

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue cap at the top. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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Report 95-710

The Fair Housing Act: Legal Overview

David H. Carpenter, American Law Division

June 11, 2008

Abstract. The Fair Housing Act, as amended in 1988, prohibits discrimination in housing based on race, color, religion, national origin, sex, physical or mental handicap, or living with children, except that housing for older persons may exclude children.

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The Fair Housing Act: A Legal Overview

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June 11, 2008

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Summary

The Fair Housing Act (FHA) was enacted “to provide, within constitutional limitations, for fair housing throughout the United States.” The original 1968 Act prohibited discrimination on the basis of “race, color, religion, or national origin” in the sale or rental of housing, the financing of housing, or the provision of brokerage services. In 1974, the act was amended to add sex discrimination to the list of prohibited activities. Likewise, in 1988 the act was amended to prohibit discrimination on the additional grounds of physical and mental handicap, as well as familial status. Although the FHA has been amended by a series of smaller laws in recent years, there has not been a major overhaul of the act since 1988.

The FHA may be enforced in varying ways by the Attorney General, the Department of Housing and Urban Development (HUD), and by victims of discrimination. The act’s coverage has been extended to “residential real estate-related transactions,” which include both the “making [and] purchasing of loans ... secured by residential real estate [and] the selling, brokering, or appraising of residential real property.” Thus, the provisions of the FHA extend to the secondary mortgage market.

In general, the FHA applies to all sorts of housing, public and private, including single family homes, apartments, condominiums, mobile homes, and others. However, the act includes some exemptions. The FHA does not “limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”

Currently, no bills to amend the FHA have been introduced in the 110th Congress. This report will be updated as warranted.

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I. Introduction¹

The Fair Housing Act (FHA) was enacted “to provide, within constitutional limitations, for fair housing throughout the United States.”² The original 1968 Act prohibited discrimination on the basis of “race, color, religion, or national origin” in the sale or rental of housing, the financing of housing, or the provision of brokerage services.³ In 1974, the act was amended to add sex discrimination to the list of prohibited activities.⁴ Likewise, in 1988 the act was amended to prohibit discrimination on the additional grounds of physical and mental handicap, as well as familial status.⁵ Although the FHA has been amended by a series of smaller laws in recent years, there has not been a major overhaul of the act since 1988. Currently, no bills to amend the FHA have been introduced in the 110th Congress.

The FHA may be enforced by the Attorney General, the Department of Housing and Urban Development (HUD), and by victims of discrimination. (For more information on the enforcement of the act, *see* the “Enforcement of the Fair Housing Act” section of this report.) The act’s coverage has been extended to “residential real estate-related transactions,” which include both the “making [and] purchasing of loans ... secured by residential real estate [and] the selling, brokering, or appraising of residential real property.”⁶ Thus, the provisions of the FHA extend to the secondary mortgage market.⁷

In general, the FHA applies to all sorts of housing, public and private, including single family homes, apartments, condominiums, mobile homes, and others. However, the act includes some exemptions. For one, it does not apply to single family homes that are rented or sold by a private owner who owns no more than three single family homes at the same time, without the use of a real estate agent, provided that certain other conditions are met.⁸

Additionally, religious groups and nonprofit entities run by religious groups are not prevented by the act “from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preferences to such persons, unless membership in such religion is restricted on account of race, color, or national origin.”⁹ The act also does not prevent private clubs “from limiting the rental or occupancy of [] lodgings to its members or from giving preference to its members” if those lodgings are not being run for a commercial purpose.¹⁰ “Housing for older persons,” as the term is defined by the act, are

¹ This report was previously updated by Kamilah M. Holder, who was formerly a legislative attorney with the American Law Division. It will be updated as warranted.

² 42 U.S.C. § 3601. The FHA, 42 U.S.C. §§ 3601 *et seq.*, was originally enacted as Title VIII of the Civil Rights Act of 1968.

³ 42 U.S.C. §§ 3604-06.

⁴ P.L. 93-383.

⁵ P.L. 100-430.

⁶ 42 U.S.C. § 3605.

⁷ *See*, 24 C.F.R. § 100.125

⁸ 42 U.S.C. § 3603(b)(1). Other requirements include the condition that the house be sold or rented without a broker and without advertising. However, HUD regulations that implement the FHA provide that the exemptions specified in 42 U.S.C. § 3603(b) do not apply to advertising. In other words, advertising that indicates a discriminatory preference or limitation is prohibited even when such discrimination itself is not. 24 C.F.R. § 100.10(c).

⁹ 42 U.S.C. § 3607(a).

¹⁰ 42 U.S.C. § 3607(a).

exempted from the FHA's proscription of discrimination on the basis of familial status. In other words, "housing for older persons" may exclude families with children.¹¹ (For more information on housing for older persons, *see* the "Familial Discrimination and Housing for Older Persons" section of this report).

Finally, the FHA does not "limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."¹² Concerned that occupancy limits may conflict with the prohibition against familial status discrimination, Congress enacted section 589 of the Quality Housing and Work Responsibility Act of 1998.¹³ This legislation required HUD to adopt the standards specified in the March 20, 1991 Memorandum from the General Counsel,¹⁴ which states that housing owners and managers have discretion to "implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the housing unit."¹⁵ HUD concluded that "an occupancy policy of two persons in a bedroom, as a general rule, is reasonable" under the FHA.¹⁶ (For more information about state and local restrictions on occupancy limits, *see* the "Group Homes" section of this report.)

