

How to Analyze Impediments to Fair Housing and Develop a Plan

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A Primer on Fair Housing Law¹ Appendix 1

¹ Allison K. Bethel, F. Willis Caruso, and Michael P. Seng, *A Primer on Fair Housing Law* (The John Marshall Law School Fair Housing Legal Support Center and Clinic, 2014).

Overview of the Analysis of Impediments to Fair Housing Choice (AI) Requirement

Background

Title VIII of the Civil Rights Act of 1968, as amended (the Fair Housing Act), prohibits discrimination in housing-related activities on the basis of race, color, religion, sex, national origin, familial status (number and age of children), and disability (handicap). The Act further requires that all federal executive departments and agencies administer their programs and activities relating to housing and urban development in a manner affirmatively to further fair housing (42 U.S.C. section 3608(d)). Section 808(e)(5) of the Fair Housing Act requires the Secretary of the Department of Housing and Urban Development (HUD) to administer the housing and community development programs in a manner to affirmatively further fair housing (AFFH). This duty also applies to state and local recipients of federal funds. Community Development Program grantees are required by Section 104(b)(2) of the Housing and Community Development Act of 1974, as amended, and Section 105(b)(3) of the National Affordable Housing Act (NAHA) of 1990 to certify that they will affirmatively further fair housing.

The regulations at 24 CFR 570.487 and 24 CFR 91.325 include the affirmatively furthering fair housing requirements of the Fair Housing Act that apply to the Community Development Program. They specify that the affirmatively furthering fair housing certification requires grantees to engage in fair housing planning by conducting an analysis of impediments to fair housing choice within its jurisdiction, taking appropriate actions to overcome the effects of identified impediments, and maintaining records to document the analysis and actions taken.

An Analysis of Impediments (AI) should identify existing conditions or barriers that limit housing choice within the community. In its simplest form, an AI addresses the question: “Do all residents and potential residents of this jurisdiction have equal access and choice to housing regardless of their race, color, religion, sex, national origin, disability, or familial status? If not, why?”

The regulations require an analysis of impediments to fair housing choice, not to affordable housing.

The courts have recognized that the affirmatively furthering fair housing duty requires HUD and its grantees to do more than simply not discriminate but to use the grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.²

Who must conduct an analysis of impediments (AI)?

The Ohio Development Services Agency, Office of Community Development (OCD) requires all communities who receive federal financial assistance to administer their programs and activities related to housing and community development in a manner affirmatively to further the purposes of the Fair Housing Act, 42 U.S.C. Section 3601-3610, and consistent with other applicable provisions ensuring equal opportunity and freedom from discrimination.

OCD grant recipients sign certifications as a part of every grant agreement. These certifications include the requirement that each recipient’s programs and activities will be conducted and administered in conformity with all civil rights provisions including Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, and the Housing and Community Development Act.

The Housing and Community Development Act, as amended, and the Community Development Block Grant Program (CDBG) regulations establish performance standards for affirmatively furthering fair housing which apply to entitlement communities, states and state program grantees. This includes CDBG, Home Investment Partnership (HOME), and Neighborhood Stabilization Program (NSP) grantees. The development of an Analysis of Impediments to Fair Housing Choice is a required component of a program to “affirmatively furthering fair housing.”

Beginning 1993, the state of Ohio required all CDBG and HOME grantees to conduct a fair housing program with standard features. Some of the features of the state’s standard program include designation of a local fair housing contact, and fair housing education and outreach activities. In addition, grantees were required to have an on-going process for identifying new fair housing concerns or issues and analyzing their efforts in mitigating or remedying previously identified problems.

² NAACP v. Sec’y of Housing and Urban Development, 817 F .2d 149, 155 (1st Cir. 1987)

CDBG funds supporting fair housing activities

The Housing and Community Development Act, as amended, authorizes the use of CDBG funds for public services and for planning and program administration costs. Development of an analysis of impediments is an eligible planning activity. Fair housing services may be an eligible use of program administration and public services funds. Eligible fair housing costs are outlined in 24 CFR 570.206(c) and include making all persons aware of the range of housing options available, enforcement, education, outreach, avoiding undue concentrations of assisted persons in areas of low- and moderate-income persons, and other appropriate activities selected by the grantee to affirmatively further fair housing.

When should an AI be conducted?

A comprehensive AI must be completed every five years to reflect the current fair housing situation in the jurisdiction. Ohio's Community Development Small Cities grantees were first required to conduct an AI during the FY'85 CDBG program year. Grantees must update the AI annually to reflect current market conditions or other factors related to fair housing choice. Additionally, grantees must evaluate and submit an annual report on the implementation of jurisdiction's AI Action Plan by summarizing the identified impediments and describing the actions taken to overcome the effects of the impediments. The report should include actions the jurisdiction plans to take to overcome impediments to fair housing choice during the coming year.

NOTE: OCD Community Development Allocation Program grantees are required to complete a comprehensive AI for PY 2016, and submit it to OCD by June 17, 2016.

Where the AI should be kept?

Grantees are required to have a local comprehensive analysis of impediments to housing choice available upon request. A copy of the local AI should be maintained in a centralized location - preferably with the other fair housing program records.

What is fair housing choice?

The ability of persons - regardless of race, color, religion, sex, disability, familial status, or national origin - of similar income levels to have available to them the same housing choice.

Housing choice is impeded when actions, omissions, or decisions:

- restrict a person's choice of housing because of the person's race, color, religion, sex, disability, national origin, or familial status; or
- make certain residential dwellings not available to persons because of race, color, religion, sex, disability, familial status or national origin.

What should be included in an AI?

The AI should provide direction and focus needed to achieve HUD's mission to create strong, sustainable, inclusive communities and quality, affordable homes for all.

The AI should include:

1. a clear analysis of collected information;
2. identified impediments, fair housing concerns, or problems;
3. changes needed to remedy or overcome impediments; and
4. a plan of action with a timetable or schedule to remedy the problems.

Grantees should have an on-going process to identify all fair housing concerns and problems and for analyzing local efforts in mitigating or remedying problems. The local AI must be updated annually.

What should be analyzed?

The AI and Fair Housing Action Plan should address systemic and structural barriers to fair housing choice. Grantees should analyze how current patterns of segregation and points of resistance to diversity and integration such as municipal zoning, industry practices, and popular perceptions limit housing choices for groups protected by the Fair Housing Act.

The following areas should be analyzed for impediments:

1. Provisions of financing assistance for residential real property purchases, construction, improvements, repairs, or maintenance of dwellings;
2. Terms, conditions, or privileges of sale or rental of dwellings;
3. Advertising with respect to sale or rental of housing;
4. Realtor practices;
5. Appraisal practices;
6. Access to any multiple listing service, real estate brokers' organization, or facility relating to the business of selling or renting dwellings;
7. Administrative policies concerning community development and housing activities, site selection policies, local code requirements, local zoning requirements, and other local housing construction requirements;
8. Results of actions undertaken by the grantee to remedy problems identified by the analysis of the above seven (7) areas or identified in a court suit or finding of noncompliance by HUD, the Ohio Civil Rights Commission (OCRC), or OCD.

Sample Outline For The Analysis Of Impediments To Fair Housing Choice

Introduction/General Summary of Analysis

1. Who Conducted the Analysis of Impediments
2. Methodology Used
3. AI Funding
4. Findings and Actions Needed
5. Conclusions

Jurisdictional Background Data

1. Demographic Data
2. Income Characteristics
3. Employment and Transportation Profile
4. Housing Profile
5. Maps

Evaluation of Jurisdiction's Current Fair Housing Profile

1. Analysis of the types and number of complaints that have been filed alleging discrimination in housing in the grantee's community, including those in which the Secretary of HUD has issued a charge of discrimination or suit has been filed by the Department of Justice.
2. Identification of other fair housing concerns or problems

Identification of Impediments to Fair Housing Choice

1. The Sale or Rental of Housing
2. Provision of Housing Brokerage Services
3. Provision of Financing Assistance for Dwellings
4. Public policies and actions affecting the approval of sites and other building requirements used in the approval process for the construction of publicly assisted housing
5. The administrative policies concerning community development and housing activities such as HOME, Neighborhood Stabilization Program, multifamily rehabilitation, and activities causing displacement which affect opportunities of minority households to select housing inside or outside areas of minority concentration
6. Where there is a determination of unlawful segregation or other housing discrimination by a court or a finding of noncompliance by HUD regarding assisted housing within a recipient's jurisdiction, an analysis of the actions which could be taken by the recipient to help remedy the discriminatory condition, including actions involving the expenditure of HUD funds the grantee has received.
7. Assessment of Current Public and Private Fair Housing Programs/Activities in the Jurisdiction

Conclusions and Recommendations

1. Impediments, Fair Housing Concerns, or Problems
2. Changes or Remedies Needed Overcome Identified Impediments
3. Plan of Action with a Timetable or Schedule

Signature Page

1. Chief Elected Official
2. CDBG Program Administrator
3. Chairperson, Citizen Advisory Group/Task Force
4. Housing Program Administrator

Guidance for The Analysis Of Impediments to Fair Housing Choice

1. Introduction and General Summary of the Analysis

a. Who Conducted the Analysis of Impediments

Grantees should provide a brief description of the organizations and individuals that conducted the analysis and identify the issues each group or individual participated in reviewing. Grantees should describe the nature and extent of the chief elected official's and the local government's legislative body's commitment to the analysis process and fair housing plan.

Grantees should provide a description of the methodology(ies) used to conduct the analysis and include a description of the structure of the process and show which organization or individuals:

- had lead responsibilities to identify impediments and sources of information
- provided information regarding impediments or suggestions for actions to address them
- actually analyzed each problem area, produced findings and recommendations

The grantee may want to provide a chart to demonstrate the organizational structure and how it operated to obtain input from a broad spectrum of community groups and individual citizens.

b. Funding and Services Provided

Grantees should describe how the analysis has been funded, including specific references to funds or services provided by non-profit organizations, private individuals, colleges or universities, for profit contractors/developers or others along with the funding, staff support or other services provided by the grantee.

c. Findings

Grantees should summarize the analysis findings and indicate the section of the report that contains each of the findings listed.

d. Summary

Grantees should summarize the conclusions of the analysis.

2. Background Data

The grantee should provide specific types of background data that have served as a basis for identifying impediments and arriving at findings and conclusions.

a. Demographic Data

Number and percentage of persons in the grantee's jurisdiction by race, color, sex, national origin, age, disability, and familial status.

b. Income Data

Income characteristics of the population in the grantee's jurisdiction. The grantee should ensure that income data, for all income categories and for all Fair Housing Amendments Act protected classes, is included in the background data of the analysis of impediments, to the extent such data is available from the United States Census, Ohio Office of Strategic Research, local advocacy organizations, or other sources.

c. Employment and Transportation Data

For the analysis of impediments to fair housing, the employment and transportation profile should focus on:

- 1) The locations of job centers in the grantee's jurisdiction and in nearby jurisdictions that now offer - or will offer - jobs (including job training opportunities) to persons at the lower income levels of the wage/salary scale.
- 2) The geographic relationship of such centers to the current and planned locations of housing for lower income households.
- 3) The availability of public transportation, including train and bus service, and subsidized low or no cost (to consumer) van pools to link job centers with lower income housing locations, where housing has not been and will not be provided near such centers.

d. **Housing Profile**

The grantee's study should contain a significant level of information about housing conditions of lower income households in the grantee's community. These are the households for which HUD assisted housing programs are intended. This type of housing is in shortest supply and should be the focus of a grantee's housing affordability strategy.

Additionally, the analysis of impediments profile should describe the degree of segregation, by race and ethnicity, and concentration of poverty in the grantee's housing market overall and should relate this information by neighborhood and cost of various types of housing in each neighborhood.

This description should also discuss the extent to which housing for persons with disabilities are distributed throughout the grantee's community in demonstration of the grantee's efforts to provide such housing in integrated settings containing housing for non-disabled households and households at a variety of income levels. In addition, local effort to promote housing sustainability through energy-efficient, environmentally friendly, healthy design, including elements of visitability and universal design should be discussed.

e. **Maps**

- 1) Location of housing for persons with disabilities
- 2) Racial housing patterns
- 3) Housing costs and vacancy rates
- 4) Location of proposed multifamily housing, including price range, subsidized or private
- 5) Location of Industrial and Commercial Development and Areas Expecting to Undergo Revitalization
- 6) Location of Major Employers and Mass Transportation Routes
- 7) Areas of Minority Displacement
- 8) Central Business District
- 9) Areas of high rate of subprime loans and high foreclosures

3. **Evaluation of Jurisdiction's Current Fair Housing Profile**

Grantees should provide additional background information in discussion which:

- a. Reviews of the types and number of complaints that have been filed alleging discrimination in housing in the grantee's community including those in which the Secretary of HUD has issued a charge of discrimination or suit has been filed by the Department of Justice. Trends in complaints should be examined in terms of overall numbers, types of complaints and classes of persons alleging discrimination. The grantee should examine the reasons for these trends, and, in the section of the analysis describing impediments, discuss these causes and barriers to be addressed in specific fair housing actions.
- b. Summarizes other fair housing concerns or problems as an introduction to the detailed discussion of impediments.

