



2014

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Emily Mikles
University of Baltimore School of Law

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Recommended Citation

Mikles, Emily (2014) "Cashing in on Green: Casino Development and Sustainability," *University of Baltimore Journal of Land and Development*: Vol. 3: Iss. 2, Article 5.

Available at: <http://scholarworks.law.ubalt.edu/ubjld/vol3/iss2/5>

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COMMENTS

CASHING IN ON GREEN: CASINO DEVELOPMENT AND SUSTAINABILITY

Emily Mikles

I. Introduction

The development of the Horseshoe Casino in Baltimore, MD has created its fair share of contention and controversy for local residents.¹ The typical residential concerns surrounding casino development—disparate impacts on surrounding businesses, employment concerns, and economic impact—are not raising eyebrows in the Baltimore area; rather, residents are concerned about the environmental impacts of the casino construction and development project.² Several lawsuits have been filed attempting to halt casino construction due to the chemical contaminants that are seeping into the soil and into the bay through storm drains.³ These suits raise an interesting issue that some state legislatures and casino developers have yet to address—the environmental consequences of casino development.⁴ Some companies, such as Penn National, are implementing sustainability programs to limit the environmental impact of casino development.⁵

Ultimately, casino development is harmful for the environment, but with state governments looking for ways to boost the local economy and bring revenue into the state, the subject of casino development is only going to continue in the public dialogue.⁶ There are ways to mitigate the damage that casino development does to the local ecosys-

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1. See Timothy B. Wheeler, *Pair Sue Over Horseshoe Casino Site Contamination*, BALTIMORE SUN (July 3, 2013), http://articles.baltimoresun.com/2013-07-03/features/bs-bz-casino-lawsuit-20130703_1_cbac-gaming-westport-residents-patapsco-river.
 2. See *id.*
 3. See *id.*
 4. See *id.*
 5. Todd S. Davis, *Gaming Goes Green*, Brownfield Renewal (Oct.2010), available at http://hemispheredev.com/index.php?option=com_content&view=article&id=35&Itemid=2
 6. See Ashleigh Stevenson & Kier Shorey, *Qld Government gives green light for first stage of \$4.2 Cairns casino-resort*, ABC News AU (Aug. 5, 2013, 7:34 AM), <http://www.abc.net.au/news/2013-08-02/green-light-for-first-stage-of-42b-cairns-casino-resort/4860456>.

tems.⁷ State and local governments need to develop legislation regulating and preventing ecological issues, such as chemical contaminant runoff that, like in Baltimore, arises from casino development.⁸ However, gaming and entertainment companies must also invest in sustainable business practices and green initiatives to reduce the carbon footprint caused by casino development.⁹ The partnership between state legislatures and gaming and entertainment companies will help to reduce the negative impacts of casino development while increasing profits for casinos.¹⁰

II. Background/Historical Development

A. *A Brief History of Commercial Casino Development and Legislative Response in the United States*

In 1931, Nevada became the first state to legalize commercial casino gambling.¹¹ Since Nevada, numerous states have legalized commercial casinos and gambling, including Maryland, Ohio, and Massachusetts.¹²

Few of the states that legalized casino development and gambling have created legislation to limit the adverse effect of casino development on the environment.¹³ Massachusetts, for example, passed a bill to legalize casino development and operation in November 2011.¹⁴ The legislature included only four environmental requirements in the bill: the casinos must be certified gold by Leadership in Environmental and Energy Design (LEED), meet building code requirements, 10 percent of the casino's electricity must come from renewable sources, and the casino must meet Massachusetts Environmental Protection Agency's (MEPA's) agency regulations.¹⁵ Although these development guidelines are some of the most stringent commercial guidelines for casinos in the nation, the law fails to address ancillary environmental issues that stem from casino development, such as excess water usage, noise pollution, traffic and car emissions, and other environmental concerns.¹⁶

7. See Davis, *supra* note 5.

8. Wheeler, *supra* note 1.

9. See *id.*

10. See *W. Mass. Casino Health Impact Assessment*, Partners for a Healthier Community, Inc. (2013) http://www.partnersforahealthiercommunity.org/sites/default/files/WMCHIA_ExecSummary-Final.pdf

11. *Pivotal Dates in Gambling History*, AMERICAN GAMBLING ASS'N, <http://www.americangaming.org/industry-resources/research/fact-sheets/pivotal-dates-gambling-history> (last visited Jan. 10, 2014).

12. See *id.*

13. Rebecca Chazin, et. al, *Casinos: An Ecological Gamble*, SMITH COLL. ENVTL SCI. & POLICY (May 2012), <http://www.smith.edu/env/documents/ENV312-Spring12-Casino.pdf>.