II. Housing Practices in Which Discrimination Is Prohibited

The FHA prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin in the sale or rental of housing, the financing of housing, the provision of brokerage services, or in residential real estate-related transactions. The HUD regulations elaborate upon the types of housing practices in which discrimination is prohibited and provide illustrations of such practices.¹⁷ Under the regulations, the housing practices in which discrimination is prohibited include the sale or rental of a dwelling;¹⁸ the provision of services or facilities in connection with the sale or rental of a dwelling;¹⁹ other conduct which makes dwellings unavailable to persons;²⁰ steering;²¹ advertising or publishing notices with regard to the

¹¹ 42 U.S.C. § 3607(b).

¹² 42 U.S.C. § 3607(b)(1).

¹³ P.L. 105-276, § 589.

¹⁴ P.L. 105-276, § 589.

¹⁵ *See*, 63 Fed. Reg. 70,982, 70,984 (December 18, 1998), which adopted the 1991 Memorandum.

¹⁶ *Id.*

¹⁷ 24 C.F.R. Part 100.

¹⁸ 24 C.F.R. § 100.60. Prohibited actions under this section include "(1) [f]ailing to accept or consider a bona fide offer ... (2) [r]efusing to sell or rent a dwelling [], or to negotiate for a sale or rental ... (3) [i]mposing different sales prices or rental charges for the sale or rental of a dwelling ... (4) [u]sing different qualification criteria or applications ... or (5) [e]victing tenants because of their race, color, religion, sex, handicap, familial status, or national origin"

¹⁹ 24 C.F.R. § 100.65. Such discriminatory conduct includes "(1) [u]sing different provisions in leases or contracts of sale ... (2) [f]ailing or delaying maintenance or repairs of ... dwellings; (3) [f]ailing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately ... (4) [l]imiting the use of privileges, services or facilities in connection with the sale or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin ... or (5) denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors."

²⁰ 24 C.F.R. § 100.70(d). Such discriminatory conduct includes "(1) [d]ischarging or taking other adverse action against an employee, broker, or agent because he or she refused to participate in a discriminatory practice [or] ... (2) (continued...)"

selling or renting of a dwelling;²² misrepresentations as to the availability of a dwelling;²³ blockbusting;²⁴ and the denial of “access to membership or participation in any multiple-listing service, real estate brokers association, or other service ... relating to the business of selling or renting dwellings.”²⁵

Yet another provision makes it unlawful to “coerce intimidate, threaten, or interfere with” individuals for exercising, or aiding others in the exercise of their rights under the FHA.²⁶

(...continued)

[e]mploying codes or other devices to segregate or reject applicants, purchasers or renters ... or refusing to deal with certain real estate brokers or agents ... (3) [d]enying or delaying the processing of an application made by a purchaser or renter or refusing to approve such a person for occupancy in a cooperative or condominium ... [or] (4) [r]efusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.”

²¹ 24 C.F.R. § 100.70(c). Prohibited steering practices include “(1) [d]iscouraging any person from inspecting, purchasing, or renting a dwelling ... (2) [d]iscouraging the purchase or rental of a dwelling ... by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of a community, neighborhood, or development ... (3) [c]ommunicating to any prospective purchaser that he or she would not be comfortable or compatible with existing residents of a community, neighborhood or development ... [or] (4) [a]ssigning any person to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of race, color, religion, sex, handicap, familial status, or national origin.”

²² 24 C.F.R. § 100.75. Discriminatory advertisements or notices include “(1) [u]sing words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons ... (2) [e]xpressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter ... (3) [s]electing media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities ... [or] (4) [r]efusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.”

²³ 24 C.F.R. § 100.80. Illustrations of this prohibited activity include “(1) [i]ndicating through words or conduct that a dwelling which is available for inspection, sale, or rental has been sold or rented ... (2) [r]epresenting that [a person cannot rent or purchase a dwelling because] covenants or other deed, trust, or lease provisions which purport to restrict the sale or rental of a dwelling ... (3) [e]nforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person ... (4) [l]imiting information, by word or conduct, regarding suitably priced dwellings ... [or] (5) [p]roviding false or inaccurate information regarding the availability of a dwelling for sale or rental to any person ... because of race, color, religion, sex, handicap, familial status, or national origin.”

²⁴ 24 C.F.R. § 100.85(b). The HUD regulations define “blockbusting” to mean “for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin or with a handicap. 24 C.F.R. § 100.85(a). For blockbusting to be established, profit does not have to be realized, as long as profit was a factor for engaging in the activity. 24 C.F.R. § 100.85(b).

²⁵ 24 C.F.R. § 100.90. Such prohibited actions include “(1) [s]etting different fees for access to or membership in a multiple listing service ... (2) [d]enying or limiting benefits accruing to members in a real estate brokers’ organization ... (3) [i]mposing different standards or criteria for membership in a real-estate sales or rental organization ... [or] (4) [e]stablishing geographic boundaries or office location or residence requirements for access to or membership or participation in any multiple listing service, real estate brokers’ organization or other service ... because of race, color, religion, sex, handicap, familial status, or national origin.”