4. **Identification of Impediments to Fair Housing Choice**

- a. Sale or Rental of Housing
 - 1) Real estate practices such as steering, or Blockbusting
 - 2) Deed restrictions, trust or lease provisions
 - 3) Conversion of apartments to all-adult
 - 4) Property management firm's "occupancy quotas"
- b. Provisions of Housing Brokerage Services
 - 1) Exclusion of minority brokers from participation in multiple listing service and real estate brokers' association
 - 2) Restricted use of privileges, services, or facilities by all brokers
 - 3) Assignment of brokers and areas by racial/ethnic composition of census tracts
- c. Provisions of Financing Assistance for Dwellings
 - 1) Discriminatory lending patterns, practices, and disclosures
 - 2) Discriminatory Appraisal and Underwriting Practices
 - 3) Disinvestment and Redlining Practices
 - 4) Racial credit steering
 - 5) Substantial increase in reverse mortgages
- d. Public Policies and Actions Affecting the Approval of Sites and Other Building Requirements Used in the Approval Process for the Construction of Publicly Assisted Housing
 - 1) Equalization of Municipal Services
 - 2) Local Zoning Laws and Policies
 - 3) Land use policies, exclusionary zoning and displacement
 - 4) Sites for subsidized housing by census tracts
 - 5) Make-up of planning and zoning boards (list of member names)
- e. The Administrative Policies Concerning Community Development and Housing activities such as HOME, Neighborhood Stabilization Program (NSP), Multifamily Rehabilitation, and Activities Causing Displacement which Affect Opportunities of Minority Households to select Housing Inside or Outside Areas of Minority Concentration
 - 1) Displacement
 - 2) Revitalization of neighborhoods
 - 3) HOME Investment Partnership Program Funds
 - 4) Revolving loan funds for property repairs
 - 5) Property tax increases
 - 6) Demolition of subsidized housing
- f. Where there is a determination of unlawful segregation or other housing discrimination by a court or a finding of noncompliance by HUD regarding assisted housing within a recipient's jurisdiction, an analysis of the actions which could be taken by the recipient to help remedy the discriminatory condition, including actions involving the expenditure of HUD funds the grantee has received.
 - 1) Development and implementation of a fair housing information program for municipal officials, and employees having duties related to fair housing, zoning, planning, assisted housing and community and economic development.
- g. Assessment of Current Public and Private Fair Housing Programs/Activities in the Jurisdiction

- 1) Grantees should briefly describe fair housing actions recently completed and currently underway. Grantees should relate details of specific accomplishments, actual or anticipated, that promoted and will promote fair housing.

5. **Conclusions and Recommendations**

Grantees should summarize the conclusions they have reached, based on the analysis, and describe in some detail the recommendations that have come out of the analysis effort. This section provides the essential link between the analysis of impediments and the grantee's plan to affirmatively further fair housing. The grantee's plan should clearly reflect the position the grantee takes with respect to each recommendation. The plan should include an outline of all changes needed to remedy or overcome the identified impediments and a timetable or schedule to remedy the impediments. The grantees should have an on-going process for identifying additional fair housing concerns and analyzing local efforts in mitigating and remedying issues.

6. **Signature Page**

Grantees should provide a signature page as part of the analysis. This page should contain the signature of each individual that participated in the analysis process or has responsibility for assuring that the grantee meets the requirements to affirmatively further fair housing. HUD suggests that, at a minimum, the following signatures appear on this page:

- 1) The chief elected official
- 2) Program administrators (e.g. CDBG, CHIP, and NSP)
- 3) The chairpersons of the fair housing committee, citizen advisory group, etc.
- 4) Housing program administrators responsible for public housing and other publicly assisted programs operated by the grantee or public agencies in the grantee's jurisdiction.

Steps Following Completion of the Analysis of Impediments

Once the analysis is complete, an immediate goal of the grantee should be to bring the major findings and recommendations to the attention of policy makers, key government staff, community organizations, and the general public. The grantee should provide copies of the analysis to all organizations that participated in identifying impediments and researching information regarding their nature, extent and impact and to any other organizations that may not have participated, but are involved in housing issues that affect their constituent populations.

In addition to distributing copies, the grantee should consider providing briefings to key officials and staff in the government as well as to community organizations that express an interest. The grantee should have copies on hand for distribution to the public upon request. If possible, the Analysis of Impediments and Fair Housing Action Plan should be posted online for public review and comment before the jurisdiction adopts them. All comments provided online should be placed in the public record, as well as all final versions of the Analysis and Plans.

Jurisdictional Background Data

Demographic Data and Income Characteristics

Actual number and percentage of persons in the jurisdiction by race, color, sex, national origin, age, disability, and familial status. Income characteristics of the jurisdiction (e.g. median income of households, by race, color, sex, national origin, age, disability, and familial status). Data available from the most recent available Census, Ohio Office of Research, community surveys, Housing Assistance Plans, and Comprehensive Homeless Assistance Plans.

Employment and Transportation Profile

Listing of employers, by type and the number of people employed within the jurisdiction, by salary bands and racial group, ethnicity, gender etc, identification of growth trends, if any.

Listing of major forms of transportation. Identification of access to adjacent job centers. Data available from the most recent and available Census, local planning and transportation offices, major employers and private surveys, if any.

Housing Profile

Total number of housing units in the jurisdiction noting type (multifamily/single family), cost, condition of housing, level of accessibility and whether occupied or vacant. Identification of vacancy rate.

Data available from the most recent Census, local planning office, local housing agency and private surveys, if any.

Maps

1. Location of housing for persons with disabilities
2. Racial housing patterns
3. Housing costs and vacancy rates
4. Location of existing and proposed multifamily housing, including price range, subsidized or private
5. Location of Industrial and Commercial Development and Areas Expecting to Undergo Revitalization
6. Location of Major Employers and Mass Transportation Routes
7. Areas of Minority Displacement
8. Central Business District
9. Areas of high rate of subprime loans and high foreclosures

Identification of Impediments to Fair Housing Choice

Demographic Information

Is all demographic information that has been collected as up-to-date as possible?

YES _____ NO _____

Is there any meaningful demographic data which is not available but should be obtained by local surveys or other sources?

YES _____ NO _____

Comments: _____

Is there any meaningful demographic data that is not available specifically for the jurisdiction but statewide or area data (averages) could be used to suggest "typical characteristics?"

YES _____ NO _____

Comments: _____

Is there reason to believe that certain portions of the demographic information collected do not accurately portray the true characteristics and trends of the populations in the jurisdiction?

YES _____ NO _____

Comments: _____

Do the trends in the demographics suggest any important changes that are going on in the area?

YES _____ NO _____

If yes, what causes or other factors can be attributed to these changes?

Do the demographics and trends of nearby areas suggest any future trends for the local jurisdiction?

YES _____ NO _____

Comments: _____

Does the local jurisdiction lack racial or ethnic diversity? (Especially areas with less than 5% minority population)

YES _____ NO _____

If yes, what causes or other factors can be attributed to this lack of diversity in the jurisdiction?

Has there been evidence of resistance to diversity or integration in the jurisdiction?

YES _____ NO _____

Comments: _____

Are there noticeable patterns of segregation within the jurisdiction?

YES _____ NO _____

If yes, what causes or other factors can be attributed to these patterns?

Has the jurisdiction reviewed the historical information, policies, ordinances, etc. that helped establish and maintain racial and ethnic segregation?

YES _____ NO _____

Comments: _____

Has the jurisdiction provided more than the numbers and offered an analysis for the cause of segregation and a plan to desegregate neighborhoods?

YES _____ NO _____

Comments: _____

Does the local jurisdiction lack housing that meets the needs of individuals with disabilities?

YES _____ NO _____

If yes, what causes or factors can be attributed to the lack of affordable accessible housing for individuals with disabilities?

Is the housing that is available for individuals with disabilities segregated or limited to individuals with a defined disability or minimum age such as 202 & 811 programs?

YES _____ NO _____

Comments: _____

Are mainstream accessible housing units, especially larger units designed for families with a member with a disability, available in public and/or assisted housing?

YES _____ NO _____

Comments: _____

If the local jurisdiction has a homeownership program, are accessible units available?

YES _____ NO _____

Comments: _____

Has there been evidence of resistance to group homes or housing designed for populations with disabilities within the jurisdiction?

YES _____ NO _____

Comments: _____

Has the jurisdiction reviewed the local policies, zoning, ordinances, etc. that helped establish and maintain lack of or segregation of housing for individuals with disabilities?

YES _____ NO _____

Comments: _____

Has the jurisdiction applied for and/or utilized funds to make public places, streets and sidewalks accessible for people with disabilities?

YES _____ NO _____

Comments: _____

Is there a relationship with service providers for people with disabilities and the fair housing office to identify and eliminate barriers to fair housing?

YES _____ NO _____

Comments: _____

Has an analysis been completed that makes recommendations for achieving fair housing for people with disabilities?

YES _____ NO _____

Comments: _____

Does the jurisdiction have a plan of action with a timeline to increase the availability of mainstream, integrated housing that is usable by individuals with disabilities?

YES _____ NO _____

Comments: _____

Have all geographic areas been examined and meaningful access to program information given to Limited English Proficiency (LEP) speaking populations within the local jurisdiction?

YES _____ NO _____

Comments: _____

Does the jurisdiction have a LEP Implementation Plan that ensures that eligible LEP populations benefit from and are included as program participants?

YES _____ NO _____

Comments: _____

Has the jurisdiction translated fair housing materials into languages for LEP persons residing in the jurisdiction?

YES _____ NO _____

Comments: _____

Are translators available to help people understand their fair housing rights?

YES _____ NO _____

Comments: _____

Is there a relationship with service providers for linguistically isolated families and the fair housing office to identify and remedy problems?

YES _____ NO _____

Comments: _____

In addition to basic statistics, has the jurisdiction analyzed the patterns, laws, and actions implicated in establishing and maintaining certain demographic patterns?

YES _____ NO _____

Comments: _____

Has the jurisdiction made recommendations for challenging programs, policies, laws, or other activities that violate fair housing laws?

YES _____ NO _____

Comments: _____

NOTES:

Sale of Housing

Is there evidence of restrictive covenants, trusts or lease provisions in use in the community that would exclude sale to, or occupancy by, a particular group of potential buyers or renters based on membership in any of the protected classes?

YES _____ NO _____

Comments: _____

Are covenants that contain such restrictions recorded in deeds on file in the jurisdiction's deed recordation office?

YES _____ NO _____

Comments: _____

Have there recently been incidents of negative community attitudes resulting from moves by minorities into non-minority, white neighborhoods, or vice versa? Moves by persons with disabilities into, for example, groups homes in certain area?

YES _____ NO _____

Comments: _____

Does the jurisdiction collect similar information from lenders, brokers, and subdivision sellers on applicants for mortgage loans, brokerage services, or home purchases?

YES _____ NO _____

Comments: _____

Does the jurisdiction conduct sales audits to measure whether or not homes are made available regardless of the racial composition of the neighborhood or public schools?

YES _____ NO _____

Comments: _____

Does the jurisdiction conduct investigations to ensure that racial steering is not occurring and that no illegal manipulation of the market place is occurring in any neighborhood?

YES _____ NO _____

Comments: _____

Will local real estate companies accept listings regardless of the value of the home?

YES _____ NO _____

Comments: _____

Have real estate companies carved out a niche market and refuse to accept listings or show homes outside of that niche market?

YES _____ NO _____

If yes, does this policy have a discriminatory effect on neighborhoods where the residents are members of protected groups?

Rentals

Do local rental complexes have policies that unduly restrict access for families with children or persons with disabilities such as high security deposits or restricting in which building families or persons with disabilities can reside?

YES _____ NO _____

Comments: _____

Are families with children or persons with disabilities restricted to first floor units?

YES _____ NO _____

Comments: _____

When families with children reside in the complex, are they limited to the times when children can have access to amenities such as the pool, community room, etc?

YES _____ NO _____

Comments: _____

Is there evidence, from complaints, audits or other sources, that landlords of privately owned rental housing, or their management agents, are limiting occupancy in multifamily housing complexes through use of occupancy quotas based on membership in any of the protected classes?

YES _____ NO _____

Comments: _____

Does the jurisdiction have a regular program to collect summary data from landlords and managers of rental housing on the racial, ethnic, gender, and familial and disability status of tenants and applicants for rental housing in the jurisdiction?

YES _____ NO _____

Comments: _____

Does the jurisdiction use this information in connection with fair housing audits of rental housing, as a part of its fair housing enforcement or education and outreach efforts?

YES _____ NO _____

Comments: _____

NOTES:

Advertising

Do the advertisements for home sales, rental, or access to rehabilitation or remodeling programs include photographs of people from different racial/ethnic backgrounds?

YES _____ NO _____

Comments: _____

Are advertisements published in newspapers that reach a wide variety of eligible applicants as well as being written in languages other than English when appropriate?

YES _____ NO _____

Comments: _____

Are newly constructed rental units advertised as "barrier free?"

YES _____ NO _____

Comments: _____

Do local newspapers use the non-discrimination disclaimer in its advertising section?

YES _____ NO _____

Comments: _____

Do the local newspapers know the fair housing law requirements for advertising?

YES _____ NO _____

Comments: _____

Does the jurisdiction monitor the advertising of local newspapers for compliance with the fair housing laws?

YES _____ NO _____

Comments: _____

Are affordable housing developments advertised on the Internet?

YES _____ NO _____

Comments: _____

Are local affordable housing providers advertising their available units on the Internet on the Ohio Rental Housing Locator?

YES _____ NO _____

Comments: _____

Insurance

Are there age restrictions that prevent the writing of replacement or guaranteed replacement cost policies for older homes?

YES _____ NO _____

Comments: _____

Do insurance companies have marketing programs that exclude writing multi-line coverage for the jurisdiction or certain neighborhoods within its jurisdiction?

YES _____ NO _____

Comments: _____

Do companies have policies that prohibit the writing of replacement or guaranteed replacement cost coverage for homes with market values that fall significantly below the estimated cost to replace the home?

YES _____ NO _____

Comments: _____

Do residents of some neighborhoods, particularly low- to moderate-income residents, experience difficulty in obtaining reasonable insurance coverage for the dwellings?

YES _____ NO _____

Comments: _____

Affirmative Marketing Programs

Housing that receives federal and/or state of Ohio funding generally must develop and implement an affirmative marketing plan, particularly developments of 5 or more units. The plan should be designed to attract the people least likely to apply for the housing.

Have the developers/builders of federal- or state-assisted housing identified and attempted to reach those persons least likely to apply for the housing?

YES _____ NO _____

Comments: _____

Do local assisted housing providers (HOME, LIHTC, Rural Development, Section 8, Public Housing, etc) and Supportive Housing Programs list and market their units through the Ohio Rental Housing Locator? (located at <http://www.ohiohousinglocator.org/>)

YES _____ NO _____

Comments _____

Are people with disabilities encouraged to seek housing in new subdivisions through print and online advertising or direct marketing through agencies that serve people with disabilities?

YES _____ NO _____

Comments: _____

Does the jurisdiction monitor subsidized housing developments for compliance with affirmative marketing requirements?

YES _____ NO _____

Comments: _____

Accessibility for Persons with Disabilities/Design Issues

Does the local jurisdiction have a system in place for the review and approval of architectural designs, platting, sidewalks, curb cuts, etc. to ensure compliance with Federal, state, and local accessible design requirements?

YES _____ NO _____

Please explain local process

What unit of government oversees compliance with the Fair Housing Act for new construction, substantial rehabilitation, and remodeling of multi-family housing?