14. *Id.*

15. *Id.*

16. *Id.*

Other states, like Maryland for example, have allegedly tiptoed around the environmental infractions caused by casino development.¹⁷ In March 2013, a Maryland nonprofit community action group, the Inner Harbor Stewardship Foundation, filed a suit requesting a restraining order and injunction against the construction of the Horseshoe Casino.¹⁸ The group alleges that Maryland's Environmental Protection Agency (EPA), Baltimore City, and CBAC Gaming (the gaming and entertainment company constructing Horseshoe) did not properly follow federal regulations that require comprehensive studies and cleanup of "highly contaminated" properties where the casino was being built in Westport.¹⁹

Another suit was brought against the mayor and city council of Baltimore by citizen Mark Richardson alleging that the City of Baltimore violated the federal Clean Water Act by discharging pollutants from the Horseshoe Casino construction site into the Patapsco River.²⁰ The Plaintiff also contended that, because the casino's location was also an industrial site, the land was rife with pollutants, including petroleum compounds and volatile organic compounds.²¹ Further, the construction and creation of impervious surfaces caused the pollutants in the soil to seep directly into the bay by a storm drain set up on the construction site.²² Although the case was dismissed, there are still community members rallying against the construction of the casino due to the resulting detrimental environmental impacts.²³

Similar suits were brought in California by residents of Richmond who opposed construction of a casino at Point Molate.²⁴ The Citizens for East Shore Parks, like the non-profit community group in Maryland, first alleged that the City of Richmond did not perform its due diligence in conducting a full environmental review before selling the land to developer Upstream Point Molate.²⁵ In 2006, the City officials settled with the group and agreed to conduct an environmental impact statement under the California Environmental Quality Act prior to approving the project.²⁶ However, in 2008, after the City made an

17. Timothy B. Wheeler, *Judge temporarily blocks Baltimore casino construction*, BALTIMORE SUN (March 11, 2013), available at http://articles.baltimoresun.com/2013-03-11/features/bs-bz-casino-order-20130311_1-westport-residents-construction-work-construction-activity.

18. *Id.*

19. *Id.*

20. *Richardson v. Mayor & City Council of Baltimore*, Civil Action No. RDB-13-1924, 2014 WL 60211 (D. Md. Jan. 7, 2014).

21. *Id.*

22. *Id.*

23. Wheeler, *supra* note 1.

24. Josh Wolf, *Environmental Group May Settle Point Molate Lawsuit*, RICHMOND CONFIDENTIAL (Nov. 16, 2009, 6:00 AM), <http://richmondconfidential.org/2009/11/16/environmental-group-may-settle-point-molate-lawsuit/>.

25. *Id.*

26. *Id.*

agreement with Upstream that put the developer in charge of hazardous cleanup, the Citizens for East Shore Parks filed another suit claiming that the casino would violate California Code.²⁷ Specifically, it violated California Government Code 37351 which stated that the legislative body will not sell or convey waterfront property unless it is used as a public beach or park.²⁸ After conducting an Environmental Impact Report (EIR) that found that the benefits of a casino did not outweigh the disparate environmental impact, the City of Richmond abandoned the casino initiative.²⁹ Community policing is important to raise awareness over environmental issues and push legislatures and the court to prevent casino development from negatively affecting the local ecological system.³⁰

B. Self-Imposed Sustainability: Commercial Casinos and Corporate "Green" Initiatives

Many entertainment and gambling companies have, as recently as 2009, created sustainability programs that promote environmental awareness.³¹ MGM Resorts International and Penn National Gaming have invested in green building, focusing on LEED gold certifications as a way to combat the environmental effects of casino development and construction.³² To achieve the LEED gold certification, casino development projects are evaluated based on credit categories, including sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and so forth.³³ The credits are calculated under each of these and other categories and, based on the score, casinos are rated to determine whether they meet silver, gold, or platinum certification.³⁴

For example, Penn National sought to develop a casino in Ohio as they had purchased the abandoned Delphi Automotive Plant near Columbus.³⁵ The Delphi Automotive Plant was considered a brownfield property; that is, the property was contaminated with hazardous substances and pollutants that make redevelopment and cleanup compli-

27. *Id.*

28. Cal. Gov't. Code §37351 (1957).

29. *City Within Its Rights to Abandon Casino Deal*, Courthouse News Serv. (Dec. 16, 2013 12:44PM), <http://www.courthousenews.com/2013/12/16/63780.htm>.

30. *See generally, id.*

31. *Case Studies: Industry Sustainability Efforts in Action*, AMERICAN GAMING ASS'N, <http://www.americangaming.org/social-responsibility/all-in-campaign-headquarters/all-in-for-the-environment/case-studies-industry> (last visited Jan. 10, 2013).

32. *Id.*

33. *LEED Rating Systems*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/leed/rating-systems> (last visited Jan. 10, 2014).

34. *Id.*

35. Davis, *supra* note 5.

cated.³⁶ The abandoned plant posed many environmental risks for development: substantial amounts of asbestos, chemicals in the soil from manufacturing, oil pits, and so forth.³⁷ Penn National worked closely with the EPA in Ohio and federally to investigate and remediate the plant's environmental issues.³⁸ Through this partnership, Penn National substantially remediated the groundwater issues, asbestos, and recycled salvaged building materials to develop the new casino.³⁹ By investing in a brownfield property, Penn National's cleanup not only reduced soil contaminants and pollutants, but also helped to gentrify a blighted area.⁴⁰

Penn National is not the only entertainment and gaming company to create a sustainability program around casino development. MGM Grand also has a corporate sustainability program and implemented green initiatives for its new casino development.⁴¹ In 2005, MGM began development of the CityCenter Resort and Casino in Las Vegas, which became one of the largest LEED certified projects in the world at that time, receiving over six LEED gold certifications.⁴² The development included repurposing water, water conservation, and 55 percent diversion of waste from landfills.⁴³

