

New Hampshire Municipal Association

Fair Housing in New Hampshire

New Hampshire Town and City, November / December 2013

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Forty-five years ago, at the height of the civil rights movement and in the wake of the assassination of Dr. Martin Luther King, Jr., Congress passed the federal Fair Housing Act (“FHA”). It was the final piece of modern civil rights laws begun with the Civil Rights Act of 1964 which was promulgated to address and suppress racial discrimination against Americans of African descent. The FHA initially prohibited discrimination based on race, color, national origin, religion. It was amended in 1974 to include gender or sex and again in 1988 to cover familial status and disability. Together, these are known as “protected classes.”

The FHA has two major goals: (1) to stop discriminatory practices against protected class members in access to and receipt of housing and housing-related services; and (2) to promote integration and suppress segregation in housing.

The overall purpose of the FHA is not only to outlaw discrimination in housing, but also to set out steps that are needed to proactively overcome the legacy of discrimination. Today, fifty years after Martin Luther King’s March on Washington, his vision of a fully equal society remains an ideal, not a reality. Throughout the United States and even in New Hampshire, too many of our citizens remain in segregated communities with high concentrations of poverty.

Over the past two years, the New Hampshire Housing Finance Authority has been working with New Hampshire Legal Assistance to develop educational materials for local and regional planners in our state to help them understand the implications of the FHA as it relates to their actions. This fall, we have published *Fair Housing and Regional and Municipal Planning: A Guidebook for New Hampshire Planners*. The *Guidebook* provides an overview of the FHA and summaries of relevant legal actions taken against municipalities throughout the country. It is available at www.nhhfa.org.

Key Features of the Fair Housing Act

Recognition of pervasive discrimination in the daily lives of African Americans in the United States led to the enactment of the Civil Rights Acts of 1866 and 1964 and resulted in the development of the legal notion of “protected class.” Further understanding that other groups of people also suffered unequal access to opportunities has expanded the number of groups protected under state and federal anti-discrimination and civil rights laws. The federal Fair Housing Act now includes seven protected classes: race, color, national origin, religion, sex, familial status and disability. New Hampshire’s housing discrimination laws expand protection to three additional

groups based on age, marital status or sexual orientation.

Over the years, many housing discrimination lawsuits based on land use laws have been brought by and/or on behalf of protected class members against governmental entities on theories of both intentional and direct discrimination and on the basis of “disparate impact.”

Race: Although civil rights laws prohibiting racial discrimination were initially enacted to protect those of African American descent, the laws’ protections extend to persons of all races who have been harmed by discriminatory actions. Case law provides numerous examples of land use, municipal ordinances and zoning laws that have, intentionally or otherwise, promoted exclusion and segregation on the basis of race.

For example, Coal Run, the only predominantly African American neighborhood in Zanesville and all of Muskingum County in Ohio, did not receive government-provided water despite years of requests, even as water was piped past Coal Run to more distant white neighborhoods. Residents sued under the FHA and other civil rights laws and a jury returned a verdict of \$10.8 million to the residents. *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

Color: This distinct protected class category is most often used in conjunction with allegations of racial or national origin discrimination. Several contemporary studies have documented discriminatory treatment of individuals based on the lightness or darkness of their skin both by members of the same racial/ethnic group and by members of different racial/ethnic groups. No examples of discrimination exclusively based on color involving land use, municipal ordinances or zoning cases could be found.

National Origin: The U.S. Supreme Court has said that the term national origin refers “to the country where a person was born, or, more broadly, the country from which his or her ancestors came.” The FHA and other civil rights laws have interpreted the notion of national origin to include ethnicity such as being of Latino or Arabic heritage.

Religion: Although complaints of religious discrimination in housing cases are relatively small in number compared to other class categories, there have been several land use, municipal ordinances and zoning cases brought under the FHA and other legal claims.

Gender: Protections against housing discrimination based on gender or sex were added to the FHA in 1974 in recognition of the fact that women in American society have been disadvantaged in accessing housing opportunities as they have in the employment and other arenas. Gender discrimination, stereotyping and sexual harassment have resulted in disparate treatment of women in home sales, rentals, lending and other aspects of the provision of housing and housing-related services.

Familial Status: In 1988, the FHA was amended to prohibit discrimination in housing based on familial status which refers to the presence of children under 18 years in the home. Included in the class are families of many configurations including parents

expecting the birth of a child, adoptive parents, foster parents, grandparents and other relatives caring for children and parents awaiting custody of a child and may residential facilities for children.

