The Fair Housing Act

Affirmatively Furthering Fair Housing rule and the impact on siting of affordable housing

Patricia Link, Division Chief, Land Use and Real Estate, Austin Texas

Elizabeth Hull, Partner, Best Best & Krieger, LLP

© 2022 Best Best & Krieger LLP

Agenda

- Overview of Fair Housing Laws
- Complying with the FHA: Municipal Laws and Actions
- Proposed Affirmatively Furthering Fair Housing (AFFH) Rule
- How the FHA and AFFH Rule Interact
- Siting of Affordable Housing and the Impact of the AFFH Rule

Fair Housing Laws

- US Constitution
  - Equal Protection Clause - defendant acted with intent or purpose to discriminate based upon plaintiffs membership in a protected class
  - Due Process Clause - provides heightened protection against government interference with certain fundamental rights and liberty interests

Fair Housing Laws

- Civil Rights laws
  - Fair Housing Act of 1968 and its amendments (42 USC § 3601 et seq.)
    - Approved by Congress on April 11, 1968
    - 7 days after Dr. Martin Luther King Jr was assassinated
    - Prohibits discrimination in housing related transactions
    - Includes more than not discriminating, must act to eliminate housing inequities
    - Affirmative Obligation to Further Fair Housing including acting to desegregate communities
  - Americans with Disabilities Act (42 USC § 12101 et seq.)
  - Title VI of Civil Rights Act

Fair Housing Laws

- State Level
  - Constitution
  - Civil Rights Law
    - Fair Employment and Housing Act and Unruh Civil Rights Act in California
    - Texas Fair Housing Act
  - Housing Laws
- Funding Sources
  - Both state and federal funding sources have fair housing obligations and reporting requirements
  - CDBG
  - HOME Funds
  - Tax Credits

Fair Housing Claims

- Each law may have a slight variation but claims fall into two categories:
  - Disparate treatment
    - Facially discriminatory
    - Intentional discrimination
  - Disparate Impact
    - Facially neutral but discriminatory effect
    - Actions by private or government bodies that create discriminatory effect on upon a protected class or perpetuate housing segregation without a legitimate reason

- Federally Identified Protected Classes
  - Race
  - Color
  - Religion
  - Sex
  - Familial Status
  - National Origin
  - Disability
- State laws may include additional protected classes

Complying with the FHA: Municipal Laws and Actions

Laws: Zoning, Inclusionary and Exclusionary

- Inclusionary Zoning = A policy that *requires* a certain portion or percentage of housing built or preserved to be affordable to low or moderate income households.
- Exclusionary Zoning = Laws that place restrictions on the types of homes that can be built.
  - Standing: Specific, concrete facts demonstrating that the challenged practices harm the plaintiff, and that the plaintiff personally would benefit in a tangible way from the court's intervention. (Court does not require a present contractual interest.) *Warth v. Seldin*, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210, 45 L. Ed. 2d 343 (1975).
  - Resource: The White House's Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market

Laws: Zoning, Disparate Treatment

- Keep in mind: FHA forbids the government from taking action based on community fears, prejudices, stereotypes, or assumptions about future residents.
  - Action premised on those concerns can support a finding of improper motive (i.e. discrimination).
  - Was discrimination a motivating factor?
    - Historical background of the decision, specific sequence of events leading up to the decision, and legislative history.
    - Departures from the normal procedural sequence or from considering factors that are typically important to the decisionmaker
- Cases:
  - *Valley Hous. LP v. City of Derby*, 802 F. Supp. 2d 359 (D. Conn. 2011).
  - *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493 (9th Cir. 2016).
  - *Hansen Found., Inc. v. City of Atl. City*, 504 F. Supp. 3d 327 (D.N.J. 2020).

Laws: Zoning, Disparate Impact

- Does the zoning regulation have a disparate adverse impact on a protected class?
- Does the zoning regulation perpetuate segregation?
- Cases
  - *United States v. City of Black Jack, Missouri,* 508 F.2d 1179 (8th Cir. 1974).
  - *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526 (N.D. Tex. 2000).
  - *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563 (E.D. La. 2009).