Through corporate initiatives such as sustainability policies and a focus on environmental preservation, many gaming and entertainment companies are changing the face of casino development and, as discussed later on, benefiting from cost savings and tax deductions for their business.⁴⁴

III. Analysis

A. *The Negative Environmental Impact of Casino Development: Abusing Natural Resources*

The Environmental Impact Report (EIR) is one study evaluating the extent that casino development affects the environment; unfortunately, there are not many studies that directly address the extent that

36. *Brownfield Lange Revitalization*, ENV'T'L PROT. AGENCY, <http://www.epa.gov/brownfields/> (last visited Jan. 13, 2014).

37. *Id.*

38. *See id.*

39. *See id.*

40. Kitty McConnell, *CEO Ameet Patel: Casino Bids to Grow Along with Environs*, THE COLUMBUS DISPATCH (Jan. 5, 2014, 9:24 AM), <http://www.dispatch.com/content/stories/business/2014/01/05/casino-bids-to-grow-along-with-environs.html>.

41. *Green Advantage: Environmental Responsibility Report 2010*, MGM RESORTS INT'L, <http://www.mgmresorts.com/files/company/MGMReport-final.pdf> (last visited Jan. 10, 2014).

42. *Id.*

43. Sadhbh Walshe, *Las Vegas: The Reinvention of Sin City as a Sustainable City*, THE GUARDIAN (April 25, 2013, 12:32 PM), <http://www.theguardian.com/sustainable-business/las-vegas-sin-city-sustainable>.

44. *See id.*

casinos influence environmental factors such as energy usage, waste disposal, soil and water contamination, and water usage.⁴⁵ There is some research that suggests that some larger casinos consume five times as much energy, approximately 1,200,000 British thermal units (Btu.) per square foot, annually in contrast to the average large hospital that uses 225,100.⁴⁶

In areas like Las Vegas, the combination of an arid climate, seasonal droughts, and water consumption have caused concerns for environmentalists, government officials, and gaming enterprises.⁴⁷ An aesthetic water fountain such as the dancing water fountain outside of the Bellagio Hotel and Casino holds 22 million gallons of water and is refilled with 12 million gallons annually.⁴⁸ The fountain at the Bellagio is one example of the environmental waste that casinos cause and can be averted through proper sustainability and green development initiatives.⁴⁹

There are other environmental concerns with casino development, including soil and water contamination.⁵⁰ Runoff from increased traffic, construction, and waste are all considerations for waterfront or water-view casinos.⁵¹ Hydrocarbons in fossil fuels, heavy metals, and other contaminants from casino construction can contaminate the surrounding waterways by rain runoff from impervious surfaces into storm drains.⁵² In Baltimore, the Horseshoe Casino has faced many complaints from community members about the ecological effects of contaminated runoff flowing into the bay and the creation of cancer-

45. See, e.g., EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS, CERTIFICATE OF THE SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS ON THE DRAFT ENVIRONMENTAL IMPACT REPORT (Feb. 7, 2014), available at <http://www.env.state.ma.us/mepa/mepacerts/2014/sc/eir/15033deir.pdf>

46. *Energy Management Increases Tribal Casinos' Profitability*, ENERGY SERVICES (March 2006), <http://ww2.wapa.gov/sites/western/es/pubs/Documents/casino%20fact%20Sheet.pdf>.

47. Lauren Morello, *Las Vegas Gambles with an Uncertain Water Future*, NEW YORK TIMES (Nov. 10, 2009), <http://www.nytimes.com/cwire/2009/11/10/10climatewire-las-vegas-gambles-with-an-uncertain-water-fu-61314.html?page-wanted=all>.

48. *How Much Water Evaporates from the Bellagio Fountains?*, LAS VEGAS SUN (Apr. 14, 2010, 2:00 AM), <http://www.lasvegassun.com/news/2010/apr/14/how-much-water-evaporates-bellagio-fountains/>

49. *Id.*

50. Timothy B. Wheeler, *Casino Site Contamination Prompts New LawsUIT*, THE BALTIMORE SUN (May 20, 2013), http://articles.baltimoresun.com/2013-05-20/features/bs-gr-casino-cleanup-lawsuit-20130520_1_inner-harbor-stewardship-foundation-cbac-gaming-new-lawsuit

51. *Gambling with the Environment? Casinos Change the Coastal Management Game*, NOAA (Feb. 1999), http://www.csc.noaa.gov/magazine/back_issues/jan_feb99/gambling.html.

