



Understanding and Navigating the Contemporary Fair Housing Challenge

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Session Objectives

- Understand the hierarchy of fair housing laws that impact (and preempt) local zoning
- Know who is protected under the Fair Housing Act, and what the Act protects against, in order to recognize violations
- Understand additional obligations arising under state zoning acts and federal funding programs
- Learn how law is in flux on fair housing and how that may impact local government obligations

Fair Housing Obligations for State and Local Government



- Federal and state antidiscrimination law
 - Fair Housing Act of 1968 (and 1988 Amendments)
 - Americans With Disabilities Act
 - Rehabilitation Act of 1974
 - State antidiscrimination acts
- State zoning enabling laws
 - “Group homes” statutes
- Obligations under federal funding programs
 - CDBG, HOME, other HUD programs, etc.

Exclusionary Zoning

Common forms of exclusionary zoning

- Minimum lot sizes
- Minimum house sizes
- Restrictions/prohibitions on multifamily housing
- Restrictions/prohibitions on manufactured housing or mobile homes
- Restrictions/prohibitions on group homes
- Fiscal motivations
- Restrictive definitions of “family”

Zoning

Two things to remember...

- There is a typical presumption that zoning regulations are valid—this is NOT the case in fair housing claims against local zoning authorities
- FHA is federal law, which trumps local zoning codes



The Fair Housing Act

“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”

-42 U.S.C. § 3601

Structure

The FHA has three major parts:

- General provisions
 - *Policy statement, definitions*
- Substantive requirements
- Enforcement
 - *Options for legal action, penalties, attorneys' fees*

Who is Protected?

Protected classes under the Fair Housing Act include:

- Race
- Color
- Religion
- Sex
- Familial status
- National origin
- Handicap
- State fair housing laws may add classes

-42 U.S.C. § 3604(a)-(f)

Who is Protected?

Familial status—*protects parents with children under 18 from discrimination*

- Protects foster families, recipients of Aid to Families With Dependent Children
- Not interpreted to ban housing restrictions in favor of households with children
- Licensed, age-restricted elderly living communities are exempted from compliance with prohibitions against discrimination based on familial status

-42 U.S.C. §§ 3602(k), 3607(b)

Who is Protected?

Handicap—*protects persons with disabilities or those associated with the disabled person*

- “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance”
- Disabilities under the FHA also include past drug or alcohol addictions and HIV infections

-42 U.S.C. § § 3602(h)

Who is Protected?

Handicap—*conditions not considered disabilities under the FHA*

- Emotional disturbance
- History of abuse
- Homelessness
- Post-incarceration halfway houses
- Juvenile delinquency
- Current drug users

Who is Protected?

Some key missing classes...

- Income/economic class
- Source of income (*i.e. government support programs*)
- Orphanages, homeless persons
- Sexual orientation

Covered Housing



Source: <http://myemail.constantcontact.com/Shelter-from-the-Cold.html?soid=1103391372388&aid=SOqwdsMxsTc>

- FHA protections apply to dwellings:

“‘Dwelling’ means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.”

Covered Housing

While it is generally easy to determine whether a place is a dwelling, some are not so easy...

- Temporary housing vs. transitional living facilities
- Homeless shelters
- Hotels/motels
- “Sell or rent”

Prohibitions

“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 ...”

-42 U.S.C. § 3604(a)

Key language: *“make unavailable or deny...”*

- Refusal to sell or negotiate
- “Constructive eviction”
- Restrictive covenants or other private agreements
 - Expressly prohibited by some state laws
- Zoning or building regulations

Prohibitions

“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 ...”

-42 U.S.C. § 3604(b)

- Terms, conditions, or privileges—written documents
- Provision of services
 - Post-acquisition apartment or condominium complex services
 - Local government services, such as utilities

Prohibitions

“a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises”
-42 U.S.C. § 3604(f)(3)(a)

- **Modification**—physical alterations of a property
 - “if such modifications may be necessary to afford such person full enjoyment of the premises”
 - Installation of ramps, railings, etc. at the expense of the disabled person
 - Landlord is permitted to require the restoration of the alterations to the condition that existed prior to the alterations

Prohibitions

“a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling”

-42 U.S.C. § 3604(f)(3)(b)

- Applies to both private and public rules, policies, practices or services
 - Private rules: homeowners’ association rules, condo association rules, apartment policies
 - Public rules: zoning, building and other laws
- Three key terms: *reasonable, necessary, equal opportunity*