²⁶ 42 U.S.C. § 3617. Violations of this section include “(1) coercing a person ... to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction ... (2) [t]hreatening, intimidating, or interfering with persons in their enjoyment of a dwelling ... (3) [t]hreatening an employee or agent with dismissal or adverse action, or taking such adverse employment action, for any effort to assist a person seeking access to the sale or rental of a dwelling or seeking access to any residential real estate-related transaction ... (4) [i]ntimidating or threatening any person because that person is engaging in activities designed to make other persons aware of [their fair housing rights, or] ... (5) [r]etaliating against any person because that person has made a complaint, testified, assisted, or participated in a proceeding under the Fair Housing Act.” 24 C.F.R. § 100.400.

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Finally, as noted above, the FHA applies to public as well as private housing. As a result, a number of lawsuits over the years have challenged the fair housing practices of state and local housing authorities and even HUD itself, particularly with respect to discrimination in low-income public housing.²⁷ In one recent case, African-American residents of public housing in Baltimore sued HUD and various local agencies for race discrimination, and the court ultimately held that HUD had violated the FHA “by failing adequately to consider regional approaches to ameliorate racial segregation in public housing in the Baltimore Region.”²⁸

Disparate Impact Discrimination

In addition to outlawing direct discrimination against individuals on the prohibited grounds mentioned above, the federal courts have generally agreed that “under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect²⁹ without a showing of discriminatory intent.”³⁰ The Seventh Circuit justified such a holding in the following way:

a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy.... A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry ... [which] has become harder to find.³¹

A practice that, while often not intentional discrimination directed at individual members of a minority group but that may have a disparate impact on such persons, is “redlining,” which is a business’s refusal to provide loans, home insurance coverage, etc., based on the characteristics of a neighborhood in which the home is located.³² The courts have consistently held that redlining violates the FHA. The federal court in *Dunn v. Midwestern Indemnity Mid-American Fire and Casualty Co.*³³ explained it this way:

the availability of appropriate insurance is a necessary predicate to the availability of financing, and financial assistance is a precondition to securing the availability of adequate housing. Since a discriminatory denial of financing violates § 3604(a), a discriminatory failure or refusal to provide property insurance on dwellings also must violate § 3604(a).³⁴

²⁷ See, e.g., *N.A.A.C.P. v. Sec’y of Hous. and Urban Dev.*, 817 F.2d 149 (1st Cir. 1987).

²⁸ *Thompson v. U.S. Dep’t of Hous. and Urban Dev.*, 348 F. Supp.2d 398, 524 (D. Md. January 6, 2005).

²⁹ The term “discriminatory effect” is used interchangeably with the term “disparate impact.”

³⁰ *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

³¹ *Id.* Such a holding is not limited to disparate impacts on the basis of race.

³² See, 69 Fed. Reg. 63,760 (November 2, 2004).

³³ 472 F.Supp. 1106 (S.D. Ohio 1979).

³⁴ *Id.* at 1109. 24 C.F.R. § 100.70(d)(4). The FHA does not explicitly address the issue of housing insurance, but language in §§ 3604 and 3605 of the act has been construed to apply to insurance. HUD regulations prohibit the refusal to provide “property or hazard insurance for dwellings or providing such ... insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.” See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996). In contrast, a federal district court has held that the FHA does not prohibit discrimination in connection with mortgage disability insurance, because § 3605 prohibits discrimination in the provision of housing-related “financial assistance” and mortgage disability insurance, unlike property and hazard insurance, is not a prerequisite to obtaining financing and thus is not a form of “financial assistance.” *Doukas v. Metro. Life Ins. Co.*, 882 F. Supp. 1197 (D.N.H. 1995).

Of course, not all policies and decisions that result in a disparate impact on a protected class are prohibited by the FHA. The decision in *Thomas v. First Federal Savings Bank of Indiana*³⁵ highlights the need for more than just a statistical discriminatory effect. In that case, black homeowners claimed that the defendant financial institution had redlined the plaintiffs' neighborhood when it refused the homeowners' application for a second mortgage. The court held:

plaintiffs' statistical evidence is not sufficient as a matter of law to establish a violation of section 3605. Plaintiffs' attorneys offered no explanation of the meaning of these figures.... Although section 3605's red-lining prohibition makes it illegal to discriminate on the basis of certain characteristics of the plaintiff's neighborhood (e.g., race, color, religion, sex or national origin), there are numerous legitimate business factors that go into a decision to make a loan which do not form the basis of a violation under section 3605.³⁶

The courts, however, are not in agreement as to how to determine if a discriminatory effect violates the act. Some courts apply a four-factor test originally set out in the Seventh Circuit's *Village of Arlington Heights* decision. These factors are:

(1) [the] strength of the plaintiff's statistical showing; (2) the legitimacy of the defendant's interest in taking the action complained of; (3) some indication—which might be suggestive rather than conclusive—of discriminatory intent; and (4) the extent to which relief could be obtained by limiting interference by, rather than requiring positive remedial measures of, the defendant.³⁷

Other courts apply a burden-shifting regime to assess the validity of a disparate impact claim pursuant to the FHA.³⁸ Yet there are some differences in the tests applied, even among the various courts that apply burden-shifting schemes. All courts that use burden-shifting tests agree that the burden is initially on the plaintiff to make a *prima facie* showing, generally with the use of statistics, that a specific policy results in a disparate impact upon a protected class, and that upon such a showing the burden shifts to the defendant to show that the policy was initiated for some nondiscriminatory, legitimate purpose.³⁹ From there, some courts keep the onus on the defendant to show there is not a less discriminatory alternative that would allow the defendant to meet the same legitimate purpose.⁴⁰ Other courts, upon a defendant showing a nondiscriminatory,

³⁵ 653 F. Supp. 1330 (N.D. Ind. 1987).