Disability: The FHA's 1988 amendments also expanded the protected class coverage to include persons with disabilities. They "were clearly intended to curb land-use restrictions on communal housing opportunities for disabled persons (sometimes called 'group homes')." The FHA's definition of a person with a disability is consistent with the definitions set forth in the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. "Handicap" is defined as "a physical or mental impairment which limits one or more of [a] person's major life activities, a record of having such an impairment, or being regarded as having such an impairment." The FHA protections extend to those associated with a person with a disability such as family members and friends. The FHA provides enhanced protections to persons with disabilities in that they may request accommodations and/or modifications in order to be able to use and enjoy their dwelling and to access and use other housing related services.

New Hampshire's Three Additional Protected Classes

State housing discrimination laws may offer more protections than federal law, including extension of protected class status to additional groups of people. New Hampshire has added three additional classes: age, marital status and sexual orientation. Although the federal Fair Housing Act does not include these categories as protected classes, the US Department of Housing and Urban Development (HUD) does prohibit HUD-funded housing providers and FHA lenders from discrimination on the basis of sexual orientation and marital status. In addition, the FHA carves out an exemption from familial status discrimination in allowing the provision housing for older persons.

Age: New Hampshire law prohibits age discrimination in housing except in cases where the housing provider has met the federal and state standards required to provide housing for persons fifty-five and older (RSA 354-A:15). The interplay between state and federal laws renders this area quite complex and easy to misconstrue. Many municipalities have ordinances governing housing for older persons in their communities. A brief survey of selected municipalities found that several ordinances appeared to run afoul of state law age protections. Examples include creation of elderly housing districts and imposition of age restrictions that exceed those permitted by state and federal law. None of the municipalities surveyed appeared to require a developer to provide "significant facilities and services specifically designed to meet the physical or social needs of older persons" as required under RSA 354-A:15, IV(a).

Marital Status: Complaints of housing discrimination under New Hampshire law based upon marital status are rare but do arise occasionally. In the mid-2000s, in separate cases, New Hampshire Legal Assistance and a private attorney filed housing discrimination complaints against a town and a 55+ condo community based on the town's zoning ordinance that prohibited anyone under 55 years from residing in the

community unless married to a person 55 years or older. As part of the resolution of the case, the town changed its ordinance.

Sexual Orientation: Sexual orientation is the newest protected class under New Hampshire law having been added in 1997 (RSA 354-A). New Hampshire law also prohibits eviction of a tenant solely because the person has or is perceived to have AIDS, a once lethal health condition that disproportionately affected gay men in the U.S. (RSA 354-A:10, VI). Because of this link, gay rights advocacy groups have often intervened in discriminatory actions against individuals with HIV/AIDS or groups and organizations providing services to them.

Prohibited Activities Under the Fair Housing Act

The FHA's reach is very broad and it covers many activities and applies to many parties including individuals, corporations, sellers, landlords, insurance companies, appraisers, lenders, governmental entities and others. It prohibits entities from making a dwelling unavailable on the basis of protected class status including refusing to sell or rent a dwelling or to negotiate the sale or rental of a dwelling (42 U.S.C. § 3604(a)). The FHA also bars discrimination in the terms and conditions of sale or rental of a dwelling or in the provision of connected services of facilities. (42 U.S.C. §3604(b)). Statements, verbal or published, including advertising that state a preference, limitation or discriminate on the basis of protected class membership constitute unlawful conduct. In addition, the FHA requires the provision of reasonable accommodations and modifications in rules, policies, practices and services for persons with disabilities.

While the circumstances in which municipalities provide housing are limited (such as a local housing authority), there are many actions that a municipality might take that could run afoul of the FHA's prohibition against discrimination in housing. Some of these include:

Exclusionary zoning and land use restrictions: includes situations where the zoning and land use ordinances are intended to exclude members of certain protected classes as well as those where the ordinances have a disparate impact on members of a protected class.

Steering: this practice involves limiting housing choices and opportunities for protected class members by guiding them toward or away from housing opportunities based on the protected class of the party.

Discriminatory terms, conditions, services and facilities (charging different rates, providing different levels of services, limiting use of facilities based on protected class status).

Discriminatory advertising, notices and statements.

Failure or refusal to allow reasonable accommodations or modifications for persons with disabilities.

Intent and the Fair Housing Act

There are two theories of discriminatory conduct under the FHA: intentional discrimination and disparate impact. For intentional discrimination, there is no

requirement of malicious intent or animus toward the protected class, just a demonstration of intent to treat people belonging to protected classes differently. Even practices with “benign” intent trigger liability. For example, if a real estate agent showed a Latino client only homes for sale in a heavily populated Latino neighborhoods, even if she sincerely assumed that this would be what the buyer would prefer, this would be unlawful steering, a prohibited practice.