Does the local government have a process in place to conduct on-site review during construction projects to ensure compliance with accessibility designs as submitted?

YES _____ NO _____

Comments: _____

Is there a mechanism to review and bring into compliance any builder not following the requirements of the Fair Housing Act or other applicable accessibility requirements?

YES _____ NO _____

Comments: _____

Has the local government taken any steps to disestablish segregated and promote integrated housing for individuals with disabilities?

YES _____ NO _____

Comments: _____

Community Development Corporations (CDC)

Are fair housing training and educational materials provided to local CDCs to ensure that they affirmatively market and provide housing in a non-discriminatory manner?

YES _____ NO _____

Comments: _____

Is staff trained to recognize and report potential housing discrimination, fair lending, or insurance problems that the CDC or its clients experience during any phase of the development of a project (e.g. acquiring land, zoning/special use issues, etc.)?

YES _____ NO _____

Comments: _____

Does the local jurisdiction encourage CDCs and other housing developers to include units to meet the area's underserved populations including development of affordable, integrated, accessible and/or Universally-designed housing or units for large families with children or multi-generational families?

YES _____ NO _____

Comments: _____

CDBG/HOME Funded Programs

Is credit scoring used by CDBG or HOME-funded programs to determine program eligibility?

YES _____ NO _____

Comments: _____

If so, has the credit scoring system been evaluated for possible discriminatory impact against members of the protected groups?

YES _____ NO _____

Comments: _____

Do the local CDBG and housing program staff administrators ensure that program participants are treated fairly under the requirements of the Fair Housing Act when applying for financing or being pre-qualified for home loans?

YES _____ NO _____

Comments: _____

Is preference for program participation given to residents of the community and, if so, will this have a disparate impact on members of the protected groups? (For example, if a predominately white community restricts applicants for government subsidized/built housing to local residents, this may have a discriminatory impact on people of color wanting to move to the community.)

YES _____ NO _____

Comments: _____

Do actual beneficiaries (outcomes) of the local federally funded housing and community development programs represent the characteristics and statistics of the local demographics?

YES _____ NO _____

If no, explain:

Housing Programs and Activities

Before undertaking a new OCD-funded housing program or activity, or before renewing funding for an existing program or activity, grantees should review and document the projected or actual impact on fair housing and related aspects of protected equal opportunity based on race, color, religion, national origin, disability status, gender, familial status, ancestry, and military status.

Does the housing project promote or discourage integrated housing and neighborhoods; and will it include and enhance housing opportunity, mobility, and affirmative fair housing measures, as required under existing law?

YES _____ NO _____

Comments: _____

Does the housing project include measures to ensure that the populations with the greatest barriers to upward mobility (under 200% of the federal poverty level) have access to more quality housing?

YES _____ NO _____

Comments: _____

Will displacement due to the project, if any, disproportionately burden members of particular demographic groups?

YES _____ NO _____

Comments: _____

Will displacement due to the project create segregation or integrative effects for members of particular demographic groups?

YES _____ NO _____

Comments: _____

To what extent will any new housing units be equally accessible to individuals and families across the covered characteristics?

Are there any burdensome procedures that disparately impact equal access to housing for individuals and families protected by the Fair Housing Act?

YES _____ NO _____

Comments: _____

Does the project increase the residential integration of individuals with disabilities and enable populations of people with disabilities who are facing the greatest barriers to community integration (e.g., individuals living in overly institutionalized settings) to have access to community-based housing opportunities?

YES _____ NO _____

Comments: _____

Housing Brokerage Services

Have the brokerage firms in the jurisdiction carefully examined their business relationships with mortgage lending institutions to assure that these institutions do not restrict their lending activities to certain areas of the community?

YES _____ NO _____

Comments: _____

Do the formal training and licensing requirements for real estate brokers that are applicable in the jurisdiction and surrounding jurisdictions include a requirement for training in and demonstrated knowledge of all applicable fair housing laws?

YES _____ NO _____

Comments: _____

Is there any evidence that minority brokers are excluded from participation in multiple listing services in the jurisdiction or surrounding areas?

YES _____ NO _____

Comments: _____

Is there any evidence that minority, persons with disabilities, or women participants in real estate brokers associations are excluded or restricted?

YES _____ NO _____

Comments: _____

Is there evidence that real estate brokerage services are assigning brokers based on the race or ethnicity of the brokers and the racial or ethnic composition of neighborhoods in which brokers operate?

YES _____ NO _____

Comments: _____

Are the opportunities for minority persons and persons with disabilities to become brokers as available as opportunities for non-minority white and non-disabled persons?

YES _____ NO _____

Comments: _____

Are there local programs to attract minority and disabled persons to careers as brokers and to provide training and other assistance for this purpose?

YES _____ NO _____

Comments: _____

Are the boards of real estate brokers in the jurisdiction and nearby jurisdictions signatory to a voluntary affirmative marketing agreement (VAMA) with HUD?

YES _____ NO _____

Comments: _____

NOTES:

Financing Assistance for Dwellings

Have lenders, appraisers, and private mortgage insurers operating in the jurisdiction carefully examined their policies, procedures and practices to determine where differential treatment based on race and ethnicity occurs?

YES _____ NO _____

Comments: _____

Are loan officers, other lending personnel, appraisers, and private insurer staff fully trained in how to apply the policies and standards and aware of the reasons they have been developed?

YES _____ NO _____

Comments: _____

Where lenders, appraisers, or private mortgage insurers have removed old policies, standards and procedures because of their association with discriminatory antecedents, have they adopted new policies, procedures and standards for:

- Loan origination
- Loan processing
- Assessing borrower credit worthiness
- Appraising the value of the collateral and selecting appraisers
- Underwriting decisions
- Providing private mortgage insurance and selecting a private mortgage insurer

YES _____ NO _____

Comments: _____

Do lenders, mortgage bankers, appraisers, and private mortgage insurers in the area regularly monitor the application of these new policies and standards to determine if they are followed as intended?

YES _____ NO _____

Comments: _____

If lenders and mortgage bankers hire fee appraisers, or refer customers to an approved list of appraisers, do lenders set clear requirements regarding the standards that are acceptable to the bank that appraisers and private mortgage insurers should use?

YES _____ NO _____

Comments: _____

Do lenders and mortgage bankers disclose the full appraisal report to the borrower?

YES _____ NO _____

Comments: _____

Do lenders and mortgage bankers use a pre-screening process and, if so, do they document the results and place the documentation in the applicant's file and make the document available to the applicant?

YES _____ NO _____

Comments: _____

Do lenders and mortgage bankers examine their conventional mortgage and home improvement loan profiles to determine whether there are neighborhoods that are under represented or not represented in these profiles?

YES _____ NO _____

Comments: _____

Do lenders and mortgage bankers use the population and housing characteristics data that is available from the federal financial regulatory agencies for this purpose and their Home Mortgage Disclosure Act (HMDA) data?

YES _____ NO _____

Comments: _____

Do lenders and mortgage bankers compare the home improvement loan profile to the mortgage loan profile to determine if the former, which is usually a short term consumer loan, is made more frequently to minorities in minority neighborhood and to homeowners in mixed neighborhoods than mortgage loans?

YES _____ NO _____

Comments: _____

Does the jurisdiction regularly monitor reports of financial institutions subject to Home Disclosure Act (HMDA) Community Reinvestment Act (CRA)?

YES _____ NO _____

If so, what are the results and does the jurisdiction act upon this information in any specific way?

For example, does the jurisdiction use this information as an incentive by depositing jurisdiction funds in banks with the best performance records?

YES _____ NO _____

Comments: _____

Do any lending institutions aggressively market the availability of mortgage and home improvement loans in minority neighborhoods and encourage minorities to apply in non-minority neighborhoods? In low and moderate-income neighborhood?

YES _____ NO _____

If so, do these institutions provide such loans in all areas of the community, or only in minority neighborhoods?

Are these "prime" lending institutions such as banks or are they "subprime" lending institutions such as mortgage companies?

Mortgage Fraud Schemes

With all the foreclosures in Ohio, mortgage fraud and rescue scams are becoming big business.

- **Traditional mortgage fraud** includes situations in which homebuyers and/or lenders falsify information to obtain a home loan.
- **Mortgage Rescue and Loan Modification Scams** claim they can help struggling homeowners save their home from foreclosure.
- **Reverse Mortgage Scams** have been associated with deceptive practices and allegations of high-pressure sales tactics and the risk of being steered into inappropriate loans and annuities.

Below is information about various types of mortgage fraud schemes:

Property Flipping - Property is purchased, falsely appraised at a higher value and then quickly sold. What makes property flipping illegal is that the appraisal information is fraudulent. The schemes typically involve one or more of the following: fraudulent appraisals, doctored loan documentation, inflating buyer income, etc. Kickbacks to buyers, investors, property/loan brokers, appraisers and title company employees are common in this scheme. A home worth \$20,000 may be appraised for \$80,000 or higher in this type of scheme.

Silent Second - The buyer of a property borrows the down payment from the seller through the issuance of a non-disclosed second mortgage. The primary lender believes the borrower has invested his own money in the down payment, when in fact, it is borrowed. The second mortgage may not be recorded to further conceal its status from the primary lender. This action, on the part of both the seller and the buyer, is illegal.

Silent Gift - This scheme is similar to the "Silent Second" scheme except that the second mortgage is disguised as a gift from the seller. This type of gift is illegal unless the seller is directly related to the buyer. A false claim/verification must be signed by the seller who claims to be directly related to the buyer. This may be done with OR without the buyer's knowledge. The seller submits the verification to the lender then, upon closing, initiates the "Silent Second". If the buyer is aware and part of the scheme, this is signed mutually. If the buyer is unaware of the scheme, the second mortgage is "slipped in" without explanation then, collection is sought at a later date, with threats to foreclose on the property if unpaid (aka "silent extortion").

Nominee Loans/Straw Buyers -The identity of the borrower is concealed through the use of a nominee who allows the borrower to use the nominee's name and credit history to apply for a loan.

Fictitious/Stolen Identity - A fictitious/stolen identity may be used on the loan application. The applicant may be involved in an identity theft scheme. An applicant's name, personal identifying information and/or credit history are used without the true person's knowledge.

Foreclosure Schemes - The perpetrator identifies homeowners who are at risk of defaulting on loans or whose houses are already in foreclosure. Perpetrators mislead the homeowners into believing that they can save their homes in exchange for a transfer of the deed and up-front fees. The perpetrator profits from these schemes by remortgaging the property or pocketing fees paid by the homeowner. The three most used foreclosure schemes are identified as: phantom help; bust-out; and the bait and switch.

Equity Skimming - An investor may use a straw buyer, false income documents, and false credit reports to obtain a mortgage loan in the straw buyer's name. Subsequent to closing, the straw buyer signs the property over to the investor in a quit claim deed which relinquishes all rights to the property and provides no guaranty to title. The investor does not make any mortgage payments and rents the property until foreclosure takes place several months later.

Fake "Government" Modification Programs - Unscrupulous people may claim to be affiliated with, or approved by, the government or may ask you to pay high up-front fees to qualify for government mortgage modification programs. While government-supported mortgage modification and refinancing

initiatives are legitimate, the scam artists' claims are not. Keep in mind that you do not have to pay to benefit from these government programs. All you need to do is contact your lender or loan servicer. The scam artist's name or Web site may be very similar to those of government agencies. The scam artist may use such terms as "federal," "TARP," or other words or acronyms related to official U.S. government programs. These tactics are designed to fool you into thinking the scam artist is somehow approved by, or affiliated with, the government. The government is taking actions to stop this fraud, but you also need to protect yourself. So be wary of claims offering "government-approved" or "official government" loan modifications. Your lender will be able to tell you whether you qualify for any government initiatives to prevent foreclosure. You do not have to pay anyone to benefit from them.

Leaseback/rent-to-buy schemes - In this type of scam, you are asked to transfer the title to your home to the scammer, who will, supposedly, obtain new and better financing and/or allow you to remain in the home as a renter and eventually buy it back. If you do not comply with the terms of the rent-to-buy agreement, you will lose your money and face eviction. The agreement may be very hard to comply with, because it may require, for instance, high up-front and monthly payments that you may not be able to afford. In fact, the scammers may have no intention of ever selling the home back to you. They simply want your home and your money. Remember that transferring your title does not change your payment obligations - you will still owe your mortgage debt. The difference will be that you will no longer own your home. If payments are not made on the mortgage, your lender has the right to foreclose, and the foreclosure and any other problems will appear on your credit report.

Debt-elimination schemes - Scammers may claim to be able to "eliminate" your debt by making illegitimate legal arguments that you are not obligated to pay back your mortgage. These scammers will provide you with inaccurate claims about applicable laws and finance, such as that "secret laws" can be used to eliminate debt or that banks do not have the authority to lend money. Do not stop making payments on your mortgage based on their claims.

Is there evidence of mortgage fraud or foreclosure rescue scheme operations within the local jurisdiction?

YES _____ NO _____

Comments: _____

If yes, what is being done to educate the public about the various schemes and legitimate alternatives?

Outcomes of Sales and Rental Practices Examination

What specific steps should the jurisdiction take based on an examination of sales and rental practices including real estate broker practices, e.g. adoption and dissemination of anti-redlining or anti-blockbusting policies establishing reporting requirements for housing providers in the jurisdiction; establishing a stronger public education effort regarding the protection under fair housing laws; other actions?

What steps should the jurisdiction take to promote specific efforts to make brokerage services more inclusive and fully consistent with the requirements and objectives of fair housing laws?

What steps should the jurisdiction take to promote cooperative efforts with other nearby communities to foster open and fair sale and rental practices and services on a metropolitan or other region-wide basis?

What specific actions should the jurisdiction take regarding restrictive covenants, leases, or other restrictive provisions that have been recorded in deeds or appear to operate in single-family housing developments, condominiums or rental complexes?

What steps should the jurisdiction take to educate the public about mortgage schemes and how to avoid them?

Appraisal Practices

Is there a pool of appraisers familiar with all types of housing and markets throughout the jurisdiction?

YES _____ NO _____

Comments: _____

Do lenders use appraisers familiar with evaluating property in older, urban neighborhoods, if appropriate?

YES _____ NO _____

Comments: _____

Does the jurisdiction review the impact of foreclosures on the community and if foreclosures were due to faulty, discriminatory appraisal practices?

