

The Fair Housing Act

An Overview of Current Law

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Sources of Fair and Affordable Housing Law

- Federal
  - Constitutional limitations
    - Takings Clause, Equal Protection Clause, Due Process Clause
  - Civil rights laws
    - **Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.***
    - **Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.***
    - Rehabilitation Act, 29 U.S.C. § 701
    - Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*
  - Funding sources
    - Housing and Community Development Act of 1974 (CDBG): 42 U.S.C. § 5301 *et seq.*
    - Cranston-Gonzalez National Affordable Housing Act of 1990 (HOME Investment Partnership Program): 42 U.S.C. § 12703 *et seq.*

Sources of Fair and Affordable Housing Law

- State
  - Constitutional limitations: mirror federal
  - Civil rights laws: mirror federal
  - Limitations on local government authority
    - "Group home" statutes
    - Rent control statutes
    - Housing Authority Laws
  - Consumer/landowner protection laws
  - Funding programs
    - Affordable housing construction grant programs or tax credits

Sources of Fair and Affordable Housing Law



Source: Zillow

- Local
  - Zoning codes
  - Building, housing codes
  - Mandatory inclusionary housing
  - Affordable housing funds
  - Public housing authorities

Fair Housing Act: Outline

Fair Housing Act outline:

- Who is protected?
- What types of housing are protected?
- Who must comply?
- Substantive prohibitions



Who is protected?

Protected classes under the Fair Housing Act include:

- Race
- Color
- Religion
- Sex
- Familial status
- National origin
- Handicap

-42 U.S.C. § 3604(a)-(f)

- **State fair housing laws may add classes**

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—expanded definition in 24 C.F.R. § 100.201

- Physical or mental impairment
  - Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine
  - Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

Who is protected?

- Major life activities
  - Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working
- Record of impairment
  - History of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities
- Regarded as having an impairment
  - A physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;
  - A physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or
  - Is treated by another person as having such an impairment

Who is protected?

Handicap—*conditions not considered disabilities under the FHA*

- Emotional disturbance
- History of abuse
- Homelessness
- Past incarceration or criminal behavior
- Juvenile delinquency
- Current drug users

Who is protected?



Source: Common Dreams

Some key missing classes from federal Fair Housing Act protection…

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

What housing is covered?



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

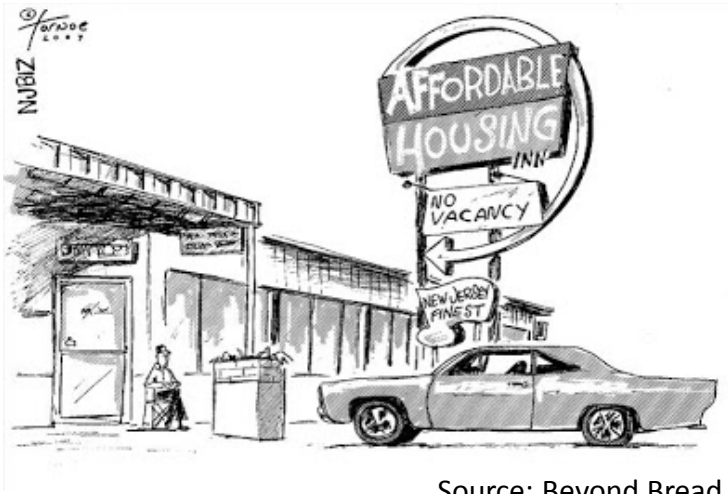
- FHA protections apply to dwellings:

"'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."

What housing is covered?

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”



Source: Beyond Bread

Who Must Comply?

- Private landowners (with some exceptions)
- Real estate agents
- Mortgage lenders
- Local governments



Source: WCPO.com

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)

- Zoning or building regulations

"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)

- 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
  - Installation of ramps, railings, etc. <u>at the expense of the disabled person</u>
  - Landlord may require restoration of the alterations to the condition that existed prior to the alterations

Prohibitions

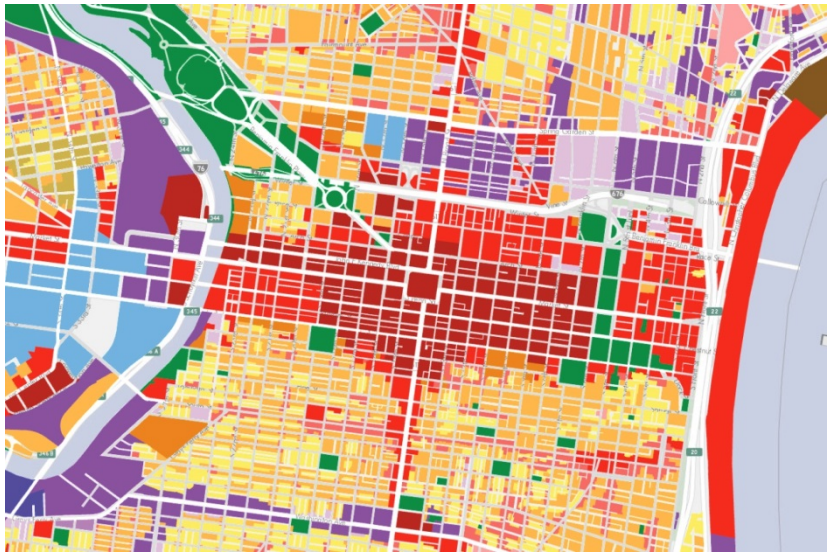
*"a refusal to make **reasonable accommodations in rules, policies, practices, or services**, when such accommodations may be necessary to afford [a disabled] person **equal opportunity to use and enjoy** a dwelling"*
-42 U.S.C. § 3604(f)(3)(b)

- 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

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 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?

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
  - Maximum occupancy limits rarely questioned, but family composition rules cannot discriminate
- Accommodating low-income persons
  - Direct correlations between protected classes and income
- Facility spacing or dispersal requirements
  - Use the minimum necessary to achieve treatment outcomes
- Special use permit requirements
  - Not a subterfuge for denial, based on planning-related concerns
- Utility service
  - Verify that municipal utilities are not discriminating



Resources:

- HUD/DOJ Joint Statement: https://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1
- Group Homes: Strategies for Effective and Defensible Planning and Regulation: https://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=215023
- Priced Out: The Housing Crisis for People with Disabilities: http://www.tacinc.org/media/52012/Priced%20Out%20in%202014.pdf.



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