The notion of disparate impact applies to seemingly neutral laws, regulations, policies or practices that have a negative impact on members of a protected class. This area most readily applies to municipal actions, such as the enactment of zoning standards that have a disproportionately negative impact on the ability of people belonging to protected classes to be able to afford housing in that community. Failure to incorporate fair housing analysis and failure to recognize structural barriers within the community that promote segregation and lack of access to opportunity are key problems. Litigation in this area has had the effect of promoting inclusionary zoning and land use practices in communities throughout the nation.

HUD’s Discriminatory Effects Regulation and U.S. Supreme Court Action

On February 15, 2013, HUD issued regulations to be applied in HUD fair housing investigations of disparate impact (Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 et seq. (Feb. 15, 2013)). Although all of the federal appellate courts that have issued rulings in this area have acknowledged that a neutral policy or practice may be unlawful under the FHA because of disparate impact, the courts have adopted different standards of analysis. The HUD regulations set a 3-pronged burden-shifting standard for analysis of a seemingly neutral law, policy or practice through the lens of disparate impact (this approach does not apply to cases of intentional discrimination). First, the plaintiff must prove that an action has a disparate impact on members of a protected class, and that the harm is substantial or that the practice tends to reinforce patterns of segregation, or both. Second, the defendant may rebut the claim by proving that the action is necessary to achieve substantial, legitimate, nondiscriminatory interests, supported by evidence. Finally, the plaintiff may show that the same interests could be met by a different action that has a less discriminatory effect.

Until now, the U.S. Supreme Court has not explicitly ruled on the disparate impact theory. But earlier this year, the U.S. Supreme Court decided to hear the appeal of Mt. Holly, N.J. v. Mt. Holly Gardens Citizens (11-507 U.S. Sup. Ct. 6/17/13). This disparate impact case involves the neighborhood of Mt. Holly Gardens in Mt. Holly, New Jersey. The Mt. Holly Gardens neighborhood contains Mt. Holly’s highest concentration of Black and Latino residents of mostly poor and working class income levels. Some years ago, the Town of Mt. Holly entered into a redevelopment plan with a private developer which called for demolition of the neighborhood and replacement with mostly market rate housing with only a fraction of the housing set aside for low-income residents.

Residents of the neighborhood brought a lawsuit in federal court, which granted

summary judgment to the town. The decision was reversed on appeal and remanded for further hearing on the merits. The Town appealed to the Supreme Court, which will hear the case this fall with a decision expected sometime next year. The issue before the court is whether disparate impact is a legally cognizable claim under the Fair Housing Act, and the decision in this case is likely to have a profound impact on fair housing jurisprudence as well as on community planning activities.

The Fair Housing Act and New Hampshire's Workforce Housing Law

Since the New Hampshire Legislature enacted the Workforce Housing Law (RSA 674:58-61) in 2008, many communities statewide have been working to identify appropriate regulatory mechanisms to comply with it. The law requires all municipalities to provide "reasonable and realistic opportunities" for the development of homes that are affordable to low and moderate income families. Although there is no direct link between the Workforce Housing Law and the FHA, municipal actions taken to comply with the Workforce Housing Law's obligations may help to protect a municipality from claims brought under the FHA.

Several dozen communities have adopted zoning provisions aimed at providing opportunities for the development of workforce housing. Because of the Workforce Housing statute's inherent flexibility, communities are developing different strategies to meet its requirements, given their own unique circumstances – such as the nature of the local real estate market, existing patterns of development, and peculiarities of the local land use regulations. Changes that have been adopted include regulatory flexibility, inclusionary zoning, accessory dwelling unit standards, and multi-family housing standards, among others.

These efforts to comply with the state's Workforce Housing Law may also serve to demonstrate a community's commitment to the principles of the federal Fair Housing Act. Many of the people protected under the FHA are also those who are considered by the Workforce Housing Law. While the Workforce Housing Law is limited to questions of income, because of our nation's historical practices of discrimination, members of the FHA's protected classes often still do not have the same economic opportunities afforded to society at large. The regulatory measures that municipalities may take to promote workforce housing can also work to undo that history of discrimination. Although the March on Washington 50 years ago yielded promising legislation, there is still much work to be done.

For more information, including links to the new *Fair Housing and Regional and Municipal Planning: A Guidebook for New Hampshire Planners*, as well as workforce housing resources, go to www.nhhfa.org.

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