52. Marc Holmes, et. al., *Preliminary Evaluation of the Environmental Impacts of a Resort Casino Proposed by the Federated Indians of the Graton Rancheria at Lakeville Highway and State Highway 37 in Southern Sonoma County, California*, BAY.ORG (Jul 2003), <http://www.bay.org/assets/White%20Paper.pdf>.

causing vapors from heavy metals contaminating the soil.⁵³ Unfortunately, each case that has been brought by local residents has been dismissed by the courts.⁵⁴ However, it is still important for community members to continue to raise the environmental issues caused by the casino and attempt to hold developers and casino owners accountable for their environmental impact.⁵⁵

B. Going Green: How Casino Sustainability Initiatives Save Money and Reduce the Negative Environmental Impact of Casino Development

It is not a coincidence that gaming and entertainment companies like MGM and Penn National are adopting corporate sustainability policies and initiatives—there is a monetary benefit from being green.⁵⁶ These benefits include, but are not limited to, energy cost savings, increase in grant money, and tax relief discussed below.⁵⁷

i. Brownfield Rejuvenation: Resurrecting Blighted and Hazardous Property

Brownfield rejuvenation, as demonstrated in Penn National's construction of the Hollywood casino in the Delphi Plant, benefits both the environment and the developer's profit margin.⁵⁸ In the aforementioned example, Penn National was able to receive loans for the assessment and remediation of a brownfield site from the Ohio Water Development Authority (OWDA).⁵⁹ The OWDA loans up to \$500,000 for assessment and \$5,000,000 for environmental cleanup to government and private entities of brownfield properties.⁶⁰ Penn National also benefited from the Ohio Vacant Facilities Fund that provides approximately \$500 per new full-time position created at a building or business park that has been at least 75 percent vacant for one year.⁶¹ On a federal level, the EPA also provides grants for brownfield proper-

53. Van Smith, *Vapor Intrusion*, CITYPAPER.COM (Aug. 14, 2013), <http://citypaper.com/news/vapor-intrusion-1.1535816>.

54. *Id.*

55. See Smith, *supra* note 53.

56. Krista Sykes, et. al, *Sustainability in Casino Design and Operation*, RICHARD STOCKTON COLL. OF NEW JERSEY <http://intra.web.stockton.edu/eyos/business/content/docs/LIGHT/SUSTAINABILITY%20IN%20CASINO%20DESIGN%20AND%20OPERATION.pdf> (last visited Jan. 10, 2014).

57. Myla Kelly, *How One Tribe Cut its Energy Costs by 18 Percent*, GREENBIZ.COM (June 12, 2012), <http://www.greenbiz.com/blog/2012/06/12/how-one-tribe-cut-casino-energy-costs-18-percent>.

58. Davis, *supra* note 5.

59. *Ohio Revamps Brownfield Loan Program*, OHIO ENVTL LAW BLOG (Jan. 22, 2011), <http://ohioenvironmentallawblog.com/tags/clean-ohio-fund/>

60. *Program Guidelines: Brownfield Program*, OHIO WATER DEV. AUTH. (Dec. 9, 2009), <http://www.owda.org/owda-doc/Program%20Info/NotesBFDec2010ODSA2012.pdf>.

61. *Ohio Vacant Facilities Fund*, OHIO DEV. SERV. AGENCY, https://development.ohio.gov/cs/cs_ovff.htm (last visited Jan. 10, 2014).

ties specific to the stage of property development.⁶² For example, the EPA's assessment grants provide up to \$350,000 for a business to assess and create a strategy to utilize brownfield sites for development.⁶³ In addition, it is worth noting that the prices of these properties are substantially less than non-brownfield properties.⁶⁴

ii. Energy Cost Savings and Casino Development Sustainability

Grant money is not the only way that going green can help casinos and their subsequent development; reducing carbon emissions and energy usage can also benefit the casino long term while mitigating the environmental effects of the casino.⁶⁵ Casinos consume a large amount of electricity, and casino lighting systems, both decorative and functional, can potentially consume up to 30 percent of the total electrical costs of a casino operation.⁶⁶ However, using light emitting diode (LED) bulbs and fluorescents along with fiber optics can potentially save casinos up to 30 percent on their electrical bills, labor, and bulb replacement.⁶⁷ For example, in 2008, the El Cortez Hotel and Casino in Las Vegas invested in lighting retrofits including the LED fixtures and fiber optics, which saved them 40 percent in energy costs and consumptions, and the casino recovered the project costs within 19 months.⁶⁸ MGM saved more than 300 million kilowatt hours of electricity from 2006 to 2011 based on changes to more energy efficient fixtures along with Energy Star televisions, lighting, and digital thermostats.⁶⁹ According to its sustainability report, MGM's lighting improvements saved the same amount of electricity consumed annually by 500 average U.S. households.⁷⁰ These small changes can create a large impact, and including sustainable practices such as LED lights and energy efficient systems during the development process can monetarily benefit the casino as well as reduce the casino's carbon footprint.⁷¹

Many new casinos are going beyond simply changing light fixtures to reduce their environmental impact; there is a new trend for casinos to be LEED certified.⁷² According to one study, developing a LEED-certified casino and building can drop the operating cost of the facil-

62. *EPA Brownfields Revolving Loan Fund Grants: Interested in Applying for Funding?*, ENVTL. PROT. AGENCY, http://www.epa.gov/brownfields/grant_info/rlf/rlf_factsheet.pdf (last visited Jan. 10, 2014).

63. *Assessment Pilots/Grants*, ENVTL. PROT. AGENCY, http://www.epa.gov/brownfields/assessment_grants.htm (last visited Jan. 10, 2014).

