floor space requirements also constitute a violation of the Fair Housing Act of 1968, 42 USC § 3601 et seq. ...⁶

Again, the HUD claims document requires a statistical analysis to formally show disparate impact. The argument made by plaintiffs boils down to: larger houses cost more to build, so larger houses will be more expensive, only larger new houses will be available in the future, Blacks in Mississippi earn less on average than Whites, so Blacks on average will have less opportunity to buy housing - ergo, disparate impact.

Note that it appears that the argument confuses housing and new housing - this is not a failing in presentation in this paper, but rather the argument made in court which continually confused all housing with new housing. The availability of housing currently, substitution effects, and other economic factors were not considered in the plaintiffs' argument.

The analysis presented by the plaintiffs involved the computation of affordability pools. The calculation looked at the average price of a home per square foot in the city of Brandon (about \$90 per square foot) and multiplied that times the square footages in Table 1 above. This amount was then amortized in a six percent loan over 30 years (a fixed mortgage) to compute P&I on an annual basis. Using this amount, and using a HUD recommendation that housing not be more than 1/3 of a family's annual income, the proportion of Blacks and Whites in Brandon and in Jackson (the capitol and the most populous city in Mississippi) who could

⁶ op. cit. Complaint in Brandon

afford a house on this basis was computed. The conclusion was, under this scenario, fewer blacks than whites could afford a new house built at or above the standards required by the 2006 Ordinance.

This argument contains several logical flaws, but at its worst ignores what was actually happening in Brandon in its housing market. An alternative analysis offered by the City of Brandon considered the current housing market and business reasons for the 2006 Ordinance.

Data, Assumptions, and Tests

Once again, two sets of data are needed for this analysis. The first was a listing of all home sales prices for house sales in the City of Brandon, obtained from the Rankin County Tax Assessors office (the City of Brandon is in Rankin County). This database included sales prices for homes as well as information on the square footage, age, and features of each house. Using locational information on the Tax Assessor file, this information was merged with block data from the Bureau of the Census. As in the case with the City of Dallas, one cannot know or find a source of information for the race of each homeowner in Brandon, so information about the block is substituted and records are created for each block in the City to analyze the data on that level.

The first part of the analysis for the defense was to determine how homeowners are currently distributed in Brandon and to consider racial distributions for income and for homeownership. Chart 2 below shows the distribution of minorities in the City of Brandon by block (from the Bureau of the Census for 1,199 blocks). Chart 3 shows the summary of incomes by block groups in the City of Brandon.

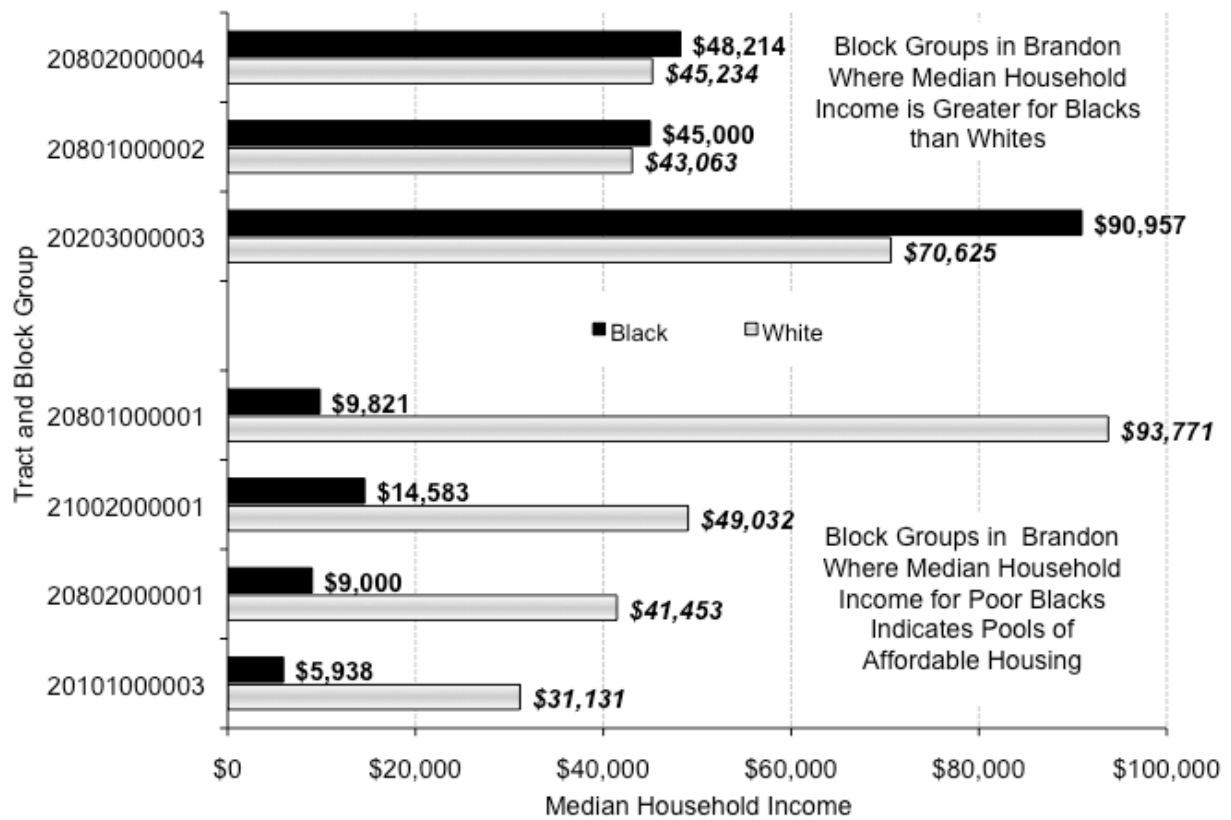
With the majority of blocks having from 5 percent to 30 percent minority (primarily Black) households, it seems that there is currently good access to housing for minorities within the city of Brandon. Almost all of the blocks in Chart 2 have single-family residences, as Brandon is a suburban community; this is evidence that there is wide-spread and unfettered access to housing by all, with no discrimination evident.