³⁶ *Id.* at 1340. In addition to the creditworthiness of the borrower, other legitimate business factors raised by the court included the diversification of the defendant's assets and the salability of the home, the second of which could be affected by characteristics of the neighborhood in which the home was located. *Id.*

³⁷ *Phillips v. Hunter Trails Cmty. Assoc.*, 685 F.2d 184, 189-190 (7th Cir. 1982) (quoting *Village of Arlington Heights*, 558 F.2d at 1290). *See also*, *Hartman v. Greenwich Walk Homeowners' Assoc., Inc.*, 71 Fed. Appx. 135, 137 (3rd Cir. 2003).

³⁸ *See, e.g.*, *Graoch Assoc. # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Com'ee*, 508 F.3d 366, 374 (6th Cir. 2007); *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1195-96 (9th Cir. 2006); *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 901-02 (8th Cir. 2005); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 466-67 (3rd Cir. 2002); *Langlois v. Abingdon Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935-36 (2nd Cir. 1988).

³⁹ *Id.*

⁴⁰ *See, e.g.*, *Darst-Webbe*, 417 F.3d at 901-02.

legitimate purpose, shift the burden to the plaintiff to submit proof of a viable, less discriminatory alternative.⁴¹

Finally, there is a third group of courts that apply the burden-shifting framework, generally, but look to the four-factor balancing test to determine if the plaintiff has met his or her original burden of establishing a *prima facie* disparate impact.⁴²

While there is a great deal of variation in how courts assess a disparate impact claim, one common thread is that they are all fact-intensive. This makes predicting how courts will decide disparate impact cases quite difficult.

III. Familial Discrimination and Housing for Older Persons

The Fair Housing Amendments Act of 1988 added “familial status,” which generally means living with children under 18, to the grounds upon which discrimination in housing is prohibited.⁴³ One exception to the 1988 law barring familial status discrimination, however, is that “housing for older persons” may discriminate against families with children. The committee report that accompanied the 1988 amendments explains the purpose of this exemption:

In many parts of the country families with children are refused housing despite their ability to pay for it. Although 16 states have recognized this problem and have proscribed this type of discrimination to a certain extent, many of these state laws are not effective.... The bill specifically exempts housing for older persons. The Committee recognizes that some older Americans have chosen to live together with fellow senior citizen[s] in retirement type communities. The Committee appreciates the interest and expectation these individuals have in living in environments tailored to their specific needs.⁴⁴

Housing for older persons” is defined as housing that is (1) provided under any state or federal housing program for the elderly, (2) “intended for and solely occupied by persons 62 years of age or older,” or (3) “intended and operated for occupancy by persons 55 years of age or older” and

⁴¹ See, e.g., *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 575 (2nd Cir. 2003).

⁴² See, e.g., *Thompson*, 348 F. Supp. at 417-18; *Owens v. Nationwide Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 15701, 47-51 (N.D.Tex. 2005); see, also, *2922 Sherman Ave. Tenants' Assoc. v. District of Columbia*, 444 F.3d 673, 679-80 (D.C. Cir. 2006).

⁴³ The statute (42 U.S.C. § 3602(k)) and the regulation (24 C.F.R. § 100.20) both define “familial status” as follows:

“Familial status” means one or more individuals (who have not attained the age of 18 years) being domiciled with—

- (1) a parent or another individual having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

The 1988 amendment also added the handicapped to the list of protected groups. For more information on this subject, see the “Discrimination Based on Handicap” section of this report.

⁴⁴ H.Rept. 100-711, 100th Cong., 2d Sess. 19, 21 (1988); reprinted in 1988 U.S.C.C.A.N. 2180, 2182.

that meet several other requirements such as having at least 80% of units occupied by a minimum of one individual 55 or older.⁴⁵

An individual who believes in good faith that his or her housing facility qualifies for the familial status exemption will not be held liable for money damages, even if the facility does not in fact qualify as housing for older persons.⁴⁶

IV. Discrimination Based on Handicap⁴⁷

In addition to prohibiting discrimination on the grounds discussed above, the FHA also prohibits discrimination in housing on the basis of handicap. The act defines “handicap” as:

(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.”⁴⁸

The definition of handicap expressly precludes the current, illegal use of or addiction to a controlled substance.⁴⁹ However, because this exclusion does not apply to former drug users, the definition of handicap thus could encompass individuals who have had drug or alcohol problems that are severe enough to substantially impair a major life activity, but who are not *current* illegal users or addicts. As a result, recovering alcoholics and addicts can fall within the definition of “handicap.”⁵⁰

Discrimination on the basis of handicap under the FHA includes not allowing handicapped individuals to make reasonable changes to a unit that will “afford [them] the full enjoyment of the premises.”⁵¹ However, a landlord may premise the changes on the handicapped individual’s promise to return the unit to its original state. A landlord may not increase a required security deposit to cover these changes, but may require handicapped persons to, in certain circumstances, make payments into an escrow account to cover restoration costs.⁵²

Discrimination against a handicapped person also includes “refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy the dwelling.”⁵³ In addition,

⁴⁵ 42 U.S.C. § 3607(b)(2). The remaining requirements for the third category of housing for older persons are that “the housing facility or community publish[] and adhere[] to policies and procedures that demonstrate the intent required [to be a housing for older persons]” and that the facility comply with HUD rules for occupancy verification. 42 U.S.C. § 3607(b)(2)(C) and 24 C.F.R. §§ 100.304-07.