64. Davis, *supra* note 5.

65. Sykes, *supra* note 56.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Green Advantage: Environmental Responsibility Report 2010*, *supra* note 41 at 19.

70. *Id.*

71. *Id.*

72. *See id.*

ity by 13.6 percent, increase the building value by 10.9 percent, and improve the return on building investment by 9.9 percent.⁷³ Green buildings use less fossil fuel and reduce carbon emissions along with dependence on foreign oil.⁷⁴ MGM reported that its sustainability practices reduced its annual emissions and carbon-based energy usage by more than 100,000 metric tons of carbon dioxide equivalent.⁷⁵

Casino developers also must be cognizant of water usage to reduce waste and realize cost savings.⁷⁶ Variables such as faucet flow rates, toilet flush rates, and aesthetic water fixtures need to be carefully evaluated to ensure that there are measures in place to prevent over-usage.⁷⁷ For example, MGM's CityCenter Casino and Resorts was designed to be water smart and saves approximately 50 million gallons of water annually.⁷⁸ At the MGM Grand Las Vegas, MGM focused on water-saving initiatives such as replacing sink fixtures, showerheads, and toilets.⁷⁹ These small but significant changes helped MGM save over 1.9 billion gallons of water between 2007 and 2010.⁸⁰

iii. The Baltimore Brownfield Disaster: The Environmental Failings of the Horseshoe Casino

However, there are some cities that have allowed construction on brownfield properties without imposing necessary cleanup requirements to mitigate the environmental aftereffects of development.⁸¹ The Horseshoe Casino in Baltimore would be considered a brownfield site, and the owners and city officials could have taken precautions to alleviate the environmental effects of casino construction.⁸² Unfortunately, the City partnered with the Maryland Department of the Environment (MDE) and submitted an incomplete Response Action Plan (RAP) to clean up chemical contaminants. This report con-

73. Julie Taylor, *Casino Design, Sustainability, and Community Linkages: Requiring Excellence for Massachusetts Casinos*, MASSGAMING.COM (Mar. 2013), <http://massgaming.com/wp-content/uploads/AIA-Paper-to-MA-Gaming-Commission.pdf> at 24.

74. *Id.* at 28.

75. *MGM Resorts Green Advantage*, MGMGrand.com, <http://www.mgmgrand.com/sustainability/> (last visited Jan. 11, 2014).

76. Heather Cooley, et. al, *Hidden Oasis: Water Conservation and Efficiency in Las Vegas*, Pacific Inst. (Nov. 26, 2007), http://www.pacinst.org/reports/las_vegas/LasVegas_Appendix%20E.pdf.

77. *Id.*

78. *Green Advantage: Environmental Responsibility Report 2010*, *supra* note 41, at 21.

79. *Green Initiatives*, Las Vegas Convention and Visitors Authority, available at <http://www.lvcva.com/article/green-initiatives/811/>.

80. *Id.*

81. Compl. ¶ 3, *Sherrill, et. al v. Mayor and City Council of Baltimore, et. al*, No. 1:2013cv02768 (D. Md. Sept. 19, 2013), available at, <http://www.saveinnerharbor.org/wp-content/uploads/2013/02/IH-Complaint-02-20-13-FINAL.pdf>.

82. *Id.* at 2.

tained initiatives that were inexpensive, incomplete, and failed to develop and include an implementation schedule for the cleanup.⁸³ The MDE approval of the RAP allows the developers and casino owners to avoid the requisite investigatory and cleanup costs while causing chemical contaminants to enter waterways that directly flow into the Chesapeake Bay and negatively affect the health of those living around the contaminated site.⁸⁴

By remediating a brownfield property, developers are able to utilize federal grant money to build casinos thus reducing the cost of development and remediating hazardous and blighted areas.⁸⁵ However, the risk associated with building on a brownfield site without taking the proper steps to assuage any environmental risk is extremely dangerous, both to the ecological systems surrounding the development and the people who live near the contaminated site.⁸⁶ By avoiding cleanup initiatives and allowing cancer-causing contaminants into the soil, developers and casino operators are not only harming the environment but are at risk for future environmental lawsuits and health claims for failing to address the risk that chemical contaminants, vapors, and other hazards from improper brownfield development cause.⁸⁷

IV. Conclusion

Simply put, state legislatures and environmental agencies need to look outside of the socioeconomics and focus on the environmental effects of casino development. Casinos are creating sustainability programs, but that is not enough to combat the disparate environmental implications caused by casino development. State legislatures, gaming and entertainment companies, and developers must work together to create more sustainable solutions that decrease the adverse effects of casino development on the environment. Otherwise, cities will be faced with the ecological issues present in Baltimore that will continue to impact the environment for generations to come.

83. *Id.* at 14.

84. *Id.* at 25.

85. Davis, *supra* note 5.

86. Complaint at 26, *Sherrill v. Mayor of Baltimore*.

87. Vin Gurrieri, *Baltimore, Casino Developer Sued Over Contamination*, law360.com (Sept. 20, 2013), <http://www.law360.com/articles/474337/baltimore-casino-developer-sued-over-contamination>.