Construction of the FHA

- “Broad and inclusive”
 - Definitions of the various protected classes have been read broadly; “dwelling” is a broad term
- Standing rules
 - Supreme Court has granted standing to anyone in a housing unit who is injured by discrimination
 - Role of fair housing organizations
 - Can bring suit when discrimination is *likely* to occur

Enforcement

Three options:

- Administrative enforcement (HUD)
 - File a written complaint with HUD, or refer to a HUD-certified fair housing agency
 - HUD may refer the complaint to the Department of Justice
 - Encourages conciliation agreements
- Direct lawsuit
- Department of Justice proceeding



Source: <http://www.law.ou.edu/gallery/bell%20courtroom>

Remedies

- Damage awards
 - Sometimes difficult to calculate since the bulk of the injury is often loss of rights, humiliation, etc.—difficult to quantify
 - No statutory cap on punitive damage awards
- Injunctive relief
 - More common in land use regulation cases
- Attorneys' fees

Zoning and Fair Housing

Ways that regulations can violate the FHA:

- Disparate *treatment*
- Disparate *impact*
- Failure to reasonably accommodate (*disability cases only*)



Disparate Treatment

- Facial discrimination
 - *Example:* “Group homes for the mentally disabled shall not be located within 1,500 feet of a school zone”
 - May be permissible if the facially disparate treatment *benefits* the protected class
- Discriminatory intent
 - Focus mostly on perceived discriminatory animus in passing the regulation

Disparate Treatment

Discriminatory Intent, cont'd.

Finding discriminatory intent:

- Actual impact
- Historical background of the decision;
- Specific sequence of events leading up to the decision;
- Legislative or administrative history (including statements, etc.)

Disparate Impact

- Looks at whether a particular action has greater *effect* on a particular protected group—it's a tough call!
- Three-pronged test:
 - (1) showing of impact; (2) government's interest in the decision; (3) is the government being compelled to provide housing, or just restrained from interfering with property owners' interests?
- Unclear legal future

Reasonable Accommodation

- Applies in the disability context only
- Three components
 - *Reasonableness* of the accommodation
 - *Necessity* of the accommodation
 - *Equal enjoyment* by the disabled resident
- Requests for accommodation
- Lone exception: if the accommodation would cause a public safety problem (very limited)

Zoning and Fair Housing

Some issues...

- Family composition rules vs. maximum occupancy limits
- Accommodating low-income persons
- Facility spacing or dispersal requirements
- Utility service



State Zoning Enabling Acts and Fair Housing

Zoning Enabling Acts

- Many state zoning enabling acts contain fair housing provisions relating to group homes for persons with disabilities

“A statutory or home rule city or town or city and county shall not enact an ordinance prohibiting the use of a state-licensed group home for either persons with developmental disabilities or mental illness that serves not more than eight persons with developmental disabilities or eight persons with mental illness and appropriate staff as a residential use of property for zoning purposes.” –C.R.S. § 31-23-201

Zoning Enabling Acts

Standard history/features...

- Feature of pre-FHAA state law
- Protected group homes/individuals typically do not line up with FHAA definitions
 - Protected groups are often some version of “developmentally disabled”—thus, AIDS/HIV patients, recovering substance abusers, etc. not protected
- Generally some limit to the size of protected group homes
- Express preemption of local zoning ordinances with respect to single-family residential districts



New Developments in Fair Housing

Two Areas of Change...

- Changes in Federal Fair Housing Act liability/interpretation
- Changes in obligations of federal grant recipients

Disparate Impact Under Fire

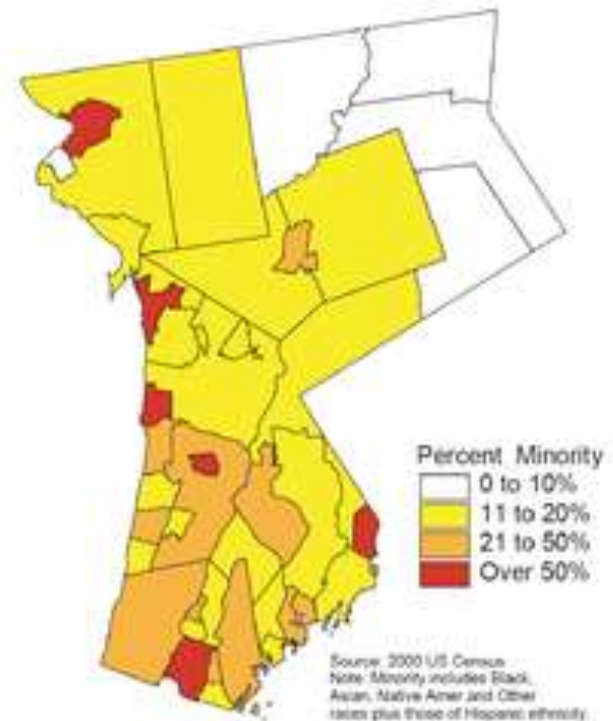
- Eleven circuit courts of appeal have found that FHA provides for disparate impact analysis
 - The Equal Protection Clause does not provide for disparate impact analysis
 - Language of other federal antidiscrimination law specifically prohibits policies with disparate impact (i.e. Title VII employment discrimination)