YES _____ NO _____

Comments: _____

What specific actions should the jurisdiction direct to the lending and appraisal industries to promote fair lending and appraisal self-monitoring programs, revisions to lending and appraisal policies, procedures and standards, and training of lending institution officers and staff?

Subprime Lending Issues

Has the jurisdiction identified local companies offering subprime loans within the local community?

YES _____ NO _____

Comments: _____

Has the jurisdiction attempted to identify predatory lenders soliciting loans in minority, integrated and low and moderate-income neighborhoods?

YES _____ NO _____

Comments: _____

Have predatory or abusive lending practices resulted in fast foreclosures and vacant, abandoned, or boarded up properties that have an adverse affect on home values?

YES _____ NO _____

Comments: _____

Has the jurisdiction taken action to educate homeowners who are typically the victims of predatory lending – the elderly, women, people of color, and persons with disabilities?

YES _____ NO _____

Comments: _____

What steps has the jurisdiction developed and implemented to foster conventional lending services in under-served neighborhoods?

What is the distribution of full service branches, offices, or ATMs in the jurisdiction?

Are full service branch offices located in low and moderate-income neighborhoods that are racially or ethnically identifiable?

YES _____ NO _____

Comments: _____

Have branch offices been closed in the past five years and what impact has this had on access to credit for people residing in the affected neighborhood?

YES _____ NO _____

Comments: _____

Are ATMs, check cashing, or payday loan stores being used to provide services in minority and low-moderate income neighborhoods?

YES _____ NO _____

Comments: _____

NOTES:

Public Policies and Actions

Should policies and procedures for selecting persons to serve as members on planning boards be changed in order to provide for an overall membership that is more representative of all segments of the community?

YES _____ NO _____

If so, who within the jurisdiction's governing structure is responsible for such selections and what specific steps should be taken to accomplish these changes?

Municipal Services, Revitalization, Employment-Housing Linkage

Does the jurisdiction have a strategy to revitalize or enhance lower income neighborhoods that looks to all possible resources including private investment strategies, such as those developed by banks and other financial institutions to meet the objectives of the Community Reinvestment Act (CRA)?

YES _____ NO _____

Comments: _____

Does the jurisdiction's strategy include a program to encourage expanded lending activity in such areas -- for housing, small business enterprise and job development or expansion -- by requiring reports of lending activity, publishing results and offering deposits of jurisdiction funds -as an incentive to increase lender investment?

YES _____ NO _____

Comments: _____

Does the jurisdiction have a formal CRA strategy that rate lender reinvestment activity, select depository of jurisdiction funds based on these ratings and negotiate specific lending agreements for specific neighborhoods?

YES _____ NO _____

Comments: _____

If the jurisdiction has undertaken a strategy, what are the results and what additional efforts, if any, should be made?

Are there specific groups within the jurisdiction that have more severe problems obtaining adequate housing than other groups in the same income range because of, for example, language barriers, physical or mental disabilities, or other conditions that might affect one's ability to secure safe, decent housing?

YES _____ NO _____

Comments: _____

What financial resources are available to the community, from outside and those within the jurisdiction, to fund low and moderate-income housing and other facilities to revitalize deteriorating neighborhoods (for profit as well as non-profit resources)? Funding could include sources such as HOME, NSP, Ohio Housing Trust Fund, Habitat for Humanity, HUD 202 or 811, Rural Development, etc.

Does the local Housing Plan and Analysis of Impediments substantiate the need for housing for underserved groups such as low- to moderate- income families, individuals with disabilities, SRO, transitional and supportive housing, etc.

YES _____ NO _____

Comments: _____

What types of funding mechanisms have been successful and why?

What might the jurisdiction learn from efforts in other communities and what sources of information are available?

Land-use (Zoning); Site Selection Issues

Were all of the zoning laws, policies and practices within the jurisdiction reviewed to ensure that they are in compliance with federal fair housing laws and applicable judicial decisions?

YES _____ NO _____

Comments: _____

Has the jurisdiction reviewed criteria for placement of group homes and determined that any restrictions do not conflict with the Fair Housing Act and judicial decisions?

YES _____ NO _____

Comments: _____

Are there any occupancy ordinances restricting the number of people in a family when buying a home?

YES _____ NO _____

Comments: _____

Does the jurisdiction define family?

YES _____ NO _____

If yes, does the definition conflict with the Fair Housing Act?

Are there ordinances that criminalize homeless persons; thereby making it difficult if not impossible for a homeless person to qualify for subsidized or other housing?

YES _____ NO _____

Comments: _____

Are there local zoning ordinances and building codes (such as lot size or square footage requirements) that could impact affordability or availability of housing for lower income residents within the jurisdiction?

YES _____ NO _____

Could these regulations be changed to provide for more inclusive housing development plans that provide for lower income housing as a part of housing developed for families with incomes above the lower income levels?

YES _____ NO _____

Comments: _____

Does your local jurisdiction's zoning ordinance set minimum building size requirements that exceed the local housing or health code or is otherwise not based upon explicit health standards?

YES _____ NO _____

Comments: _____

If your jurisdiction has impact fees or other significant fees, does the jurisdiction provider waivers of these fees for affordable housing?

YES _____ NO _____

Comments: _____

Does your jurisdiction use a recent version (i.e., published within the last 5 years, or the last published version) of one of the nationally recognized model building codes?

YES _____ NO _____

Comments- any significant technical amendments?

Does your jurisdiction's zoning ordinance or land use regulations permit manufactured (HUD-Code) housing "as of right" in all residential districts and zoning classifications in which similar site-built housing is permitted, subject to design, density, building size, foundation requirements, and other similar requirements applicable to other housing that will be deemed realty, irrespective of the method of production?

YES _____ NO _____

Comments: _____

Does your jurisdiction provide for expedited permitting and approvals for all affordable housing projects in your community?

YES _____ NO _____

Comments: _____

Does your jurisdiction have an explicit policy that adjusts or waives existing parking requirements for all affordable housing developments?

YES _____ NO _____

Comments: _____

Does your jurisdiction require affordable housing projects to undergo public review or special hearings when the project is otherwise in full compliance with the zoning ordinance and other development regulations?

YES _____ NO _____

Comments: _____

Are there court decisions or settlements which affect the local jurisdiction's zoning ordinances, building codes, or other policies and regulations relating to the provision of housing for lower income households and persons with disabilities?

YES _____ NO _____

Comments: _____

What was the result of these decisions or settlements and have all legal requirements been met?

Has the jurisdiction adopted policies and procedures that promote the placement of new or rehabilitated housing for lower income households (including housing for minorities and families with children; and families or individuals in need of housing accessible to persons with physical disabilities or designed for persons with mental impairments) in the full spectrum of neighborhoods that exist in the jurisdiction's community?

YES _____ NO _____

Comments: _____

Are there concentrations of low and moderate income housing in one or more areas of the local jurisdictions?

YES _____ NO _____

Comments: _____

Are the current policies promoting this pattern, or exerting a neutral effect in the face of such concentrations?

YES _____ NO _____

Comments: _____

What specific steps will the jurisdiction take to strengthen the fair housing aspects of community revitalization activities in poorer neighborhoods through equalization of services and revised displacement policies?

What specific changes should be made in the jurisdiction's zoning or building ordinances to foster the inclusion of housing for lower income households in housing developments for households with higher incomes?

What can the grantee do to change the course of local actions that limit the supply of genuinely open housing?

Tenant Selection; Housing Choices for Subsidized Housing

Is there a pattern, in one or more assisted housing developments, of concentration of tenants by race or ethnicity? Are any local housing developments racially or ethnically identifiable?

YES _____ NO _____

Comments: _____

Do the tenant selection policies and procedures of HUD-assisted multi-family housing providers, including the local Public Housing Authority (PHA) exclude -- or limit the participation of -- persons with disabilities in one or more types of housing developments they manage?

YES _____ NO _____

Comments: _____

If the answer to either of these questions is yes, are the policies and procedures in use consistent with the requirements of federal, State and local law and HUD regulations and guidance?

YES _____ NO _____

Comments: _____

What are these policies and procedures and how do they specifically affect the manner in which applications for housing are treated, rejected or selected as tenants?

Did the local PHA complete the HUD-required Analysis of Impediments to Fair Housing Choice?

YES _____ NO _____

If yes, were the findings consistent with the local jurisdiction's analysis?

Has any local housing provider been found to be in noncompliance with one or more civil rights laws or regulations?

YES _____ NO _____

Comments: _____

If yes, has the provider initiated appropriate corrective actions?

Are there any court lawsuits involving the tenant selection and assignment policies and procedures of any of these providers?

YES _____ NO _____

Comments: _____

If court order(s) relate to leasing practices, what is the status of actions to comply with the orders) and what are the results?

If there are concentrations of racial or ethnic groups in one or more public housing developments, has the PHA undertaken any efforts designed specifically to desegregate these developments (e.g., changes to the PHA's tenant selection and assignment plan; participation in HUD's Public Housing Affirmative Compliance Actions Program)?

YES _____ NO _____

Comments: _____

What is the location pattern of minority and non-minority certificate and voucher holders (by family type) who rent units under the Section 8 Certificate and Voucher Housing Assistance Programs?

Are minorities located primarily in minority neighborhoods and Whites in predominantly white neighborhoods regardless of family type (e.g., large family, small family, and elderly family)?

YES _____ NO _____

Comments: _____

If the answer to the previous questions is yes, what specific steps does the local PHA take to promote increased housing choices for voucher holders?

Can certificate and voucher holders use the certificates and vouchers they receive from the local PHA outside the PHA's geographic jurisdiction?

YES _____ NO _____

Comments: _____

Does the local PHA provide assistance to voucher holders from other PHA's and wish to reside in the local jurisdiction? In what ways?

YES _____ NO _____

Comments: _____

Does the PHA help certificate and voucher holders to find suitable housing especially individuals with disabilities?

YES _____ NO _____

Comments: _____

Does this help include providing up-to-date information to minority and disabled home seekers about various facilities and services available in all areas and neighborhoods with available housing that would meet their needs? Facilities and services include schools, day care, health and welfare and other social services agencies, employment centers, and public transportation.

YES _____ NO _____

Comments: _____

Does the PHA encourage certificate and voucher holders to look for housing in neighborhoods that are not traditional residential areas for the holder in question, and in particular minority certificate or voucher holders?

YES _____ NO _____

Comments: _____

Does the PHA assist the search process in any other ways, such as:

- Calling to confirm the availability of units located in non-traditional neighborhoods?
- Providing a master list of the name and addresses, number of units, etc. of multifamily developments in a metropolitan or other regional area that make units available to Section 8 participants?

YES _____ NO _____

Comments: _____

Does this help include assisting individuals with disabilities in finding suitable housing with accessible design features if needed?

YES _____ NO _____

Comments: _____

Has the local PHA completed its Section 504 assessment of the need and developed a plan for providing such housing opportunities, if an unmet need still exists?

YES _____ NO _____

Comments: _____

What steps does the PHA take to promote the availability of accessible existing housing resources suitable for Section 8 participant families in which one or more persons are mobility impaired?

What steps does the PHA take to promote housing choices for certificate or voucher holders with other types of disabilities?

Does the local PHA participate in the state's Home Choice (or Money Follows the Person) Program to move residents back into the community?

YES _____ NO _____

Comments: _____

Does the PHA apply for additional housing vouchers especially those allocated for specific groups such as individuals with disabilities, veterans, etc.?

YES _____ NO _____

Comments: _____

Does the PHA provide clear information to all participants concerning their housing rights and the steps they should take, including requesting assistance from the PHA in the housing search, if they believe they have encountered housing discrimination?

YES _____ NO _____

Comments: _____

If the jurisdiction's analysis includes review of the leasing practices in assisted housing developments, should changes or new steps be instituted to promote more inclusive tenancy patterns?

YES _____ NO _____

Comments: _____

Should the jurisdiction regularly monitor tenant characteristic data for these developments as an indicator of marketing policies, procedures and practices?

YES _____ NO _____

Comments: _____

In light of efforts currently made by the PHA, and their results, should other steps be initiated to promote greater housing choice for one or more racial or ethnic group or disabled Section 8 participants?

YES _____ NO _____

Comments: _____

Sale of Subsidized Housing and Possible Displacement

If the PHA, or other assisted housing providers (such as private section 8 housing owners) have sold or plan to sell assisted housing projects, what policies and procedures are in place provide alternative housing to displaced tenant households?

Are steps being taken to assure that displaced households are provided a varied choice of replacement housing, in particular so that minority households have an opportunity to select housing outside of areas of minority concentration?

YES _____ NO _____

Comments: _____

Does the jurisdiction have a specific policy with respect to such displacement that it requires housing providers owning assisted housing in the jurisdiction to implement when the sale of such housing occurs?

YES _____ NO _____

Comments: _____

What policies and procedures should be adopted or changed by the jurisdiction, PHA, or other agencies to assure that current tenants in assisted housing projects will be provided opportunities to select replacement housing in a full range of neighborhoods if one or more such projects are to be sold and the tenants displaced?

Who within the jurisdiction's governing structure is responsible for such selections and what specific steps should be taken to accomplish these changes?

Substantial Rehabilitation to Assisted Units

If alterations were undertaken in a project of 15 or more units and the cost of the alterations were 75% or more of the replacement cost of the completed facility –

Was the project designed to be readily accessible to and usable by individuals with disabilities?

YES _____ NO _____

Were a minimum of 5% of the total dwelling units or at least one unit, whichever is greater, made accessible for persons with mobility impairments?

YES _____ NO _____

Were an additional 2% of the total units made accessible for persons with hearing or vision impairments?

YES _____ NO _____

Were the special (and often individualized) needs of tenants with disabilities being taken into consideration during major rehabilitation of assisted housing, especially when temporary relocation is necessary?

YES _____ NO _____

Are reasonable changes made to the temporary relocation rules, policies, practices, or services to accommodate the special needs of persons with disabilities?

YES _____ NO _____

Information Programs

Has a court determined that housing discrimination has occurred in any aspect of the jurisdiction's community development or housing programs, or the programs administered by the PHA or federally-assisted housing in the local jurisdiction?

YES _____ NO _____

Comments: _____

Has HUD made a finding of violation of Title VII, Title VI, Section 504, or regulations implementing these laws, in any federally funded housing or housing related activities in the jurisdiction?