SETTLEMENT EQUALS ANOTHER MISSED OPPORTUNITY FOR THE SUPREME COURT TO DEFINE DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT

Erika Flaschner

I. Introduction

In 2003, the New Jersey Township of Mount Holly designated a neighborhood known as the Gardens as a blighted, high crime area, and called for its redevelopment.¹ The Township adopted a plan to demolish the Gardens and replace it with new residential units, of which only a fraction were designated for affordable housing.² However, the predominately minority population of the Gardens filed suit to overturn the blight designation and stop the redevelopment plan on the grounds that the plan violated the Fair Housing Act (FHA) on a disparate impact theory.³

Both the New Jersey state court and the federal district court dismissed the case.⁴ However, the U.S. Court of Appeals for the Third Circuit reversed the lower courts, holding that the evidence submitted by the residents was sufficient to establish a case of disproportionate impact in violation of the FHA.⁵ On November 14, 2013, the parties decided to settle the matter rather than proceed with the appeal before the U.S. Supreme Court in December.⁶

Prior to settlement, this was viewed as a potential landmark case that would finally decide the extent to which disparate impact claims are recognized under the FHA.⁷ Although the residents of the Gardens celebrated the settlement, the best scenario would have been for the Supreme Court to hear the case of *Mount Holly Gardens Citizens in Action, Inc.* and to both recognize and provide a clear standard for disparate impact claims under the FHA.⁸

1. *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 379 (3rd Cir. 2011).

2. *Id.*

3. *Id.* at 380.

4. *Id.* at 381.

5. *Id.* at 382.

6. Adam Serwer, *Mount Holly settlement spares Fair Housing Act- for now*, MSNBC, (Nov. 14, 2013), <http://www.msnbc.com/msnbc/mount-holly-settlement-spares-fair-housing-act-for-now>.

7. *Id.*

8. See *infra* Part.III.

II. Background

A. *The History of the Fair Housing Act*

President Johnson signed the FHA into law as Title VIII of the 1968 Civil Rights Act as a response to a variety of circumstances, including the open housing marches in Chicago and the inability of the families of Vietnam veterans to obtain housing.⁹ The FHA declares that it “is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”¹⁰ This purpose is demonstrated in section 3604, which states that “it shall be unlawful 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.”¹¹

B. *A History of Mount Holly Gardens*

During the Korean War in the mid-1950s, Mount Holly Gardens was built to accommodate military personnel from Fort Dix.¹² In the early 1990s, residents, community organizers, and township representatives formed the Mount Holly Gardens Revitalization Association to address the continuing issue of deterioration.¹³ The Association commissioned a redevelopment plan that proposed the Mount Holly Township acquire all rental units in the Gardens and transfer them to a nonprofit organization, which would rehabilitate them.¹⁴ However, the Township did not provide the resources necessary to accomplish those goals and thus declared the Gardens to be blighted, acquired the properties, boarded up the vacant units, and began demolitions.¹⁵

In 2003, a group of Gardens residents, represented by South Jersey Legal Services, filed suit against the Mount Holly Township for violating section 3604 of the FHA, claiming that the redevelopment plan was a form of discrimination because it would have a disparate impact on the minority residents.¹⁶ The proposed redevelopment plan was to replace all of the existing homes in the Gardens with newer and more expensive homes.¹⁷ However, the redevelopment plan disproportion-

9. History of Fair Housing, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/abouttheo/history (last visited Dec. 27, 2013).

10. 42 U.S.C. § 3601 (2006).

11. *Id.* at § 3604(a). This is the section at issue in the Mount Holly case.

12. *Evicted from the American Dream: The Redevelopment of Mount Holly Gardens*, NEW JERSEY DEP'T OF THE PUB. ADVOCATE 2, 4 (Nov. 2008), http://www.njeminentdomain.com/uploads/file/PubAdvocate_gardens_report.pdf.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 381 (3rd Cir. 2011).

17. *Id.* at 377.

ately affected minority families¹⁸ as Mount Holly Gardens was comprised mostly of African-American and Hispanic residents, 80% of whom lived below the Township's median income.¹⁹

The District Court ruled that there was no *prima facie* case of discrimination under the FHA and, even if there was, the residents had not shown how an alternative course of action would have had a lesser impact.²⁰ The Gardens residents filed an appeal and the U.S. Court of Appeals for the Third Circuit reversed the lower court, holding that the evidence submitted by the residents was sufficient to establish a *prima facie* case of disproportionate impact in violation of the FHA.²¹ Furthermore, the Court held that factual issues existed as to whether the Township had shown that there was no less discriminatory alternative to the redevelopment plan.²²

C. *The Mount Holly Settlement*

The Mount Holly Township agreed to a settlement in November of 2013.²³ Under the terms of the settlement, the Township will compensate the residents who want to leave and provide new homes for those who want to stay.²⁴ Olga Pomar, one of the attorneys for the residents stated, "This is what the plaintiffs have always been requesting, they don't want the community redeveloped and them not to be able to be a part of it. They want to be able to stay in this community while it's being revitalized."²⁵ The settlement rendered moot a hearing on the issue that was scheduled for December before the Supreme Court, which took the Township's appeal of a lower court decision in favor of the residents.²⁶

D. *Disparate Impact Claims and the Fair Housing Act*

Prior to *Mount Holly Gardens Citizens in Action, Inc.* being settled in November of 2013, the Supreme Court was expected to hear the case, thus revisiting the controversial legal principle of disparate impact, which has been used for decades to enforce the FHA.²⁷ The justices

18. *Id.* at 382 (detailing that the plan would affect 22.54% of all African-American households, 32.31% of Hispanic households, and 2.73% of white households in Mount Holly).