A further indication of the distribution of income and the ability to afford housing in the City of Brandon comes from an analysis of the incomes of Whites and Minorities within block groups. Income is a sample item in the Decennial Census, so it's not possible to obtain income by race at the block level. Instead, income by race is available by "block group" which is a clustering of blocks performed by the Census Bureau to allow tabulation of data at higher levels of geography. A summary of information regarding income by race is presented in Chart 3.

Chart 2: Blocks in the City of Brandon by the Percent Minority Households



Chart 3: Average Income by Race for Block Groups within the City of Brandon



There are only 23 block groups within Brandon. Of those, three block groups have families where the median household income is greater for Blacks than for Whites. In those areas, using the theory put forth by the plaintiffs, Blacks are at an advantage over Whites. In four of the block groups, median household income is significantly less for Blacks than for Whites, but the income levels for Blacks is so low that these households wouldn't be eligible to buy a home regardless of the size limitations on the house (or the lack thereof).

This latter group creates a problem for the "affordability pool" calculations offered by the plaintiffs. The percentages calculated in the affordability pools for the percent of blacks and the percent of whites includes all whites and all blacks, and so the argument made by plaintiffs as to the proportion of either group affected by the City's Ordinance includes people in both races who would never be in the market to purchase a house.

The analysis using the "affordability pool" methodology does not help a trier of fact to determine whether there is a disparate impact on minorities who may be in the market to buy a home. It includes in the population people who will not qualify to buy a home and are not relevant to the analysis. Further, the "affordability pool" methodology ignores one of the most important factors - the business reason for the Ordinance.

The City's Defense

The city of Brandon conducted an analysis before implementing the 2006 Ordinance to determine how tax revenues would be affected by unchecked growth in Brandon. The result of the analysis was that tax revenues from smaller homes being put up on partitioned lots would be insufficient for the level of services being provided by the City and Rankin county.

This included police, fire, and ambulance services as well as parks and recreation. If smaller homes were built, the projection was that for the number of homes that would exist in some areas, the demand for such city services would increase at a much faster rate than the tax revenues, meaning the city would either have to curtail such services or raise taxes.

The city argued that the city is responsible for maintaining a tax base for services provided and that a large number of smaller houses would result in a deterioration of the tax base. The city further argued that under Mississippi state law, the city was empowered to pass ordinances to protect the tax base and the people living in the City. The city won this latter argument in summary judgment, where the court acknowledged that the City had the right to pass ordinances to protect the tax base. The only question remaining was whether the size restrictions on houses were too liberal in favor of the city and had a disparate impact.