YES _____ NO _____

If yes, has the jurisdiction designed and implemented all actions necessary to address the court determination or HUD finding?

Has the jurisdiction assured that all appropriate officials and employees, including sub-jurisdiction officials and employees and PHA officials and employees, as applicable, are fully aware of the required actions and their responsibilities?

YES _____ NO _____

Comments: _____

What specific types of actions have been undertaken by the jurisdiction, and other entities, such as human relations commissions or other fair housing organizations to provide information to the general public regarding fair housing laws and objectives?

Are these activities confined largely to Fair Housing Month (April) or are there activities going on throughout the calendar year?

YES _____ NO _____

Comments: _____

How effective are the local fair housing activities?

How much does the local jurisdiction and others interested in or responsible for fair housing initiatives know about creative, effective activities in other communities and who to contact for such information?

Should the jurisdiction undertake specific programs to educate its officials and employees regarding the provisions of a particular court determination (such as the Westchester County, NY case) or HUD finding and the actions that are or will be underway to address problems found?

YES _____ NO _____

Comments: _____

How should these training programs be planned and implemented?

Should the jurisdiction, in cooperation with organizations working to promote housing opportunities for particular segments of the community such as racial or ethnic minority groups or persons with specific types of disabilities, develop new outreach, education or information programs and activities?

YES _____ NO _____

If so, what should the specific subject or focus of new efforts be?

What resources are available to support these efforts?

Who should design, carry out and monitor these efforts?

Local Laws and Procedures

Does the jurisdiction have a local fair housing law that provides the same protections as the federal Fair Housing Act?-

YES _____ NO _____

Comments: _____

Has the ordinance or resolution been updated or reviewed for accuracy? At a minimum, does it include the following protected groups: race, color, national origin, ancestry, religion, sex, familial status, disability and military status?

Does the local fair housing law include any additional protected groups?

YES _____ NO _____

Comments: _____

Does the law include local fair housing enforcement? If so, who is responsible to enforce the law? Explain:

Is it the most appropriate structure and process for the jurisdiction and does it conform to HUD requirements and guidelines and other enforcement programs recognized nationally as a model? Is the enforcement program efficient and effective in providing complainants, and respondents, with a fair process for pursuing and settling fair housing complaints?

YES _____ NO _____

Comments: _____

Employment Opportunities

The creation of employment opportunities has a direct impact on fostering fair housing opportunities. Local jurisdictions should take into consideration the fair housing implications when creating employment opportunities.

Barriers to job opportunities should be analyzed. They include:

- **Perception:** Barriers to people seeking the new job opportunities may include a perception that they will not be welcomed into the community, perhaps because of a history of members of the community acting in a threatening manner when people of color moved into the neighborhood.
- **Transportation:** The jurisdiction may not make transportation available to the job site. Jurisdictions using federal subsidies as loans, grants or to provide infrastructure to a site should ensure that low and moderate-income people as well as people of color have equal opportunity to secure employment. The failure to provide transportation or affordable housing to the new site is a barrier to exercising fair housing rights.
- **Affordable Housing:** Many newer jobs are being created in suburban communities where the cost of housing, both new and rental, is too high for low and moderate-income families. Plans to incorporate affordable housing units into new construction developments, reducing square footage requirements for units or increasing density of units per site can reduce the cost of housing and increase the opportunities for both racial and economic integration in the community.

NOTES:

Transportation

Is the jurisdiction using Department of Transportation funds to increase access for low and moderate-income persons, people with disabilities, and people of color to locations where jobs are available and affordable housing exists?

YES _____ NO _____

Comments: _____

If affordable housing does not exist where job opportunities have been created, does the jurisdiction provide affordable transportation?

YES _____ NO _____

Comments: _____

Where mass transportation exists, are incentives provided to employers to subsidize transportation costs?

YES _____ NO _____

Comments: _____

Does the jurisdiction provide early morning and late night bus transportation to locations with employment opportunities?

YES _____ NO _____

Comments: _____

Are bus routes developed and maintained with the needs of families with children and persons with disabilities in mind?

YES _____ NO _____

Comments: _____

Fair Housing Complaint Profile

The jurisdiction should review the number of fair housing complaints received, processed, and resolved annually. Attach a summary that outlines the details of the complaints, including: the number of complaints carried over from year to year; type of complaint (e.g. rental, sales, lending, insurance, zoning, advertising, racially/ethnically motivated violence, etc.); number of complaints processed; remedies secured for the complainant including securing housing, loans, or insurance and the amount of damages recovered.

Have any complaints been filed for areas within the jurisdiction through the Department of Housing and Urban Development (HUD), the Ohio Civil Rights Commission or a substantially equivalent agency?

YES _____ NO _____

Comments: _____

Were there any private lawsuits filed challenging discriminatory practices?

YES _____ NO _____

If so, did the allegations involve any departments under the jurisdiction's control?

Did state or federal agencies bring actions against any individual or corporation doing business in the jurisdiction?

YES _____ NO _____

Comments: _____

Does the jurisdiction do business with any corporation alleged to have violated the fair housing laws?

YES _____ NO _____

Comments: _____

Does the jurisdiction have a policy about doing business with entities found to have violated fair housing laws?

YES _____ NO _____

Comments: _____

Evaluation and Recommendations

After collecting and analyzing data, the jurisdiction must identify any changes needed to correct or overcome impediments to fair housing choice. OCD recommends that jurisdictions solicit public comments on preliminary findings. The methods of public input should be accessible to affected community members, including persons with disabilities and populations with limited English proficiency.

Plan of Action

The Plan of Action should be specific with an outline of actions planned or undertaken to ensure that the program or activities affirmatively further fair housing and otherwise ensure compliance with applicable nondiscrimination provisions. The plan must include a timetable or schedule outlining the resolution of identified problems or impediments. The plan should include both short-term and long-term goals with specific proposed dates for actions to be taken.

Signature Page

- Chief Elected Official
- CDBG Program Administrator
- Chairperson, Citizen Advisory Group/Task Force
- Housing Program Administrator

NOTE: Because the fair housing and equal opportunity obligations are ongoing, approval of an AI or Action Plan, or receipt of Federal financial assistance from OCD, does not constitute a determination of compliance with the applicable legal obligations.

PY 2016 FAIR HOUSING ISSUES, RECOMMENDATIONS AND TIME LINES

(Updated _____)

ISSUES OR IMPEDIMENTS	RECOMMENDATIONS	TIMELINE FOR IMPLEMENTATION/OUTCOMES

COMMENTS: _____

Appendix 1



A Primer on **Fair Housing Law**

Introduction

Congress enacted the Fair Housing Act in 1968. In 1988 Congress amended the Act to include protection for persons with disabilities and families with children and to expand enforcement mechanisms. Nonetheless, despite the presence of a strong federal law and many state laws of substantial equivalency, housing discrimination continues to be one of the major social problems in the United States. Housing discrimination occurs because of the actions of individual landlords, sellers, and lenders and because of systemic practices that occur in the market place through both governmental and private action. Because so much housing discrimination occurs as individual acts of discrimination, it is not easily remedied by a small number of class action lawsuits that seek structural change. While lawsuits dealing with systemic problems are often necessary and helpful, change is more likely to come only after the filing of an endless number of complaints at federal, state, and local agencies charged with the responsibilities of enforcing fair housing laws against individual landlords, sellers, appraisers, advertising media, insurers, developers, managers, sales people, industry organizations and real estate brokers. For this reason, it is important that individual practitioners be knowledgeable about the fair housing laws so that they can represent both complainants and respondents who might be involved in these actions.

A wide variety of judicial and administrative remedies are available to persons who are victims of housing discrimination. Lawyers need to be able to advise clients as to how best to proceed in a fair housing action. Lawyers also need to be able to counsel those who develop, manage, lease, or sell real estate or who provide service with respect to these transactions about what the laws requires of them.

Fair housing practice is no more complicated than any other area of the law, and lawyers should not hesitate to become involved in representing persons in fair housing actions. The amount of damage awards continues to increase in fair housing. Attorney's fees are available to the prevailing party in court or at administrative agencies under the federal statutes and most state and local laws. The ability to obtain fees provides incentive for lawyers to take on cases for clients who are victims of discrimination. In many areas of the country, fair housing centers are available to assist the attorney in investigating and preparing the case.

This *Primer* is revised periodically so that it reflects the most recent developments in fair housing law and practice. It is intended to outline the broad contours of fair housing law to the attorney who is new to this area. Treatises that are more comprehensive are also available to the practitioner. We especially recommend Schwemm, ***Housing Discrimination: Law and Litigation*** (West Group 1990) and Relman, ***Housing Discrimination Practice Manual*** (West Group 1992). Both of these treatises have yearly supplements that reflect current changes in the law.

Attorneys who need additional help in developing strategies when representing the victims of housing discrimination may also contact The John Marshall Law School Fair Housing Legal Support Center & Clinic.

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I. Discrimination Prohibited by Federal, State, and Local Fair Housing Statutes and Ordinances

The Fair Housing Act prohibits discrimination against certain protected classes in residential dwellings. The Act further requires that all federal executive departments and agencies administer their programs and activities relating to housing and urban development in a manner affirmatively to further fair housing 42 U.S.C. §3608(d). This duty also applies to state and local recipients of federal funds. *Otero v. New York City Housing Authority*, 354 F. Supp. 941 (S.D.N.Y.), *aff'd in part and rev'd in part*, 484 F.2d 1122 (2d Cir. 1973).

The duty to affirmatively further fair housing mandates that the HUD Secretary when administering programs has “an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply.” *Darst-Webbe Tenant Assoc. v. St. Louis Housing Authority*, 339 F.3d 702, 713 (8th Cir. 2003). And see *Dean v. Martinez* (D.Md. 2004), FH/FL ¶16,807.

HUD has published a proposed rule that implements the affirmative duty to further fair housing. 78 Fed. Reg. 43710 (July 19, 2013). As proposed, the rule directs HUD program recipients “to take steps proactively to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities for all.” Funding recipients must prepare an Assessment of Fair Housing. HUD will provide program recipients with data to assess their needs and to identify their goals and priorities in the Assessment. In addition to incorporating existing processes, the regulation requires community participation in preparing the Assessment.

A. CLASSES PROTECTED

The Federal Fair Housing Act prohibits discrimination in housing because of race, color, religion, sex, national origin, familial status, or disability. Many state or local laws and ordinances prohibit discrimination based on marital status, sexual orientation [preference], source of income, military discharge, or age. Some state laws and local ordinances define source of income specifically to include holders of Section 8 vouchers. See, e.g., *Godinez v. Sullivan-Lackey*, 815 N.E.2d 822 (Ill. App. 2003); *Montgomery Cnty v. Genmont Hills Ass'n*, 936 A.2d 325 (Md. 2007). These are not classifications protected under the Fair Housing Act. Nonetheless, a federal action can be brought if the discrimination is also based in part upon another classification prohibited in the Fair Housing Act. Thus, a rule that prohibits single women, but not single males or families, from renting in a building will be illegal as sex discrimination but not as marital status discrimination under federal law. *Morehead v. Lewis*, 432 F.Supp. 674 (N.D.Ill. 1977), *aff'd without opinion*, 594 F.2d 867 (7th Cir. 1979).

1. Race, Color, or National Origin

The Fair Housing Act broadly prohibits discrimination based on race, color, or national origin. Color generally refers to skin tone. Consequently, discrimination against dark skinned but not light skinned Hispanics is illegal. National origin generally refers to the country of a person's ancestry.

Unlike the Fair Housing Act, relief under the Civil Rights Act of 1866, 42 U.S.C. §§1981 and 1982, is limited to cases involving racial discrimination. However, the Supreme

Court has broadly construed what is meant by racial discrimination under the 1866 Civil Rights Act and held that discrimination against Arabs in *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), and against Jews in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), constituted racial discrimination under the 1866 Civil Rights Act. A number of cases have held that Hispanic persons can sue for racial discrimination under the 1866 Act. See *Aponte v. National Steel Service Center*, 500 F.Supp. 198 (N.D.Ill. 1980).

The Supreme Court held in 1968 that because the 1866 Civil Rights Act is grounded in the Thirteenth Amendment, it can reach private conduct. See *Jones v. Alfred Mayer*, 392 U.S. 407 (1968). The 1866 Act is a useful tool because it does not contain many of the exemptions found in the Fair Housing Act.

2. Sex

Sex discrimination is expressly illegal under the Fair Housing Act and is subject to the same degree of protection as is given to racial and other prohibited discrimination under the Act.

Sex discrimination has been interpreted to include sexual harassment. The United States Supreme Court first recognized that sexual harassment was a form of discrimination under Title VII of the 1964 Civil Rights Act, which prohibits discrimination in employment, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Sexual harassment occurs when there is deliberate or repeated unsolicited verbal comments, gestures, or physical contact that makes for an offensive environment or when sexual favors are sought as a “quid pro quo” for housing. *Shellhamer v. Lewallen*, FH/FL ¶15,472 (W.D.Ohio 1983), *aff’d without opinion*, 770 F.2d 167 (6th Cir. 1985); *Grieger v. Sheets*, 689 F.Supp. 835 (N.D.Ill. 1988); *Krueger v. HUD*, 115 F.3d 487 (7th Cir. 1997). One instance of sexual harassment action may not be sufficiently egregious to create a hostile environment. *DiCenso v. HUD*, 96 F.3d 1004 (7th Cir. 1996). Some plaintiffs have recovered large damage awards in sexual harassment cases in recent years.

Actions taken by a landlord against a victim of domestic violence have a disproportionate effect on women and possibly other protected classes. *Bouley v. Young-Sabourin*, 394 F. Supp.2d 675, 678 (D.Vt. 2005). HUD has offered guidance to victims of domestic violence who face eviction or loss of housing because of disturbances created by household members, guests, or other persons or because the victim has called the police to report abuses. Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHA) and the Violence Against Women Act (VAWA) (Feb. 9, 2011). <http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf>.

Discrimination on the basis of sexual orientation or gender identity is not explicitly prohibited by the Fair Housing Act. Nonetheless, discrimination against lesbian, gay, bisexual, and transgender (LGBT) individuals in housing assisted by HUD or subject to a mortgage insured by the Federal Housing Administration is prohibited by HUD regulation. The regulation also prohibits inquiries about sexual orientation or gender identity. 24 CFR §5.100 *et seq.*, 77 Fed. Reg. 5662 (Feb. 3, 2012). Recent societal and legal advances in protecting LGBT individuals are likely to prompt Congress to provide explicit protection to this class in the Fair Housing Act in the future.