19. *Id.* at 377-78.

20. *Id.* at 381.

21. *Id.* at 382.

22. *Id.* at 387.

23. Adam Serwer, *Mount Holly settlement spares Fair Housing Act- for now*, MSNBC (Nov. 15, 2013), <http://www.msnbc.com/msnbc/mount-holly-settlement-spares-fair-housing-act-for-now>.

24. *Id.*

25. *Id.* Olga Pomar is an attorney at South Jersey Legal Services. *Id.*

26. David O'Reilly, *Mount Holly Gardens discrimination dispute settled*, PHILLY.COM, (Nov. 15, 2013), http://articles.philly.com/2013-11-15/news/44078231_1_township-residents-olga-pomar-south-jersey-legal-services.

27. *Id.*

would have been asked to decide whether the Township had effectively discriminated against the predominately Hispanic and African-American residents who populated the Gardens when it condemned their homes as part of the redevelopment plan.²⁸

The concept of disparate impact comes from employment discrimination law.²⁹ In 1971, the landmark Supreme Court case of *Griggs v. Duke Power Co.* interpreted Title VII of the 1964 Civil Rights Act to include a discriminatory effect standard.³⁰ A disparate impact claim is an effective way to challenge policies that are facially neutral but have a disproportionate impact on a certain class.³¹ The purpose of a disparate impact claim is to focus on the effect of an action rather than the actor's intent, therefore making it easier for plaintiffs to prevail in discrimination cases because a showing of intent is often hard to prove.³²

The doctrine of disparate impact is unsettled because the FHA statute does not expressly mention it, even though every federal circuit recognizes it.³³ The Supreme Court has signaled that it is interested in the issue and willing to clarify the vagueness by considering cases in both 2012³⁴ and 2013.³⁵ It is imperative that the Supreme Court makes a definitive decision on this issue so that lenders and borrowers are operating in a more stable environment.³⁶ Disparate impact claims would allow the purpose of the FHA, to create fair housing for all, to be better enforced.³⁷

28. *Id.*

29. Eric W.M. Bain, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1440 (2013).

30. *Id.* at 1440-41. Prior to the Civil Rights Act, Duke Power Company had a policy of relegating African-American employees to a single department where they were paid substantially less than other "white" departments. After the Civil Rights Act passed, Duke changed its race-based employment assignments to a policy of requiring either a high school diploma or passing a standardized general intelligence test to be employed in jobs with higher wages. The Court sided with the plaintiffs, holding that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

31. Nicholas Cassidy, *The Fair Housing Act, Disparate Impact, and the Ability-to-Repay: A Compliance Dilemma for Mortgage Lenders*, 32 REV. BANKING & FIN. L. 431, 438 (2013).

32. *Id.* at 438.

33. Bain, *supra* note 29, at 1436.

34. *See generally* Gallagher v. Magner, 636 F.3d 380 (8th Cir. 2010) (discussing the Fair Housing Act and disparate impact issue as it applied to a St. Paul housing ordinance). The Supreme Court was going to hear this case in February of 2010, but St. Paul dismissed its appeal just before the case was going to be heard.

35. *See generally* Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3rd Cir. 2011).

36. Cassidy, *supra* note 31, 438.

37. *Id.*

III. Analysis

This case would have presented the Supreme Court with the opportunity to determine whether parties may bring disparate impact claims under the FHA.³⁸ While the residents of the Gardens welcomed the settlement, the best scenario would have been for the Supreme Court to hear the case of *Mount Holly Gardens Citizens in Action, Inc.* and establish a clear standard for disparate impact claims under the FHA.³⁹ This would allow for a better chance that the purpose of the FHA, fair housing throughout the United States, be carried out because the disparate impact claims would force decision-makers to be more aware of the effect of their lending policies.⁴⁰ Furthermore, there is much legal support that the Supreme Court could rely on in making the decision to allow disparate impact claims under the FHA.⁴¹

A. Similarities Between Title VII and the FHA

In order to justify a decision leading to this ideal outcome, the Court could rely on many of the same arguments used in the case of *Griggs v. Duke Power Co.*⁴² Title VII and the FHA share similar language and were enacted for the purpose of reducing discrimination only four years apart, therefore making it logical to presume that Congress intended the text to have the same meaning in both statutes.⁴³ Given the similarities in language, purpose, and time of enactment, the Court's allowing for disparate impact analysis pursuant to one statute but not for the other would be inconsistent.⁴⁴ The case of *Mount Holly Gardens Citizens in Action, Inc.* could have served the purpose for housing discrimination law that *Griggs* did for employment discrimination law.⁴⁵

B. Federal Circuit Courts and Administrative Agencies Support Disparate Impact

The Supreme Court should also consider the consensus of the circuit courts, as every circuit has decided that FHA disparate impact claims are viable.⁴⁶ Such unanimous agreement amongst the federal

38. *Id.* at 457.