⁴⁶ 42 U.S.C. § 3607(b)(5).

⁴⁷ The generally accepted term is now “individual with a disability.” However, since the FHA still uses the term “handicapped,” that term is retained here in the discussion of the FHA.

⁴⁸ 42 U.S.C. § 3602(h).

⁴⁹ 42 U.S.C. § 3602(h). The regulations also state that “an individual shall not be considered to have a handicap solely because that individual is a transvestite.” 24 C.F.R. § 100.201.

⁵⁰ See, e.g., *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996).

⁵¹ 42 U.S.C. § 3604(f)(3)(A).

⁵² 24 C.F.R. § 100.203(a). Payments required to be made into escrow must be reasonable and must be for no more than restoration costs.

⁵³ 42 U.S.C. § 3604(f)(3)(B)). As examples of reasonable accommodations required by the act, the regulations state that (continued...)

all “covered multifamily dwellings”⁵⁴ built after March 13, 1991 must meet certain design and construction specifications that ensure they are readily accessible to and usable by handicapped persons.⁵⁵ The FHA’s protection for handicapped persons does not require “that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”⁵⁶

It also is unlawful to ask about the handicaps of an applicant for housing (rental or purchase), or someone with whom they are associated. However, the regulations do allow raising certain questions that may have some bearing on one’s handicap, as long as they are asked to all applicants. For example, all applicants could be asked whether they would be able to mow the lawn, as required in a rental agreement.⁵⁷

The Americans with Disabilities Act (ADA),⁵⁸ which was enacted subsequent to the 1988 FHA amendments, does not apply to housing, although it does cover “public accommodations,” including

an inn, hotel, motel, or other place of lodging except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor.”⁵⁹

The ADA also covers “commercial facilities,” which it defines as “facilities intended for nonresidential use ... whose operations affect commerce.” The term excludes, however, “facilities that are covered or expressly exempted from coverage under the Fair Housing Act.” In other words, the ADA leaves to the FHA the determination as to which statute applies to any particular facility.⁶⁰

(...continued)

seeing eye dogs must be permitted even if a building otherwise prohibits pets, and handicapped parking spaces must be made available even if spaces are otherwise assigned on a first-come-first-served basis. 24 C.F.R. § 100.204(b).

⁵⁴ “Covered multifamily dwellings” have four or more living units. 24 C.F.R. § 100.201.

⁵⁵ 42 U.S.C. § 3604(f)(3)(C). In 1991, HUD published final Fair Housing Accessibility Guidelines to provide builders and developers with technical guidance with these accessibility requirements. 56 Fed. Reg. 9,472 (March 6, 1991). HUD supplemented these guidelines in 1994. 59 Fed. Reg. 33,362 (June 28, 1994).

⁵⁶ 42 U.S.C. § 3604(f)(9).

⁵⁷ 24 C.F.R. § 100.202(c). Examples that are provided in the regulations are:

- (1) Inquiry into an applicant’s ability to meet the requirements of ownership or tenancy,
- (2) Inquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps...
- (4) Inquiring whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance....

⁵⁸ 42 U.S.C. §§ 12101, *et seq.* For a more detailed discussion of the ADA, *see*, CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

⁵⁹ 42 U.S.C. § 12181(7)(A).

⁶⁰ The Department of Justice’s comments on its ADA rules address *mixed* use facilities, such as hotels that also have separate accommodations for apartments. The comments explain that the residential wing would be covered by the FHA even though the rest of the hotel would be covered by the ADA. However:

[i]f a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility. Such determinations will need to be made on a case-by-case basis.... A similar analysis would also be applied to other residential facilities that provide social services, including homeless shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care

(continued...)

Several other federal laws also protect individuals with disabilities from housing discrimination. Under section 504 of the Rehabilitation Act of 1973, discrimination against individuals with disabilities is prohibited in any federally funded or federally conducted program or activity,⁶¹ and under the Architectural Barriers Act of 1968, certain publicly owned residential buildings and facilities must be accessible to individuals with physical disabilities.⁶²

Group Homes and Zoning Restrictions

The FHA's prohibition against discrimination on the basis of handicap extends to protect group homes for the disabled from discrimination by certain types of state or local zoning laws. While the FHA does not "limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling,"⁶³ it does prohibit "[l]ocal zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities...."⁶⁴ Nevertheless, some municipalities have attempted to restrict the location of group homes for disabled individuals by enacting zoning ordinances that establish occupancy limits for group homes.⁶⁵ Typically established to maintain the residential character of certain neighborhoods, such occupancy limits frequently operate to restrict group homes for recovering drug users or other disabled individuals. It is also possible that a city's denial of a variance from such an occupancy ordinance could be in violation of the FHA if the denial is not reasonable.⁶⁶ As a result, these limits continue to be the subject of controversy and legal challenges under the FHA.⁶⁷

Indeed, in 1995, the Supreme Court considered the issue of zoning restrictions on group homes for the handicapped. In *City of Edmonds v. Oxford House, Inc.*,⁶⁸ a group home for 10 to 12 adults recovering from alcoholism and drug addiction was cited for violating a city ordinance because it was located in a neighborhood zoned for single-family residences. The ordinance that Oxford House, Inc. was charged with violating defined "family" as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons."⁶⁹

(...continued)

facilities, and other facilities where persons may reside for varying lengths of time." 56 Fed. Reg. 35,552 (July 26, 1991).