3. Religion

Religious discrimination is prohibited under the Fair Housing Act, except in housing operated by religious organizations. Section 3607(a). The Fair Housing Act does not require housing providers to reasonably accommodate persons because of their religion; however, intentional actions taken against persons because of their religion are prohibited. For instance, a rule prohibiting persons from displaying symbols on their doors in a condominium building in order to restrict the display of religious symbols, has been found to violate the Fair Housing Act. *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009).

In *Knutze v. Nelson*, 617 F.Supp. 977 (D.Colo. 1985), *aff'd*, 815 F.2d 1343 (10th Cir. 1987), it was held that an application form for admission to a federally financed housing project that requested information on church affiliation did not violate the Fair Housing Act because completion of the question was not a prerequisite for admission and because the information was sought for a reasonable secular purpose, namely, to allow the managers of the project to notify a tenant's clergyman in the event of death or serious illness. In *Hack v. Yale College*, 16 F. Supp. 183 (D.Conn. 1998), the Court held that the Fair Housing Act did not require a college to reasonably accommodate the religious beliefs of students who objected on religious grounds to living in co-educational residence halls. The Court noted that the duty to reasonably accommodate pertains only to persons with disabilities.

The Second Circuit Court of Appeals has held that the Fair Housing Act was violated when a village was incorporated for the purpose of enacting zoning to restrict the operation of home synagogues by Hasidic and Orthodox residents. *Le Blanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir. 1995).

Religion has been raised as a defense to housing discrimination claims in a number of cases, especially where state laws prohibit discrimination based on marital status. In a leading case, the California Supreme Court held that applying that state's anti-discrimination law to a landlord who refused to rent to an unmarried couple because of religious reasons did not violate the First Amendment. *Smith v. Fair Employment & Housing Commission*, P.2d 909 (Cal. 1996), *cert. denied*, 117 S.Ct. 2531 (1997). The Court of Appeals for the Ninth Circuit dismissed a challenge to the Alaska statute on the ground that the case was not ripe because the law had not yet been enforced against the plaintiff landlords. *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000).

4. Familial Status

The 1988 Amendments to the Fair Housing Act added familial status as a proscribed type of discrimination. Families are defined as one or more individuals (who have not attained the age of 18 years) who are domiciled with a parent or other person having custody of them or who are domiciled with a person designated by the parent or other person having such custody with the written permission of such parent or other person. Section 3602(K). "Families" also include pregnant women or persons in the process of adopting a minor child. The Seventh Circuit has held that persons who are evicted because of their desire to become foster parents have standing under the Act. *Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991).

The Act states that reasonable local, state, or federal regulations on the maximum number of occupants permitted to occupy a dwelling are lawful so long as they do not discriminate against a class protected by the Act. Section 3607(b). A municipality that

imposes an occupancy standard carries the burden of establishing that it is reasonable. *Fair Housing Advocates v. City of Richmond Heights*, 209 F.3d 626 (6th Cir. 2000). The Act does not refer to restrictions on the number of occupants imposed by a private landlord or property developer or manager; however, the HUD regulations indicate that HUD will accept such restrictions, but only so far as they are reasonable. 24 C.F.R. Ch. 1, Subch A, App. 1, §100.10.

There is considerable controversy about what is a “reasonable” occupancy standard under the Amendments. HUD continues to follow the so-called Keating Memo that two persons per bedroom is presumptively reasonable. The United States Supreme Court has held that a municipality cannot use the “reasonable occupancy standard” exemption to zone out a group home. *City of Edmonds v. Oxford House, Inc.*, 115 S.Ct. 1776 (1995).

The Act specifically exempts “housing for older persons” from the prohibitions against familial discrimination, but not other classes of discrimination. Section 3607(b)(2). This exemption imposes specific requirements and merely promulgating a rule that reserves the property for older persons may not result in the property being exempt. In *Seniors Civil Liberties Ass’n. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992), the Court rejected a broad constitutional attack by senior citizens on the familial discrimination provisions of the Act. The senior citizens had argued that the exemptions were vague and that the Act violated their freedom of association and of privacy and their rights to equal protection of the law and due process and that it took away their contract and property rights without just compensation.

The HUD Regulations are clear that families with children may not be segregated from other families. 24 C.F.R. §100.70 (c) (4). Nor, may children be restricted from using facilities or services unless the restriction furthers reasonable health and safety concerns that are narrowly tailored to meet their objective. Nothing in the Act requires landlords to provide special facilities for children. However, a landlord may not require a special security deposit for families with children and may not refuse to rent because children are presumed to damage property. A landlord can check the rental history of all tenants.

5. Handicap

The 1988 Amendments extend the Fair Housing Act to protect disabled persons. The Act broadly defines a “handicap” in Section 3602(h) 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, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)).

The Amendments adopted the same definition of handicap as used in the Rehabilitation Act of 1973. 29 U.S.C. §706(8)(b). Whether the Supreme Court’s restrictive ruling under the Americans with Disabilities Act, 42 U.S.C. §12102(2), that a person whose impairment can be corrected by medication or corrective devices is not disabled is applicable under the Fair Housing Act is as yet undecided. *Sutton v. United Airlines*, 119 S.Ct. 2139 (1999); *Murphy v. United Parcel Service*, 119 S.Ct. 2133 (1999). Similarly, the Supreme Court has held that a disability must have a major impact on the person’s

ability to perform activities that are of “central importance to daily life” and must be permanent or long-term. *Toyota Motor Mfg. V. Williams*, 534 U.S. 184 (2002).

A requirement that singles out persons with disabilities for special treatment under the Act is illegal. In *Cason v. Rochester Housing Authority*, 748 F.Supp. 1002 (W.D.N.Y. 1990), the Court held that certain public housing regulations that required handicapped housing applicants to prove their ability to live independently violated the Fair Housing Act. The court further held that it was unlawful for the housing authority to inquire into the ability of handicapped persons to live independently absent evidence that the inability created a direct threat to health or the safety of others or would result in physical damage to property.

Section 3604(f)(9) provides that a dwelling not 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 damages to the property of others.” However, housing providers cannot broadly stereotype disabled persons but must make an individualized decision on whether the person poses a risk of harm or is dangerous. *Wirtz Realty Corp. v. Freund* (Ill. App. 1999) FH/FL ¶18,262; *In re J.W.*, 672 A.2d 199 (N.J. App. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995).

B. PROPERTY COVERED

The Civil Rights Act of 1866 (42 U.S.C. §§1981 and 1982) is extremely broad in its coverage. Section 1981 protects the right of all persons to make and enforce contracts free from racial discrimination. Section 1982 protects the rights of citizens to inherit, purchase, lease, sell, hold, and convey real and personal property. The Act covers commercial as well as residential real estate transactions. The Act also covers both public and private discrimination. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The Civil Rights Act of 1866 is limited, however, to cases of racial discrimination (although some forms of ethnic or national origin discrimination may count as “racial” discrimination under the Act), and Section 1982 on its face protects United States citizens and not persons generally.

The Fair Housing Act (Title VIII, of the Civil Rights Act of 1968, as amended, 42 U.S.C. §3603) applies only to “dwellings” and not to real estate in general, as does the Civil Rights Act of 1866. The Fair Housing Act, Section 802 (42 U.S.C.3602 (b) Definitions) defines a “dwelling” as:

“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.

A “dwelling” may be either privately or publicly owned. The term “dwelling” has been broadly construed by the courts and can include any place where a person resides. In *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D.Va. 1975), the court defined a “dwelling” as “a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.” The *Hughes* definition is frequently quoted in the courts. “Dwellings” under the Act include vacation homes, residential hotels, migrant housing, dormitories, nursing homes, group homes, and homeless shelters where persons reside for extended periods of time.

A shelter for the homeless was found not to be a “dwelling” when guests were allowed to stay no more than 17 days and where the occupants were not given the same bed each night, and could not remain or leave their possessions in the shelter during the day. *Intermountain Fair Housing Council v. Boise Rescue Mission*, 655 F.Supp.2d 1150 (D.Id. 2009). This case emphasizes how important the particular facts are to determine a “dwelling.”

The Fair Housing Act contains several exemptions. (These exemptions are not applicable to actions filed for racial discrimination under the Civil Rights Act of 1866, which again emphasizes why that earlier statute continues to be extremely important in the fight against housing discrimination.) Section 3603(b)(1) exempts from coverage certain sales or rentals by an owner of a single-family house, and Section 3603(b)(2) also exempts units in an owner occupied building having no more than four families living independently of each other. These exemptions are construed very narrowly by the courts and do not apply to any discriminatory notice, statement, or advertisement with respect to a sale or rental of property otherwise exempted under 42 U.S.C. §3603(b). Section 3607(a) allows religious organizations to limit or give preference to persons of the same religion in noncommercial dwellings (so long as race is not a factor) and allows private clubs to provide noncommercial lodgings for their members.

The Act itself does not exempt shared housing units from its coverage. However, a decision of the Ninth Circuit Court of Appeals has held that the Act does not extend to “shared living arrangements.” In *Fair Housing Council v. roommates.com*, 666 F.3d 1216, 1222 (9th Cir. 2012), the Court held that persons who were seeking tenants for shared living arrangements could advertise their preferences in an overtly discriminatory manner. This decision is inconsistent with the requirement that the Act be read broadly and the exemptions narrowly.

The 1988 Amendments to the Fair Housing Act also exempt “housing for older persons” from the prohibitions against familial discrimination, but the exemption does not apply when other types of discrimination are alleged. Hence, senior facilities cannot discriminate on the basis of race, national origin, sex, religion, and especially handicap. Section 3607(b)(2) defines “housing for older persons” as housing:

- (A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or
- (B) intended for, and solely occupied by, persons 62 years of age or older; or
- (C) intended and operated for occupancy by persons 55 years of age or older and—
 - (i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
 - (ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
 - (iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall—
 - (l) provide for verification by reliable surveys and affidavits; and

- (II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

Subsection (C) was changed by the Housing for Older Persons Act of 1995 to remove some of the uncertainties created by a provision in the 1988 Amendments that required the “existence of significant facilities and services specifically designed to meet the physical and social needs of older persons.” The 1995 Amendments also provide for a good faith defense in an action for monetary damages under this subsection.

The 1988 Amendments contained a grandfather clause that provided that as to categories B and C, will qualify as “housing for older persons” even if there were persons in the units as of the date of the enactment of the Act who did not meet the age requirements, or if there were unoccupied units, so long as new occupants are required to meet the age requirements of these sections.

State and local laws and ordinances may or may not contain similar exemptions and should be carefully considered when deciding if fair housing rights have been violated.

C. PLAINTIFFS AND DEFENDANTS

Anyone injured by a discriminatory practice prohibited by the Fair Housing Act has standing to file a complaint under Sections 3610 and 3613. Standing under the Fair Housing Act extends as far as the Constitution permits under Article III. Thus, in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Supreme Court allowed white tenants in a building that excluded minorities to sue to enforce the Fair Housing Act on the ground that the management of the housing project affected “the very quality of their daily lives.”

It is not clear whether the same broad standing that applies under the Fair Housing Act will apply under the 1866 Civil Rights Act. But the United States Supreme Court has upheld the standing of a white plaintiff to sue under Section 1982 in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). The white plaintiff was directly injured when he was expelled from membership in a community recreational organization because he had rented property and assigned his membership rights to an African-American. And see *Walker v. Pointer*, 304 F.Supp. 56 (N.D.Tex. 1969), which held that white tenants who were evicted because they entertained black friends, could sue under Section 1982.

In *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979), the Supreme Court interpreted the Fair Housing Act to uphold the standing of neighborhood residents and a village who sued a realtor that was alleged to have injured the stability of the village by its racial “steering” policies. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court held that “testers” who are given false information about the availability of housing have standing, and that a fair housing organization that claims that it had “to divert resources” to fight the discrimination alleged against the defendants and that its mission to secure equal access to housing was “frustrated” by the defendants has standing as well. Some lower courts have narrowly interpreted *Havens* to hold that funds expended in litigation are not considered a “diversion of resources.”

Although the United States Supreme Court upheld the standing of fair housing organizations and other advocacy groups in general to bring actions under the Fair Housing Act in *Havens*, it did not, nor could it dispense with the requirement that the

organization allege some injury in fact caused by the defendant that can be remedied by the courts, which is the basic minimum required under the Constitution for the federal courts to exercise jurisdiction. Therefore, fair housing organizations and others must always be specific in expressing the precise injury they have suffered as a result of the defendant's wrongful conduct. Failure to do so may result in the dismissal of the action. (Later in a motion for summary judgment the plaintiff may be required to come forward with evidence to verify the injury alleged, and, of course, at trial an injured party must be prepared to present evidence to support an award of damages.)

Anyone who has engaged in any act of discrimination prohibited by the fair housing laws can be sued. The courts have applied general principles of agency in accessing responsibility under the fair housing laws. *Meyer v. Holley*, 123 S.Ct. 824 (2003). A principal may be liable even if the agent was instructed in writing not to discriminate. *Walker v. Crigler*, 976 F.2d 900, 903-05 (4th Cir. 1992).

Discriminatory admissions and other statements made by an agent, in addition to his acts and conduct, are also attributable to his principal. See e.g., *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973); *Williamson v. Hampton Management Co.*, 339 F.Supp. 1146 (N.D.Ill. 1972). Such statements are persuasive evidence, since "most persons will not admit publicly that they entertain any bias or prejudice against members of the Negro race." *United States v. Real Estate Development Corp.*, 347 F.Supp. 776, 783 (N.D.Miss. 1972); *Isard v. Arndt*, 483 F.Supp. 261 (E.D.Wis. 1980).

Where an agent discriminates pursuant to direct instructions from his or her principal, both the principal and the agent are liable. *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1120-1121 (7th Cir. 1974). "Following orders" is not a defense. The correlation of this principle is that an employee who is discharged for refusing to discriminate has a cause of action against his former employer. See 42 U.S.C. §3617; *Smith v. Stechel*, 510 F.2d 1162 (9th Cir. 1975).