39. *Id.*

40. *Id.* at 457-58.

41. *Id.* at 458.

42. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

43. Eric W.M. Bain, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1459 (2013). Title VII was passed as part of the Civil Rights Act of 1964 and the FHA was passed as part of the Civil Rights Act of 1968. *Id.*

44. *Id.* at 1460.

45. *Id.* at 1461.

46. Nicholas Cassidy, *The Fair Housing Act, Disparate Impact, and the Ability-to-Repay: A Compliance Dilemma for Mortgage Lenders*, 32 REV. BANKING & FIN. L. 431, 458 (2013).

circuit courts “is a resounding endorsement that the FHA includes a disparate impact standard.”⁴⁷ The Supreme Court would have a more difficult time allowing disparate impact claims under the FHA if the circuits were split over whether a disparate impact standard existed under the FHA, but this is not the case as all circuits agree that such a standard exists.⁴⁸ Furthermore, administrative agencies, like the Department of Housing and Urban Development (HUD), have supported a disparate impact standard in their implementation of the FHA.⁴⁹ For example, in a 1993 administrative decision, the HUD Secretary found that a “disparate impact, if proven, would establish a violation of the Act.”⁵⁰ Furthermore, HUD’s “Complaint Intake, Investigation, and Conciliation Handbook” establishes that disparate impact may be used to show a violation of the FHA.⁵¹ Additionally, the Department of Justice, using its enforcement powers, has urged courts to adopt an impact standard.⁵² The Fair Lending Unit of the Housing and Civil Enforcement Section of the Department of Justice has relied on the disparate impact theory in charging lenders with lending discrimination in violations on the FHA.⁵³

C. *The Purpose Behind the FHA*

The Supreme Court should examine the purpose behind the FHA, as the statute is ultimately concerned about the effects of housing policies and not the intent behind them.⁵⁴ The legislative history of the FHA demonstrates that Congress deliberately did not limit showings of violations to intent.⁵⁵ When advocating for the passage of the FHA, the Act’s principal sponsor, Senator Mondale, spoke of the Act combating effects of discrimination, stating that it “seems only fair. . . that Congress should now pass a fair housing act to undue the effects” of previous governmental discrimination.⁵⁶ Additionally, during congressional debate of the FHA, an amendment was introduced that would have specifically included an intent standard but the amend-

47. Bain, *supra* note 43, at 1463.

48. *Id.*

49. *Id.*

50. *Id.* at 1446, quoting Sec’y, United States Dep’t of Hous. & Urban Dev. v. Mountain Side Mobile Estates P’ship, HUDALJ 08-92-0010-1, 1993 WL 307069, at *5 (July 19, 1993).

51. Bain, *supra* note 43, at 1446.

52. *Id.* at 1463.

53. Kirk D. Jensen, *The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text*, 129 BANKING L.J. 99, 133 (2012).

54. Cassidy, *supra* note 46, at 458 (2013).

55. Robert G. Schwemm & Sara K. Pratt, *Disparate Impact under the Fair Housing Act: A Proposed Approach 10-12*, NATIONAL FAIR HOUSING ALLIANCE (2009), available at <http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf>.

56. *Id.* at 11 (citing 114 Cong. Rec. 2669 (1968)).

ment was defeated because the bill's supporters believed it would have made "proof of discrimination difficult in all but the most blatant cases."⁵⁷

D. If the Supreme Court Decides Disparate Impact is Not Allowed Under the FHA

While there is much legal support for the Supreme Court to recognize disparate impact claims under the FHA in the future, there is also the chance that the Court would decide that FHA disparate impact claims are invalid.⁵⁸ If the Court rejected FHA disparate impact claims, it could seriously undercut the enforcement of the FHA.⁵⁹ For example, if a landlord had a requirement that "all tenants must have a salaried job," this could disproportionately impact certain groups.⁶⁰ The landlord might have made this rule without any discriminatory intent, yet this type of requirement would seriously undermine the goal of the FHA.⁶¹ Without disparate impact liability, prospective tenants would have no way of challenging such a condition.⁶² The availability of disparate impact claims "encourages the inclusion of historically disadvantaged groups in the housing market" and the Court should not completely deny potential plaintiffs the opportunity to bring these claims under the FHA.⁶³

IV. Conclusion

Prior to *Mount Holly Gardens Citizens in Action, Inc.'s* being settled in November of 2013, the Supreme Court had the opportunity to decide whether disparate impact claims were permissible under the FHA. While the residents of the Gardens celebrated the long-awaited settlement, the settlement means another missed opportunity for the Supreme Court to define disparate impact claims under the FHA. When next given the opportunity, the Court not only has a responsibility to address the ambiguity of this area of law, but also owes it an identity. If and when this chance comes, the best scenario would be for the Supreme Court to recognize and provide a clear standard for disparate claims under the FHA.

57. Schwemm & Pratt, *supra* note 55, at 11 (citing 114 Cong. Rec. 5214 (1968)).

58. Cassidy, *supra* note 46.

59. *Id.*

60. *Id.* at 461.

61. *Id.*

62. *Id.* at 460.

63. *Id.* at 461.