⁶¹ 29 U.S.C. § 794(a).

⁶² 42 U.S.C. §§ 4151-57.

⁶³ 42 U.S.C. § 3607(b)(1).

⁶⁴ Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act, http://www.usdoj.gov/crt/housing/final8_1.htm.

⁶⁵ Discrimination against group homes for the disabled is prohibited not only by the FHA, but by the Constitution, to the extent that such discrimination is found to be irrational. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court held unconstitutional a zoning ordinance that allowed group homes generally, but prohibited them for mentally retarded individuals. The basis for the decision was that the ordinance was based on irrational prejudice; i.e., the discrimination failed a "rational basis" test under the Equal Protection Clause of the Fourteenth Amendment.

⁶⁶ A city could be subject to a disparate impact discrimination claim based on all of their denials for variances. (For more information on disparate impact analysis, see the "Disparate Impact Discrimination" section of this report.)

⁶⁷ Michael J. Davis, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 Kan. L. Rev. 777 (1998).

⁶⁸ 514 U.S. 725 (1995).

⁶⁹ *Id.* at 728.

The group home acknowledged that it was in violation of the ordinance, but claimed that it was entitled to be in the neighborhood anyway because the FHA required the city to “make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling.”⁷⁰ The city responded that it was not required to accommodate the group home because the FHA exempts from its coverage “any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”⁷¹

The Supreme Court held that this exemption did not permit the city’s zoning ordinance because the ordinance’s definition of family was not a restriction regarding “the maximum number of occupants’ a dwelling may house.”⁷² According to the Court, the FHA:

does not exempt prescriptions of the family-defining kind, i.e., provisions designed to foster the family character of a neighborhood. Instead, § 3607(b)(1)’s absolute exemption removes from the FHA’s scope only total occupancy limits, i.e., numerical ceilings that serve to prevent overcrowding in living quarters.⁷³

Because the ordinance set a numerical ceiling for unrelated occupants but not related occupants, it was clearly designed to preserve the family character of neighborhoods, not to place overall occupancy limits on residences. As a result, the Court held that the ordinance was not exempt from the FHA’s prohibition against disability discrimination.⁷⁴ (The Court did not decide whether or not this ordinance actually violated the FHA.⁷⁵)

In cases in which the ordinance in question is “designed to foster the family character of a neighborhood” or facially discriminates against a FHA protected class by differentiating on its face between protected groups and non-protected groups, the burden is on the defendant to show that it is not unlawful discrimination under the FHA. However, the U.S. Courts of Appeals are split as to which of two discriminatory treatment tests defendants must meet in this situation.

Before addressing the details of these two tests, it is important to note that determining if zoning ordinances violate the FHA requires a case-by-case assessment, based on the ordinance language and the specific facts surrounding the alleged violation and/or the city’s denial of a variance from the ordinance.⁷⁶ This makes predicting how a court will rule on a particular ordinance difficult, especially in light of the fact that the lower courts do not apply a single, uniform test. However, an analysis of existing case law can provide some guidance on the matter.

A minority of courts, including the Eighth Circuit, apply a rational basis test, which merely requires the defendant town or city to show there is a legitimate, nondiscriminatory purpose for classification (or denial from a variance) on the basis of a FHA protected class.⁷⁷ This is a

⁷⁰ 42 U.S.C. § 3604(f)(3)(B); *see, Edmonds*, 514 U.S. at 729-30.

⁷¹ 42 U.S.C. § 3607(b)(1); *see, Edmonds*, 514 U.S. at 736.

⁷² *Edmonds*, 514 U.S. at 728 (*quoting* 42 U.S.C. § 3607(b)(1)).

⁷³ *Id.*

⁷⁴ *Id.* at 736-37. Of course, the FHA does not prevent zoning ordinances that restrict group homes occupied by individuals who are not of a protected class, such as fraternity students.

⁷⁵ *Id.* at 738.

⁷⁶ *See*, Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act, http://www.usdoj.gov/crt/housing/final8_1.htm.