Disparate Impact Under Fire

- Supreme Court twice granted cert on the question of whether Title VIII prohibits policies with disparate impact
 - 2012: *Magner v. Gallagher* (settled out of court)
 - 2013: *Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action* (settled out of court)
- Political background, predictions for future action on disparate impact under Title VIII

Obligations on Funding Recipients

- *Westchester County cases*
 - Recipient of HUD funding under the Housing and Community Development Act of 1974
 - HCDA requires compliance with federal antidiscrimination laws
 - Signed certification: “affirmatively further fair housing”
 - Analysis of Impediments process



Obligations on Funding Recipients

Westchester County settlement

- County spends \$51.6 million to build 750 workforce housing units
- At least 84% must be in communities with less than 3% African American and less than 7% Latino population
- Units must be marketed throughout metropolitan area



Obligations on Funding Recipients

Westchester County settlement

- County must adopt policy that “the location of affordable housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation.”
- County must explore ways to can “maximize the development of affordable housing that affirmatively further fair housing "in the eligible municipalities and census blocks with the lowest concentrations of African American and Hispanic residents.”



Obligations on Funding Recipients

Westchester County settlement

- County acknowledges its authority to develop affordable housing despite local zoning restrictions and other city-created barriers.
- County obligated to take legal action against resistant municipalities where needed to fulfill the affirmatively furthering fair housing purposes of the settlement.
- Independent monitor appointed to ensure enforcement of terms.
- County pays \$7.5 million to plaintiff center, \$2.5 million to their attorneys, and \$900K to federal government for administrative expenses.



Obligations on Funding Recipients

- Post-Westchester requirements/Notice of Proposed Rulemaking: “Affirmatively Furthering Fair Housing”
 - Enhanced obligations for application, maintenance of funding streams
 - Address segregated living patterns, disparities in access to community amenities
 - Increased focus on zoning and other regulatory barriers to reducing segregation, increasing fair housing opportunity

Best Practices to Avoid Trouble

1. Plan ahead and strategize

- Identify locations in the community where certain types of housing are most appropriate (i.e. consider access to transit, job locations, etc.)
- Develop strategies for location of unwanted housing types—engage local government elected and administrative officials, media, housing developers, and the public



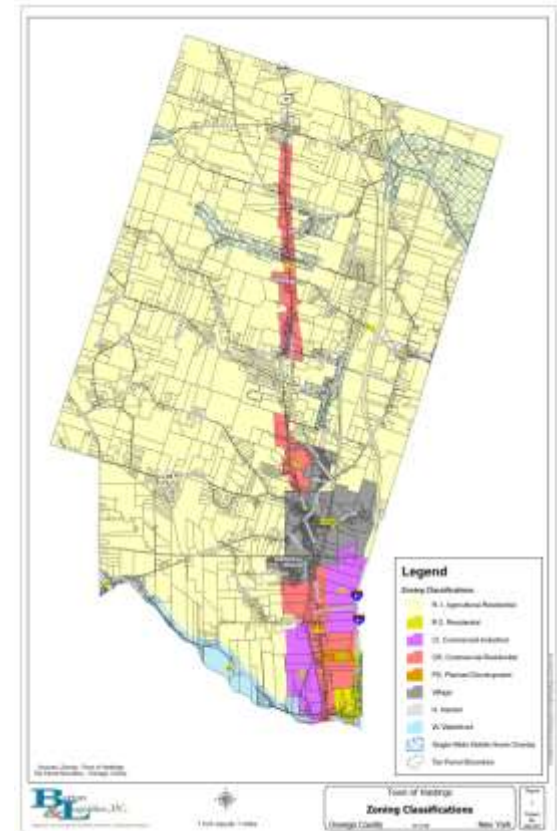
Best Practices to Avoid Trouble

2. Ensure that your code allows group homes for the full range of FHAA protected groups in at least some residential neighborhoods
 - And on terms that are not stricter than groups homes for the general public or elderly
 - Make sure any spacing requirements are even-handed
 - Treat group homes for 8 or fewer residents just like homes if possible