Actions: Reasonable Accommodations

- The accommodation may be necessary to afford the individual with a disability an equal opportunity to use and enjoy the dwelling.
- Case: *City of Edmonds v. Oxford House, Inc.*, 115 S.Ct. 1776 (1995).
- Only unreasonable if the change/exception
  - creates an undue financial/administrative burden OR
  - fundamentally alters the nature of a jurisdiction's zoning and land use regulations
- Guidance: Joint Statement by HUD and DOJ (dated May, 2004).

Actions: Reasonable Accommodations

- A municipality may require an individual with a disability to follow a particular process to request a reasonable accommodation.
  - The process cannot be burdensome or financially prohibitive.
  - A failure to follow the process cannot be a basis to deny a reasonable accommodation.
- A request may be made by:
  - the individual with a disability,
  - a representative of the individual with a disability, or
  - a person that lives, or will live, with the individual with a disability.

Actions: Reasonable Accommodations

- For unreasonable requests, the interactive process is required to determine whether there are alternative reasonable accommodations that would effectively meet the disability-related need.

- The following constitutes a denial under the FHA:
  - outright denials;
  - the failure to act promptly on a request for a reasonable accommodation; and
  - the failure to participate in the interactive process

Affirmatively Furthering Fair Housing Rule

Affirmatively Furthering Fair Housing Rule

- 1996-2015 AFFH Rule
  - Application of the FHA focused on analysis of impediments to fair housing but did not have a process in place to verify compliance
- 2015 - 2017 AFFH Rule
  - More extensive analysis of local fair housing concerns through an Assessment of Fair Housing (AFH)
  - Commitment to specific steps to remedy the identified concerns.
  - Local jurisdictions had to submit their AFH to HUD for review. If HUD rejected plan there was limited/no ability to revise
    - If HUD rejected plan jurisdiction immediately lost funding
    - HUD accepted plans to avoid that outcome

Affirmatively Furthering Fair Housing Rule

- 2017- 2021 AFFH Rule
  - Trump Administration stopped the AFH process
  - In 2020, the Administration replaced the 2015 AFFH rule with the “Preserving Neighborhood and Community Choice” (PCNC) rule without going through the notice and comment process.
    - The PCNC rule rescinded the 2015 AFFH rule
    - Redefined the term “Fair Housing”
    - Eliminated FHA’s AFFH obligations to address fair housing issues

Affirmatively Furthering Fair Housing Rule

- 2021 -2023
  - Biden Administration created an interim rule that rescinded the PCNC rule
  - Restored most of the 2015 Rule
- 2023 – HUD commenced new rule making process
  - February 9, 2023, HUD published in the Federal Register a Notice of Proposed Rulemaking
  - Public Comment concluded on April 9, 2023
  - According to HUD the new rule seeks to improve and simplify the 2015 rule

New AFFH Rule

- Starts with the 2015 rule and modifies it based upon stakeholder feedback
- Provides a framework requiring program participants to set and implement fair housing goals
  - Program Participant: states, cities, and counties that submit a Consolidated Plan and public housing authorities
- Fair housing goals will determine how housing funds will be spent

Summary of New Rule

- Public engagement process
- Identify fair housing issues
- Determine community priorities/what jurisdiction will focus on
- Develop goals to address identified fair housing issues

- 2015 rule required submittal of an “Assessment of Fair Housing” which is eliminated and replaced with an “Equity Plan”

Public Engagement

- Hold multiple community meetings at different times of day and in different locations
- Partner with local community-based organizations and stakeholders to engage protected classed and underserved communities;
- Engage with fair housing groups/advocates, community organizations, local universities, healthcare professionals, and other service providers
- Must submit to HUD information regarding public engagement process

Equity Plan

- Conduct an analysis of fair housing issues.
- “Fair Housing Issue” defined as:

  Fair housing issue means a condition in a program participant’s geographic area of analysis that restricts fair housing choice or access to opportunity and community assets. Examples of such conditions include but are not limited to: ongoing local or regional segregation or lack of integration, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, inequitable access to affordable housing opportunities and homeownership opportunities, laws, ordinances, policies, practices, and procedures that impede the provision of affordable housing in well-resourced neighborhoods of opportunity, inequitable distribution of local resources, which may include municipal services, emergency services, community-based supportive services, and investments in infrastructure, and discrimination or violations of civil rights law or regulations related to housing or access to community assets.