⁷⁷ *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251-52 (8th Cir. 1996).

relatively low burden to meet. The majority rule, which is followed by the Sixth, Ninth, and Tenth Circuits, on the other hand, requires the defendant to meet a more exacting test.⁷⁸

In *Oxford House-C v. City of St. Louis*, the Eighth Circuit addressed a city ordinance that limited “single family dwellings” to three unrelated individuals, or in the case of a group home, to eight unrelated individuals. The court stated, “[r]ather than discriminating against Oxford House residents, the City’s zoning code favors them on its face.”⁷⁹ Because the ordinance was not deemed to be discriminatory, the Eighth Circuit held that the city need only provide a rational basis for enacting the ordinance, a requirement which was satisfied by the city’s demonstration of an interest in preserving residential neighborhoods.⁸⁰ Furthermore, the Eighth Circuit held that the city “did not fail to accommodate the Oxford House as the act requires” because the group home refused to apply for a variance for higher occupancy limits and therefore never gave the city the opportunity to grant such accommodation.⁸¹

In contrast, the Sixth Circuit Court of Appeals, in *Larkin v. Department of Social Services*, addressed a state licensing requirement that group homes for the handicapped may not be spaced within a 1,500 foot radius of other such group homes and must notify the communities in which the group homes are to be located.⁸² The court ruled that these spacing and notification requirements discriminated on their face, holding that “statutes that single out for regulation group homes for the handicapped are facially discriminatory.”⁸³ Once the court ruled that these non-uniform conditions were facially discriminatory, the test shifted from a rational basis test, to a more demanding test that required the defendant to “demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply.”⁸⁴ The Sixth Circuit held that the state had failed to meet this burden. In general, “[t]he Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act.”⁸⁵

With regard to claims that localities failed to make “reasonable accommodations” for group homes, the Joint Statement by HUD and the Department of Justice states:

Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. The determination of what is reasonable depends on the answers to two questions: First, does the request impose an undue burden or expense on the local government? Second, does the proposed use create a fundamental alteration in the zoning scheme? If the answer to either question is “yes,” the requested accommodation is unreasonable.⁸⁶

⁷⁸ *Comty. House v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007); *Larkin*, 89 F.3d at 290; *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-04 (10th Cir. 1995).

⁷⁹ *Oxford House*, 77 F.3d at 251.

⁸⁰ *Id.* at 252.

⁸¹ *Id.* at 253.

⁸² 89 F.3d 285 (6th Cir. 1996).

⁸³ *Id.* at 290.

⁸⁴ *Id.* See also, *Marbrunak, Inc. v. City of Stow*, 974 F.2d 45, 47 (6th Cir. 1992).

⁸⁵ Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act, http://www.usdoj.gov/crt/housing/final8_1.htm.

⁸⁶ *Id.*

One example of a necessary reasonable accommodation might be allowing a deaf tenant to have a hearing dog in an apartment complex that normally prohibits pets.⁸⁷ Another example might be the provision of a variance from an ordinance that bars five or more unrelated people from living in a single family home, for a group home of five handicapped individuals, where it is shown that such a home would “have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an ‘ordinary family.’” Denial of a variance from this ordinance likely would not be unreasonable for a group home of 35 handicapped individuals.⁸⁸

V. Enforcement of the Fair Housing Act

Under the FHA, the Secretary of HUD, the Attorney General, and victims of discrimination may all take action to enforce the prohibition against discrimination. Typically, HUD has primary enforcement through agency adjudication, but the Department of Justice and aggrieved individuals may also bring actions in federal court under certain circumstances.

Enforcement by the Secretary

Within one year after an alleged discriminatory housing practice has occurred or terminated, an aggrieved person may file a complaint with the Secretary, or the Secretary may file a complaint on his own initiative. When a complaint is filed, the Secretary must, within 10 days, serve the respondent—the party charged with committing a discriminatory practice—with notice of the complaint. The respondent must then answer the complaint within 10 days.⁸⁹

From the filing of the complaint, the Secretary has 100 days, subject to extension, to complete an investigation of the alleged discriminatory housing practice.⁹⁰ During this time, the Secretary must, “to the extent feasible, engage in conciliation with respect to” the complaint.⁹¹ Agreements arising out of such conciliation are subject to the Secretary’s approval. Such agreements may provide for binding arbitration, which may award appropriate relief, including monetary relief, to the aggrieved party.⁹² The Secretary may also authorize a civil action for temporary or preliminary relief, pending final disposition of the complaint.⁹³

⁸⁷ See, *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995).

⁸⁸ See, Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act, http://www.usdoj.gov/crt/housing/final8_1.htm.

⁸⁹ 42 U.S.C. § 3610(a)(1).

⁹⁰ 42 U.S.C. § 3610(a)(1)(B)(iv). If the Secretary discovers that the complaint is within the jurisdiction of either a state or local public agency that the Secretary has certified, he must refer the complaint to that agency before taking any action. If the agency fails to commence the proceedings within 30 days after referral, or having commenced them, fails to carry them forward with reasonable promptness, or if the Secretary determines that the agency no longer qualifies for certification, then the Secretary may take further action. 42 U.S.C. § 3610(f). The rules regarding the certification and funding of state and local housing enforcement agencies is provided in 24 C.F.R. § 110 and was amended by a final rule at 72 Fed. Reg. 19,070 (April 16, 2007).

⁹¹ 42 U.S.C. § 3610(b)(1).

⁹² 42 U.S.C. § 3610(b). If the Secretary has reasonable cause to believe that the respondent has breached a conciliation agreement, the Secretary must refer the matter to the Attorney General with a recommendation that a civil action be filed to enforce the agreement. 42 U.S.C. § 3610(c).

⁹³ 42 U.S.C. § 3610(e)(1). Upon receipt of such authorization, the Attorney General must “promptly commence and maintain such an action.”