Best Practices to Avoid Trouble

3. Review your zoning map to see that a reasonable amount of land is zoned into districts that allow for facilities for elderly, frail, group homes, HIV patients, people with physical or cognitive disabilities, recovering drug and alcohol users
 - Judges take a dim view of “well, we allow them in our code but we never zoned any land into that district”
 - Some local jurisdictions use group home floating zones—generally a bad idea



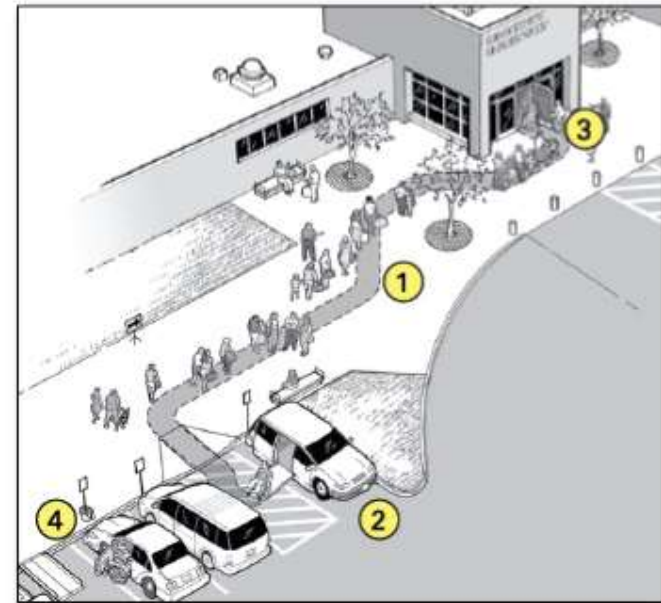
Best Practices to Avoid Trouble

4. Include in your code a process for responding to requests for “reasonable accommodations” or “reasonable modifications” – or at least know how you will respond.
 - Like a variance? OK, but the standards needed to comply with FHAA are different from those required for a traditional “hardship” variance – so don’t tie them to that standard.
 - As an administrative adjustment approvable by the director or manager?
 - Best not to require conditional permit or a public hearing.



Best Practices to Avoid Trouble

5. Include or cross-reference parking and access requirements from ADA and state acts
 - Generally addresses car parking, van parking, and walkways to building entrances from parking areas for “public accommodation” – generally multi-family housing, commercial, institutional, industrial areas.
 - No need to repeat them in the zoning code – some communities put them in the building code or a separate ordinance.



Best Practices to Avoid Trouble

6. Widen the variety of housing types allowed in your community to include smaller and more efficient units:

- Small lot single-family
- Manufactured/modular
- Accessory Dwelling Units
- 3- and 4-plexes
- Attached townhomes
- Cottage developments

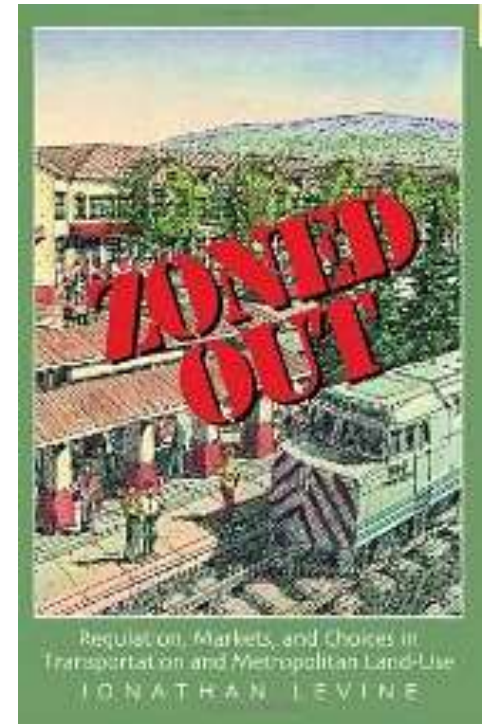
Because the market is tending in that direction
and

Because of the potential overlap of income and
FHAA protected groups – so more affordable
units reduce the risk of an FHAA challenge.



Best Practices to Avoid Trouble

7. If your state has completed an “AI” (Analysis of Impediments to Fair Housing), review it and apply its recommendations to your local codes and practices.
 - If your state has not completed an AI, consider whether you should complete one yourself
 - Be aware that new HUD requirements for AIs will be coming out within a year – and they will place more emphasis on zoning and land use controls



Questions/Discussion



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