The remaining arguments for the City had to do with responses to the claims that minorities would be shut out of housing in Brandon. The 2006 Ordinance only applies to new housing, and has no effect on current housing. Furthermore, the 2006 Ordinance allowed for some current vacant lots to be exempted from the Ordinance and allowed for variances from the Ordinance if builders needed some changes. Chart 4 shows the distribution of single-family homes in Brandon by size.

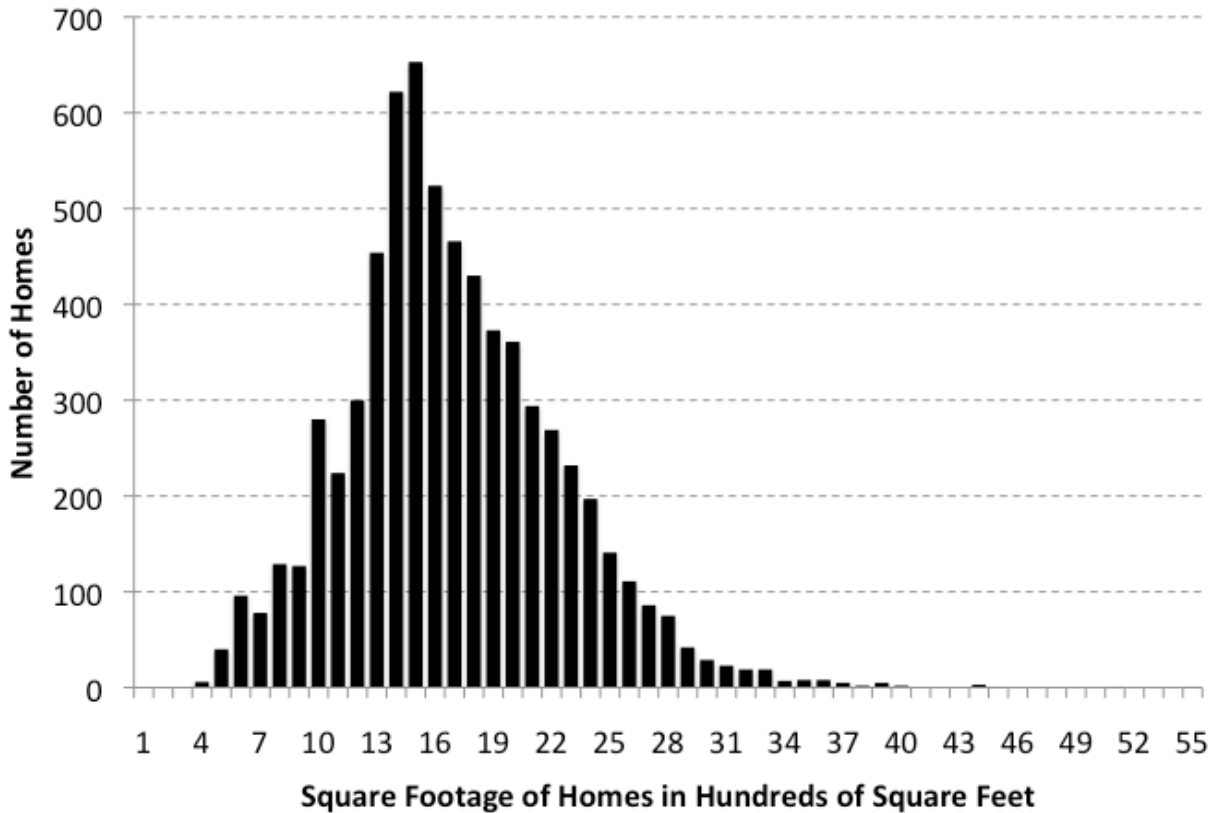
From Chart 4, one can see that over a third of the homes in Brandon have 1400 square feet or less. Following the argument made by the plaintiffs, this means that Brandon already has a large stock of homes available in the housing stock. Even with restrictions on new homes, there will still be a large stock of smaller homes in the city.

There is also a broad range of prices for any size home. Over 90 percent of the past sales prices for homes between 1550 and 1650 square feet are in the range from \$60,000 to \$130,000. Homes of this size are scattered throughout Brandon. With that range in pricing, anyone wanting to buy a home of that size (who qualifies) can readily find something that would fit within a reasonable price range.