Government officials can likewise be sued for acts performed in their official capacities, but their liability for damages may be limited by the doctrine of official immunity. See *Yeshiva Chofetz Chain Radim, Inc. v. Wallace*, 98 F.Supp.2d 347 (S.D.N.Y. 2000) (village building inspector and mayor found not to have absolute immunity in fair housing action). Local governmental entities can be sued. See *People Helpers, Inc. v. City of Richmond*, 789 F.Supp. 725, 733 (E.D.Va. 1992); *Smith & Lee Associates v. City of Taylor, Mich.*, 13 F.3d 920, 932 (6th Cir. 1993); 102 F.3d 781, 797-98 (6th Cir. 1996).

D. PROHIBITED PRACTICES

The Fair Housing Act prohibits a number of practices.

1. Refusals to Make Housing Available

The provisions of the Fair Housing Act broadly prohibit all refusals to sell or rent. Section 3604(a) makes it unlawful "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 because of race, color, religion, sex, familial status, or national origin," or because of handicap under 3604(f). It is also illegal to discriminate in the terms, conditions, or privileges of sale or rental or in the provision of services and facilities (Section 3604(b)), to advertise in a discriminatory manner (Section 3604(c)), or to misrepresent the availability of a dwelling (Section 3604(d)).

Under the Fair Housing Act it is illegal to put more burdensome application procedures on blacks than on whites. *United States v. Youritan Construction Co.*, 370 F.Supp. 643 (N.D.Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975); *Davis v. Mansards*, 597 F.Supp. 334, 343 (N.D.Ind. 1984). Similarly, the failure to provide the same service for black tenants as was formerly provided to white tenants may violate the law. *Concerned Tenants Ass'n. of Indian Trails Apts. v. Indian Trails Apts.*, 496 F.Supp. 522 (N.D.Ill. 1980).

It is unlawful to publish any discriminatory notice, statement of advertisement in regards to housing. This subsection applies even if the property is otherwise exempt under another provision of the statute. Discrimination is determined by the context and the actual impression it creates on the reader or listener. The use of human models in advertising to suggest to the reader that a particular race is preferred in a housing project may also violate the law. *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991), *cert. denied*, 502 U.S. 821 (1991).

While the Fair Housing Act contains no exemptions to the prohibition of discriminatory advertisements, the Seventh Circuit Court of Appeals has held that the Internet Decency Act gives immunity to website operators who merely provide a forum for housing providers to post advertisements that are illegal under the Fair Housing Act. *Chicago Lawyers' Committee v. Craigslist*, 519 F.3d 666 (7th Cir. 2008). However, this immunity does not apply to an operator that designs a website that forces subscribers to divulge protected characteristics and discriminatory preferences. *Fair Housing Council v. roommates.com*, 521 F.3d 1157 (9th Cir. 2007). The Ninth Circuit opinion was limited by a subsequent decision in the same case that ruled that it was not illegal to post discriminatory advertisement for what the Court termed "shared living arrangements." *Fair Housing Council v. roommates.com*, 666 F.3d 1216, 1222 (9th Cir. 2012)

Restrictive covenants based on race have been unenforceable in the courts under Section 1982 since the landmark Supreme Court decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Because it is virtually impossible to acquire property without insurance, discrimination by insurance companies in refusing to service certain neighborhoods because of a protected class or refusal to sell to a member of a protected class or on equal terms will violate 3604(a). *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

2. Refusals to Make Reasonable Accommodation and Modifications for Persons with Disabilities

The Act specifically requires a landlord or seller, when requested, to make "reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford [handicapped persons] equal opportunity to use and enjoy a dwelling." Section 3604(f)(3)(b). The failure to accommodate is an independent basis for liability under the Fair Housing Act. *Wisconsin Community Services v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006).

The Supreme Court has held in other contexts that an accommodation is not reasonable if it imposes "undue financial or administrative burdens." *Southeastern Comm. College v. Davis*, 442 U.S. 397 (1979); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

Examples of what have been held to be reasonable accommodations are allowing a clinically depressed person to have a support pet despite a "no pet" policy, providing a convenient parking space for a mobility impaired person even when it requires moving that person to the head of a waiting list, and waiving a "guest" fee if a disabled person needs live-in nursing care.

Even if an accommodation would be costly or burdensome, Section 3604(f)(3)(A) states that a landlord or seller cannot refuse “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[.]” See *HUD v. Ocean Sands, Inc.*, FH/FL ¶125,055 (HUD ALJ 1993), where a condominium association was held to have violated the Fair Housing Act when it refused to allow a disabled resident to install a wheelchair lift and walkways and make other minor changes so that the unit would be accessible and to allow him to park a golf cart near his apartment. The language of Section 3604(F)(3)(A) (modifications) differs from the language of 3604(F)(3)(B). Reasonable accommodations must be “necessary to afford such person equal opportunity to use and enjoy a dwelling, whereas reasonable modifications need only to be “necessary to afford such person full enjoyment of the premises.” This is a much broader standard, and can be explained, perhaps, by the fact that the person seeking the modification pays for it and there is less probability that there will be an undue financial or administrative burden on the housing provider.

The Act contemplates that most questions concerning reasonable accommodations and modifications will be resolved through good faith bargaining between the housing provider and the tenant. *Adam v. Linn-Benton Housing Authority*, 147 F.Supp.2d 1044 (D.Ore. 2001).

3. Accessible New Multi-Family Construction

The Act also requires that certain multifamily dwellings designed or constructed for first occupancy after March 31, 1991, meet defined design and construction requirements to make them accessible to handicapped persons. Section 3604(f)(3)(c). The requirements are minimal and can be met with little or no additional cost if done at the time of construction. They are carefully spelled out in HUD’s *Fair Housing Act Design Manual*, which is available from HUD. Compliance with the manual will be considered by HUD to be compliance with the requirements of the Act.

Anyone responsible for the design or construction of multifamily housing, including architects, developers, and contractors, can be held liable for failure to comply with the Act’s requirements. *Baltimore Neighborhoods Inc. v. Rommel Builders, Inc.*, 3 F.Supp.2d 661 (D.Md. 1998). Condominium associations may be named as defendants if their presence is necessary to allow the common areas to be retrofitted, even if the condominium association was not in existence at the time the premises were designed or constructed. *Baltimore Neighborhoods Inc. v. Rommel Builders, Inc.*, *supra*. A builder, developer, or architect found guilty of violating the accessibility requirements of the Act can be ordered to retrofit the buildings and units to the extent possible or to establish an escrow account so owners who have already purchased units can retrofit the units in the future. *HUD (Will Grundy Center for Independent Living) v. Perland Corp.*, FH/FL ¶125,136 (HUD ALJ 3/30/98).

Other laws such as the Rehabilitation Act of 1973, 29 U.S.C. §794(a), and the Americans with Disabilities Act of 1990, 42 U.S.C. §12132, should also be consulted if the building has design defects and if it is either a public building or is publicly subsidized.

4. Panic Peddling/Blockbusting

Panic peddling and blockbusting are efforts to induce white homeowners to sell their homes—generally at a reduced price—by telling them that other whites are leaving

and that the neighborhood will soon be virtually all black. These practices are illegal under Section 3604(e), and courts have rejected the argument that 3604(e) places an unconstitutional prior restraint on the right to free speech. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973).

5. Racial Steering

Racial steering is where a real estate agent steers white persons to one community or area and minorities to another community or area. This practice is specifically prohibited under Section 3604(e) and was recognized as illegal by the Supreme Court in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

The Seventh Circuit Court of Appeals has held the proof of a discriminatory motive is required in a steering case. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990). A broker may show he was serving customer preferences so long as the broker was not encouraging those preferences. Thus, evidence that black testers were shown homes in certain neighborhoods and white testers in other neighborhoods will support but will not compel an inference of illegal steering.

6. Exclusionary Zoning

Zoning that operates to exclude a class protected under the law may be illegal. If the attack is grounded on the Constitution, the plaintiff will have the burden of proving purposeful discrimination as defined in the Supreme Court's opinion in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

However, the lower courts have required a lesser standard when the suit is filed under the Fair Housing Act. On remand, in the *Arlington Heights* case, the Seventh Circuit Court of Appeals held that a significant discriminatory effect could establish a violation of the Fair Housing Act. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). In a leading case, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988), the Court held that exclusionary zoning could violate the Fair Housing Act either by a showing that it had a disparate impact on a protected class or by showing that it perpetuated segregation in the community. Although the Supreme Court has never squarely ruled on the issue, virtually every federal court of appeals has applied some aspect of the impact test to exclusionary zoning. HUD has recently adopted a regulation accepting the disparate impact theory and setting a national standard for defining a disparate impact. 78 Fed. Reg. 11460 (Feb. 15, 2013).

The "Not in My Back Yard" (NIMBY) factor is an unfortunate reality. With the adoption of the 1988 amendments, group homes for the disabled received protection under the Fair Housing Act. Although one court of appeals has held that zoning against persons with disabilities is to be reviewed according to the more deferential rational basis standard used in equal protection cases, *Familystyle of St. Paul v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991), the Act itself does not distinguish between persons with disabilities and other classes protected by the Act, and the same standard of review should be applied to all classes under the Fair Housing Act. In *Familystyle*, the Court of Appeals upheld an ordinance that required the dispersal of group homes, but other courts have held that such laws unfairly single out group homes for persons with disabilities and unlawfully impose special restrictions on them not applicable to other housing in the community. *Larkin v. Michigan*, 89 F.3d 289 (6th Cir. 1996).

Whether a municipality must reasonably accommodate persons with disabilities under Section 3604(f)(3)(B) when enforcing otherwise neutral zoning restrictions was left open by the Supreme Court in *City of Edmonds v. Oxford Housing, Inc.*, 115 S.Ct. 1776 (1995). Lower courts have ruled that they must do so. For instance, in *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996), the Court of Appeals held that communities cannot isolate or exclude group homes through unnecessary zoning restrictions. In *Smith Lee v. Taylor*, 102 F.3d 781 (6th Cir. 1996), the Court held that as a reasonable accommodation a city must allow an occupancy of nine, rather than six under the city code, because nine residents were necessary to allow the home to operate profitably and the additional three persons would not fundamentally alter the neighborhood. However, in *Bryant Woods Inn v. Howard County*, 124 F.3d 597 (4th Cir. 1997), the Court refused to allow an expansion from eight to fifteen persons because it was not shown to be necessary nor reasonable.

7. Racial Maintenance Policies

There is no question that once a defendant has been found guilty of discrimination the defendant can be required affirmatively to recruit minorities and, as a temporary measure, to establish a goal for minority-group occupants in order to achieve a proper racial or minority balance. See *Jaimes v. Lucas Metropolitan Housing Authority*, 833 F.2d 1203 (6th Cir. 1987). Cf. *Swan v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). In *Young v. Pierce*, 685 F.Supp. 975 (E.D.Tex. 1982), the Court ordered HUD to implement an affirmative action tenant assignment program, including elective transfers of applicants and tenants from traditional projects to other forms of housing, to rectify the effects of past discriminatory housing practices.

However, in *Walker v. HUD*, 169 F.3d 973 (5th Cir. 1999), the Fifth Circuit Court of Appeals held that it was unconstitutional for a district court to require the Dallas Housing Authority as a remedy for past discriminatory practices to develop family public housing in predominantly white areas of the city. The Court ruled that the race-conscious order was not narrowly tailored to remedy the effects of past discrimination and segregation. While acknowledging that there was a compelling justification to end segregation in public housing in the city, the Court was not convinced that a racial standard was the only way to ensure that desegregation was accomplished.

Whether a landlord or a municipality that has never been found guilty of discrimination may impose a minority-group occupancy goal in order to maintain a racially balanced community is less clear. Cf. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Adarand Construction, Inc. v. Peña*, 115 S.Ct. 2097 (1995). The justification for racial occupancy quotas is based on the so-called “tipping point” phenomenon. Studies generally indicate that depending upon the situation, when a certain number of blacks move into a previously all-white area, whites will flee and the area will become all-black. These studies indicate that tipping points generally fall in the range of 25 percent to 60 percent black. See Bell, *Race, Racism, and American Law* §8.10.2 (1980). The argument therefore is that if a racially integrated neighborhood is a good end, landlords or municipalities should be allowed to establish either formal or informal “quotas” or take other measures to prevent tipping or maintain a proper racial balance. See Goodwin, *The Oak Park Strategy* (1979). Cf. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

In *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1140 (2d Cir. 1973), the Court stated that it would uphold a plan to reserve certain apartments to a certain

racial group if it could be shown that the action was “essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community.” However, in *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir.), cert. denied, 488 U.S. 946 (1988), and *United States v. Charlottesville Redevelopment and Housing Authority*, 718 F.Supp. 461 (W.D.Va. 1989), the Courts held that a “quota” system designed to achieve racial integration was illegal. The Court in *Starrett* distinguished *Otero* because *Starrett City* imposed a permanent quota, whereas *Otero* involved only the initial rental of units in a new building and therefore had a less discriminatory impact.

In *South Suburban Housing Center v. Board of Realtors*, 935 F.2d 868, 884 (7th Cir. 1991), cert. denied, 112 S.Ct. 971 (1992), the Court of Appeals upheld a plan to promote a racial balance through special efforts to interest white buyers in property in a suburban community that had a large black population. The plan included directions to realtors to advertise and distribute information so as to attract potential white buyers to the community. The Court upheld the plan on the ground that the record contained no cases of particular adversely affected black home-buyers or statistical evidence that would indicate intentional invidious discrimination.

8. Financial and Brokerage Service Discrimination

Section 3605 provides that it is unlawful to discriminate in the making of loans or in providing other financial assistance in residential real estate transactions.

Any type of discrimination in the lending of money for home mortgages is illegal under the Fair Housing Act. Predatory practices that single out a protected class are thus illegal. *Honorable v. Easy Life Realty*, 100 F.Supp.2d 885 (N.D.Ill. 2000); *Hargraves v. Capital City Mortgage*, 140 F.Supp.2d 7 (D.D.C. 2000); *Taylor v. McGlawn & McGlawn*, (Penn. Human Rights Commission, Oct. 26, 2004), *aff'd in part, rev'd in part*, 2006 WL 73413 (Comm.Ct.Pa. Jan.13, 2006).

Discrimination may also take the form of a refusal to take or process an individual loan application or it may be in the form of “redlining,” a practice where loans or mortgages are refused based upon the character of the neighborhood. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F.Supp. 489 (S.D.Ohio 1976).