Equity Plan

- EP must respond to questions related to:
  - Demographics
  - Segregation and integration
  - Racially or ethnically concentrated areas of poverty
  - Access to community assets
  - Access to affordable housing opportunities
  - Access to homeownership and economic opportunity
  - Local and state policies and practices impacting fair housing

Equity Plan

- The EP must include:
  - Description of fair housing issues identified
    - conditions that constitute the fair housing issue and
    - Impacted protected class groups
  - Prioritization of fair housing issues focusing on goals for achieving material positive change for underserved communities
  - Fair housing goals
  - Description of public engagement activities

Implementation of EP

- Incorporate your fair housing goals into your Consolidated Plan, annual action plan, or Public Housing Authority plan.
- Incorporate your fair housing goals into planning documents required in connection with the receipt of federal funds.

When to comply???

- $100 million or more in grant funds starting in 2024
  - Earlier of 24 months after new rule is effective or 365 days prior next consolidated plan filing
- $30 million and $99 million in grant funds starting in 2025
  - No later than 365 days prior to the date for which a new consolidated plan is due.
- $1 million and $29 million in grant funds starting in 2026
  - no later than 365 days prior to the date for which a new consolidated plan is due.
- Less than $1 million in grant funds starting in 2027
  - No later than 365 days prior to the date for which a new consolidated plan is due.

HUD Review of EP

- HUD will publish submitted EPs on a website
- Public can provide comments directly to HUD regarding EP
- Local agency must provide annual reports regarding progress made on each goal
- Failure to have approved EP may lead to disapproval of Consolidated Plan
  - Back and forth process with HUD
  - Allows for conditional funding if EP isn't completed on time – 180 day extension
- Individuals/housing advocates/etc. can file complaints with HUD regarding AFFH Rule compliance

An Example of How the FHA and AFFH Rule Interact – Preference Policies

Preference Policies

- The policy must comply with the Fair Housing Act and the government's obligation to affirmatively further fair housing.

- A policy must promote fair housing choice and provide opportunities to improve integration.

- A policy must be designed to further the government's legitimate interests.

Preference Policies

- A policy cannot:
  - treat individuals (or households) differently on the basis of race or ethnicity;
  - have the effect of treating individuals (or households) differently on the basis of race or ethnicity; or
  - increase (or perpetuate) segregation.
- A policy cannot make the preference a *de facto* eligibility requirement

Preference Policies

- Considerations:
  - History and continuation of segregation in your community.
  - Study of potential disparate impacts.
- Examples:
  - Household size policies
  - Portland, OR
  - San Francisco, CA
  - New York City, NY [*Winfield, et al. v. City of New York*, Cause No. 15-CV-5236-LTS-DCF, U.S.D.C., S.D. New York]

Siting of Affordable Housing and the Impact of the AFFH Rule

Opportunities to Create Affordable Housing

- Bond Programs
  - Voter approved
  - Private activity bonds
- Density bonus/Incentive programs.
  - Exchange additional entitlements or other incentives for income-restricted units.
  - Enforcement considerations.
- Redevelopment of government-owned property.

Siting Decisions: Why Does Siting Matter?

- Reduce impediments to housing choice.

- Fair housing choice is the availability of information, opportunity, and options to live where an individual/family chooses without unlawful discrimination and others barriers related to race, color, religion, sex, familial status, national origin, or disability.

- For an individual with a disability, includes access to accessible housing and housing in the most integrated setting appropriate to an individual's needs.

Siting Decisions: Why does Siting Matter?

- Avoiding concentrations of poverty.
- Increasing integration/decreasing segregation.
- Considerations:
  - NIMBY-ism - *MHANY Mgmt. Inc. v. Inc. Vill. of Garden City*, 985 F. Supp. 2d 390 (E.D.N.Y. 2013), aff'd sub nom. *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581 (2d Cir. 2016).
  - Access to transit, schools, employers, grocery stores, and day cares.

Questions???