A purchaser, faced with a variety of choices, will make a rational decision regarding the purchase of a house. Substitution effects - the substitution of an existing home for a new home - cannot be ignored in the face of such variability in prices. Plaintiffs were arguing that choices were diminished or nonexistent because of the Ordinance, when in fact a wide variety of housing choices are available to anyone wishing to purchase a home in Brandon. In addition to the possibilities for purchasing a home, there are also numerous multi-family units available to rent, and there is subsidized housing in the form of public housing in the City.

The arguments presented by plaintiffs can be placed in context through use of an example. One example is passage of regulations requiring automakers to install seat belts in cars. Seat belts raise the cost of cars, and they are not optional for a purchaser. Under the argument offered by the plaintiff, this would have a disparate impact on minorities, since the cost of any car would increase. However, no one argues that this would be a reason not to implement a program that benefits all persons purchasing a car.

Chart 4: Distribution of Single-Family Homes in the City of Brandon



The Affected Class Case - the Second Response of the Defendants

In the foregoing, in both lawsuits the Defendants put forth a business reason for their actions that presented the argument that the cities were acting in a way consistent with their mandate and were not choosing programs that arbitrarily had a disparate impact on minorities. In both cases, the argument for the City was that it had certain responsibilities to the residents and that the City was acting in the best interests of all residents.

However, in both lawsuits it was also necessary to consider a broader issue. In each case, the plaintiffs had very narrowly defined the minorities who suffered the disparate impact. In the City of Dallas, it was ostensibly the minority residents of Bent Creek Apartments. In the City of Brandon, it was minorities who might in the future purchase a new home. In both cases, these understate the group of minorities affected by the activities of the City. In this section, I consider other minorities not considered by the plaintiffs.

The City of Dallas

In their complaint, plaintiffs represent the American Housing Foundation (AHF), the nonprofit operator of Bent Creek Apartments. AHF has filed on behalf of minorities who lived at Bent Creek Apartments, but no attempt was made by the plaintiffs to separately find minorities to enter the suit that felt that their rights had been abridged.

There were mixed feelings among those who reside at Bent Creek Apartments regarding the SAFE inspections. Some residents were obviously disrupted by the inspections - they were evicted. Other residents benefited from the actions that forced drug dealers and others who were not paying rent to be evicted, and they benefited from a safer environment and a better environment for children. AHF was forced to make repairs, evict those that didn't conform to the requirements of the community, and bring the property back into compliance with city codes. As a result of these activities, the vacancy rate at Bent Creek declined and more units were made habitable and were rented.

In addition, other people who lived in the same block also benefitted from the halt of the drug trade in the area. This is a second group of people, many of whom are minorities, who were not impacted directly by the inspections conducted by the SAFE team but benefitted tremendously from the outcome. As the City has a responsibility to all of its residents, how does it balance its activities against a certain few versus the larger number who benefit from the protection of the police and the courts. Plaintiffs failed to consider other minorities at Bent Creek and whether they benefitted, and plaintiffs failed to consider other minorities who lived in the area immediately adjacent to Bent Creek.

The City of Brandon

In the case of Brandon, the 2006 Ordinance was designed to preserve the tax base in the City. Without the ordinance, the City Aldermen determined that one of two outcomes would occur, namely that taxes would have to be raised to provide the same level of services as were currently being offered or alternatively services would have to be curtailed.

In either case, using the argument proffered by plaintiffs, the people currently living in the City would be affected by the tax raise or the service cuts. Since the tax increase would have the greatest impact on those with the lowest incomes, the plaintiffs would have to conclude that the tax increase on the remainder of the city would have a disparate impact. A similar argument can be made for cutting city services. Therefore, if the City doesn't implement the Ordinance, the remainder of the City of Brandon suffers the consequences and the greatest impact is on minorities already living in Brandon. Plaintiffs' assumption that only future purchasers will be impacted ignores all the people who have invested in living in the City of Brandon. Their other assumption that income is the only determinant driving purchase behavior ignores all the minorities currently living in the city who own good homes that are interspersed with all other homes in the City of Brandon.

Conclusion

Disparate impact cases are being filed by investors and homebuilders against Cities. In some of these cases there are legitimate business reasons that Cities must pursue, and an appropriate defense is to consider the responsibilities of the City versus the alleged impact on a class of persons. A second consideration is that, while there are allegations of impact on one group of minorities, there exists a second set of minorities who benefit from the activities of the City. Disparate impact claims have to be viewed in a broader context, considering all sets of minorities that may be impacted by the actions of the City and the need for the City to fulfill its statutory obligations to provide certain services.