At the completion of the investigation, the Secretary must determine whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. If he finds no reasonable cause, then he must dismiss the complaint. If he finds reasonable cause, then he must issue a charge on behalf of the aggrieved person in the absence of a conciliation agreement.⁹⁴ If a charge is issued, then the Secretary or any party to the dispute may elect to have the case heard in a federal district court. Otherwise, the case shall be heard by an administrative law judge (ALJ).⁹⁵ In such a hearing, parties may appear with legal representation, have subpoenas issued, cross examine witnesses, and submit evidence.⁹⁶

The ALJ must commence a hearing within 120 days of a charge being issued, unless adhering to that timeframe is impracticable. He also must “make findings of fact and conclusions of law within 60 days after the end of the hearing ... unless it is impracticable to do so.”

If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages ... and injunctive or equitable relief.

The ALJ may also impose a civil penalty of up to \$10,000 for a first offense or more if it is not a first offense.⁹⁷

The ALJ’s findings, conclusions, and orders may be reviewed by the Secretary.⁹⁸ Parties may appeal such orders to the federal courts.⁹⁹ The Secretary may seek enforcement of an administrative order in a federal court of appeals.¹⁰⁰ Such court may “affirm, modify, or set aside, in whole or in part, the order, or remand” it to the ALJ for additional proceedings. The court also may grant any party “such temporary relief, restraining order, or other order as the court deems just and proper.”¹⁰¹

In any administrative proceeding, or any civil action brought in lieu of an administrative proceeding, “the administrative law judge or the court, as the case may be, may allow the prevailing party, other than the United States, a reasonable attorney’s fee and costs.”¹⁰²

⁹⁴ 42 U.S.C. § 3610(g)(2).

⁹⁵ 42 U.S.C. § 3612(a). Upon such an election the Secretary must authorize a civil action, which the Attorney General (within 30 days) must commence and maintain on behalf of the aggrieved person, who may intervene as of right in that civil action. If the federal court finds a discriminatory practice took place, it may award actual and punitive damages to the extent it would in a civil action commenced by a private person. 42 U.S.C. § 3612(o).

⁹⁶ 42 U.S.C. § 3612(c).

⁹⁷ 42 U.S.C. § 3612(g).

⁹⁸ 42 U.S.C. § 3612(h).

⁹⁹ 42 U.S.C. § 3612(i).

¹⁰⁰ 42 U.S.C. § 3612(j).

¹⁰¹ 42 U.S.C. § 3612(k).

¹⁰² 42 U.S.C. § 3612(p). *See also*, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Resources*, 532 U.S. 598, 605 (2001) (denying attorneys’ fees to plaintiffs who tried to claim “prevailing party” status where there was no “alteration in the legal relationship of the parties.”). In addition, the United States is liable for such fees and costs to the extent provided by the Equal Access to Justice Act (EAJA), which makes the United States liable for the prevailing party’s attorneys’ fees if the United States fails to prove that its position “was substantially justified or that special circumstances make an award unjust.” 5 U.S.C. § 504(a)(1), 28 U.S.C. § 2412(d)(1)(A). For more information on this subject, *see*, CRS Report 94-970, *Awards of Attorneys’ Fees by Federal Courts and Federal* (continued...)

Enforcement by the Attorney General

The Attorney General (AG) may bring a civil action in federal district court if (1) the AG has reasonable cause to think that an individual or a group is “engaged in a pattern or practice” of denying one’s rights under the FHA and “such denial raises an issue of general public importance”; or (2) the Secretary refers to him a case involving a violation of a conciliation agreement or of housing discrimination.¹⁰³ In such a civil action, the court may issue preventive relief, such as an injunction or a restraining order, provide monetary damages, issue civil penalties, or provide some other appropriate relief. In some instances, prevailing parties may be able to recover reasonable legal costs and fees.¹⁰⁴

Enforcement by Private Persons

An “aggrieved person”¹⁰⁵ may commence a civil action, in a federal district court or in a state court, within two years of “the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement...”¹⁰⁶ If the Secretary has filed a complaint, an aggrieved person may still bring a private suit, unless a conciliation agreement has been reached or an administrative hearing has begun.¹⁰⁷ The AG may intervene in a private suit if he determines that the suit is of “general public importance.” If the court determines that discrimination has occurred or is going to occur, it may award punitive damages, actual damages, equitable relief (e.g., restraining order, injunction), a temporary restraining order, or other appropriate relief.¹⁰⁸ In some instances, prevailing parties may be able to recover reasonable legal costs and fees.¹⁰⁹

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(...continued)

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¹⁰³ 42 U.S.C. § 3614(a)-(b). “Upon timely application, any person may intervene in a civil action commenced by the Attorney General.” 42 U.S.C. § 3614(e).

¹⁰⁴ 42 U.S.C. § 3614(e).

¹⁰⁵ “An ‘aggrieved person’ includes any person who claims to have been injured by a discriminatory housing practice or believes that such person will be injured by a discriminatory housing practice that is about to occur.” 42 U.S.C. § 3602(i).

¹⁰⁶ 42 U.S.C. § 3613(a)(1). The calculation of the two year period does not include the time that an administrative proceeding is pending.

¹⁰⁷ 42 U.S.C. §§ 3613(a)(2)—3613(a)(3).

¹⁰⁸ 42 U.S.C. § 3613(c).

¹⁰⁹ 42 U.S.C. § 3613(c)(2).