Redlining cases are often very difficult to prove because the courts recognize that lenders must be free to consider legitimate business interests by making investments that are economically sound. *Cartwright v. American Savings & Loan Ass'n.*, 880 F.2d 912 (7th Cir. 1989). However, the Justice Department has brought a number of mortgage lending cases that have resulted in comprehensive consent decrees. See e.g., *United States v. Decatur Federal*, FH/FL ¶19,377 (N.D.Ga. 1992) (settlement worth more than \$1 million); *United States v. Chevy Chase*, FH/FL ¶19,385 (D.D.C. 1994) (settlement worth more than \$11 million); *United States v. Long Beach Mortgage*, FH/FL ¶19,392 (C.D.Cal. 1996) (settlement worth more than \$4 million). Also, individuals are beginning to be successful in claiming discrimination because they were denied mortgages. *Stevenson v. Town Mortgage*, FH/FL ¶11.2 (E.D.Mich. 1995) (\$130,000 jury award); *Alexander v. Kaye Co.*, FH/FL ¶12.2 (Ga. Superior Ct. 1994) (settlement for interest relief of \$20 million).

Other statutes may be relevant in mortgage lending cases also. For instance, the Equal Credit Opportunity Act (ECOA) (1974), 15 U.S.C. §1691 *et seq.*, prohibits discrimination in any credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public income, or due to the exercise of rights protected by the Act.

A number of cases have now interpreted Section 3604(a) to hold that discriminatory insurance practices violate the Fair Housing Act. *NAACP v. American Family Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert denied*, 113 S.Ct. 2335 (1993) (the case was subsequently settled for \$16 million); *Nationwide Ins. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995). The impact of law suits against insurance companies for discriminatory practices can be dramatic. In 1998, following a two-week trial, a jury awarded \$500,000 in actual damages and \$100 million in punitive damages against the Nationwide Insurance Company for using a race-based marketing strategy to avoid doing business in predominantly African-American neighborhoods in Richmond, Virginia. The case was subsequently settled for \$17.5 million. FH/FL ¶6.1 (June 1, 2000).

Section 3605 also prohibits discrimination in the making of appraisals. Appraisers cannot use race or other prohibited factors in making an appraisal.

Section 3606 makes it unlawful to discriminate against anyone by denying access to or membership in a multiple listing service or real estate broker's organization.

9. Threats or Retaliation

Section 3617 makes it illegal to interfere, threaten, or coerce persons in the exercise of their fair housing rights. This includes actions by neighbors as well as housing providers who attempt to discourage protected classes from moving into a neighborhood. It also includes acts of retaliation by housing providers against persons who have asserted their rights, regardless whether their original complaint was successful.

Section 3617 can raise First Amendment concerns when the activities complained of involve petitioning the government or the filing of law suits. A federal appeals court in California has held HUD investigators liable for unreasonably pursuing an investigation into the activities of a neighborhood group that had filed a lawsuit in state court and petitioned a local government to stop a group home from moving into the neighborhood. *White v. Lee*, 337 F.3d 214 (9th Cir. 2000).

II. Alternative Procedures Under Fair Housing Laws

Perhaps no area of the law accords a complainant a greater choice of procedures to remedy discrimination than fair housing law. Many states and local governments provide remedies. Federal remedies range from HUD conciliation efforts to federal court litigation. The attorney representing a complainant must be familiar with the choice of remedies and be able to advise the client what remedy is best to pursue under the particular circumstances.

A. STATE AND LOCAL REMEDIES

Many states and local governments have their own fair housing provisions. Some of these provisions may protect against forms of discrimination not covered by the federal acts. A complainant should always examine the state and local procedures available and make an informed decision as to whether there are advantages to filing directly at the state or local level.

Even if a complainant does not file a state or local charge, a complaint may be referred to a local agency by the United States Department of Housing and Urban Development (HUD). If the complainant has filed a complaint with HUD, HUD will refer the complaint to a state or local agency where the discriminatory practice occurred if the agency has been certified by HUD. Section 3610(f)(1). Certification is given to a state or local agency if the rights, procedures, and remedies are substantially equivalent to those created by the Federal Fair Housing Act and if the state makes judicial review available. Section 3610(f)(3). Referral to a state or local agency stays HUD proceedings unless the certified agency fails to act promptly. Section 3610(f)(2).

B. COMPLAINTS TO HUD

An individual can file a complaint with HUD within one year after the discriminatory practice occurred. The HUD Secretary may also initiate its own complaints. Section 3610(a)(1)(A)(i). HUD then has the duty of providing notice to both the aggrieved party and the respondent. Section 3610(a)(1)(B)(iii). HUD investigators must complete an investigation within 100 days or give reasons in writing why they have failed to do so. Section 3610(a)(B)(iv) and (C). Few HUD investigations are completed in the 100-day period, and the courts have generally held that the requirement is not jurisdictional.

During the investigatory period, HUD must attempt to conciliate the complaint. Section 3610(b). If no conciliation agreement is reached, HUD must prepare a final report at the end of the investigation. Section 3610(b)(5). This report and the information derived from the investigation can be requested by either the complainant or the respondent, but anything said or done in the course of conciliation may not be used in a subsequent proceeding. Section 3610(d).

If no conciliation agreement is reached and if the HUD Secretary determines “reasonable cause,” the Secretary must issue a charge. Section 3610(g)(2). If it is determined that there is no “reasonable cause,” the charge is dismissed. Section 3610(g)(3).

The advantages of proceeding with the HUD complaint are that the agency will investigate the matter for the complainant and conciliation may result in a binding settlement that will save the aggrieved party from having to proceed through other

administrative or judicial procedures. There are, however, disadvantages to the HUD procedures. The investigations are often slow and the complainant has very little control over the quality of the investigation or of the final report.

C. ENFORCEMENT BY THE JUSTICE DEPARTMENT

Temporary Relief—Federal Court Action Based on HUD Charge

At the request of the HUD Secretary, Justice Department attorneys may file a civil action and seek a temporary restraining order, preliminary injunction or permanent injunction pending the outcome of the HUD investigation. After the HUD charge is filed and the aggrieved party elects for the Justice Department to file a case based on the charge, Department attorneys may seek temporary restraining orders and preliminary and permanent injunctive relief or actual or punitive damages on behalf of the aggrieved party. Section 3614(d). They can also seek a civil penalty against a respondent. Section 3614(d)(1)(C).

Federal Court Action—On Behalf of Complainant

Under the 1988 Amendments to the Fair Housing Act, upon receipt of notice that a HUD charge has been filed, an aggrieved party has 20 days to elect to have the Justice Department file suit on the aggrieved party's behalf in the name of the United States. The Justice Department may also initiate a complaint seeking relief for the aggrieved party. Section 3612(a). The advantage is that the aggrieved party gets a federal trial with free government representation, a jury if requested, and an opportunity for punitive damages. Such representation may possibly give the aggrieved party a heightened status before the federal court. Although the attorney for the aggrieved party may intervene in an election case, the disadvantage is that the government lawyer has mixed loyalties—to the individual and to the government—and the government lawyer may be less sensitive to the client's needs than would be a private lawyer retained by the complainant. However, the Act does allow the aggrieved party to intervene in any suit filed by the Justice Department. Section 3614(e).

Federal Action—Pattern or Practice—Case of Particular Importance

The Justice Department has authority to commence civil actions in federal court in “pattern and practice” cases and cases of particular importance. Section 3614(a). The Justice Department may also go to court when requested by the HUD Secretary for appropriate relief when there has been a breach of a conciliation agreement. Section 3614(b)(2).

D. TRIAL BEFORE AN ADMINISTRATIVE LAW JUDGE

After HUD has issued a charge pursuant to Section 3610(g), the aggrieved person may elect to have the Justice Department file suit or the respondent may elect to have the matter heard in the federal court. If neither party elects to go to federal court, the matter will proceed to trial before an administrative law judge (ALJ). Section 3612(b).

The HUD attorneys will prosecute the case before the HUD ALJ; however, an aggrieved party may intervene as a party. Section 3612(c). Each party may seek representation by private counsel, may present evidence, and may cross-examine witnesses. *Id.* Expedited discovery is permitted. Section 3612(d)(1).

The trial must be held within 120 days following the issuance of the charge unless this is impractical. Section 3612(g)(1). The ALJ may award the aggrieved party actual damages and injunctive relief and also impose civil penalties. Section 3612(g)(3).

The HUD Secretary can review the ALJ's decision, Section 3612(h), and a party aggrieved by a final order can seek judicial review in a court of appeals. Section 3612(i). The HUD Secretary or any party may seek judicial enforcement of a final order when necessary. Section 3612(j) and (m).

The advantage of proceeding before an ALJ is that the time limits imposed by the Act insure that proceedings will be expedited. Also, the ALJs have developed an expertise in fair housing law and practice and their decisions are of a very high quality and are often cited as precedents by the courts. The disadvantages are that parties have less time to prepare a case. Also while civil penalties can be awarded, an ALJ may not award punitive damages. Many lawyers and litigants are unfamiliar with the administrative law process and have elected to go to court rather than proceed before an ALJ. Lawyers should carefully evaluate their options. If they do, more may elect to proceed along the ALJ route.

E. PRIVATE SUITS IN FEDERAL OR STATE COURT

An aggrieved party may by-pass the administrative route and file an action directly in federal or state court. The advantages of such a course of action are clear. The aggrieved party and his counsel are in charge. They control discovery and can seek whatever judicial relief is available—interim or permanent. In the end, the judicial process may save time because it is not necessary to wait until HUD completes its investigation. It will also afford the parties a jury trial when the plaintiff seeks damages. Furthermore, the 1988 Amendments removed the cap on the amount of punitive damages that can be recovered in a private civil action. Section 3613(c)(1). The disadvantages are all those that are commonly associated with resort to the judicial process. In addition, HUD ALJs have developed an expertise in fair housing law that may not be possessed by some district court judges.

An aggrieved party has two years following a discriminatory practice to file a civil action in state or federal court. Section 3613(a)(1)(A). A civil action may be filed even though a complaint was filed with HUD under Section 3610(a); however, a civil action may not be filed after HUD has issued a charge and an ALJ has commenced a hearing on the charge. Section 3613(a)(2) and (3). The court may appoint an attorney to represent the plaintiff or the defendant. Section 3613(b)(1). The Attorney General may intervene in the civil action if the Attorney General certifies that the case is of general public importance. Section 3613(e).

The advantage of pursuing a HUD complaint along with the civil suit is that the party has the advantage of the HUD investigation, which may provide useful discovery. However, if the HUD ALJ hearing starts it precludes filing a federal suit thereafter, and a final decision by the ALJ may have *res judicata* or collateral estoppel effects that will preclude further litigation in the federal court. The commencement of trial in the federal court means that the HUD administrative procedure will be stopped.

A private plaintiff may file suit in federal court to enforce a HUD conciliation agreement. Section 3613(a)(1)(A).

A private civil action may also be filed under the 1866 Civil Rights Act. *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968), makes clear that Section 1982 is different from and independent of the Fair Housing Act. A plaintiff can recover compensatory and punitive damages as well as injunctive and declaratory relief under the 1866 Act. Furthermore, the 1866 Act does not contain the limitations on who can be sued that are found in the Fair Housing Act. However, the 1866 Act applies only to racial discrimination, and only citizens can enforce Section 1982, although Section 1981 is not limited to suits by citizens. Also, to sue under the 1866 Act, the plaintiff must establish that the defendant's acts were "purposeful." *General Building Contractor's Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985).

The 1866 Act does not contain its own statute of limitations and, therefore, the courts will impose the same limitations as applied to personal injury actions under state law. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *Wilson v. Garcia*, 471 U.S. 261 (1985). Thus, depending on state law a plaintiff may have more or less time to file suit under the 1866 Act than the plaintiff has to file a fair housing action.

III. Pleadings, Requests for Emergency Relief, Discovery, and Proof of a *Prima Facie* Case

If an aggrieved party elects to pursue a private action in federal court, practice and procedure are governed by the Federal Rules of Civil Procedure. Simple, precise pleadings and prompt action are the watchwords of a fair housing case. The request for a temporary restraining order and the motion for a preliminary injunction can be made in a simple motion with appropriate supporting affidavits. The request should be allowed if properly presented. If the request for a preliminary injunction is not granted, counsel should be prepared to appeal.

A. PLEADINGS

The complaint states that the action arises under 42 U.S.C. Section 1982 and/or 42 U.S.C. Section 3604 (or the appropriate section or sections of the Fair Housing Act) and the basis of jurisdiction is 28 U.S.C. Section 1343(4), Section 2201, and/or 42 U.S.C. Section 3613. The complaint names all of the parties and identifies their status and, as appropriate, their race, religion, color, sex, national origin, family status, or handicap. It provides the date of occurrence and a representation that plaintiffs are or were ready, willing, and able to purchase or rent on the terms and conditions offered to others and a demand for monetary damages. Where appropriate, the plaintiff should allege irreparable damage and request injunctive relief.

The complaint should plead sufficient facts to show that the claim is plausible on its face. It should allege what acts are being relied on to show purposeful discrimination or a disparate impact. Relying on discovery to disclose the basis of the discrimination may not be sufficient if the complainant is met with a motion to dismiss. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

At the time of preparation of the complaint in cases where injunctive relief is sought, affidavits of the victim of discrimination should be prepared together with the motion for temporary restraining order and preliminary injunction. A notice of motion, certificate of service, and draft order are completed, and if necessary under local court rules, a short memorandum of law is prepared.

B. EMERGENCY RELIEF

The key to emergency relief in the federal court is Rule 65 of the Federal Rules of Civil Procedure. Rule 65(b) relates to temporary restraining orders and preliminary injunctions. 42 U.S.C. Section 3613(c) provides for, among other things, the entry of such relief without bond. The district court has broad power to issue injunctive relief.

A temporary restraining order may be issued without actual notice to the defendant and without a hearing. As a practical matter, an effort to give notice of a hearing or a motion for temporary restraining order either by delivering a notice or by telephonic communication is advisable. It may be requested or required by the court. In most instances, the attorney will be required to make a representation that an effort was made to give notice. If the court is not satisfied, the matter may be put over to allow for notice and more time may be lost.

When a temporary restraining order is issued without notice, its duration will be limited to 10 days. It is designed to preserve the *status quo* until there is an opportunity to hold a hearing on the application for a preliminary injunction. When actual notice of the hearing for a temporary restraining order is given, the procedure is similar to that for a preliminary injunction, and if there is an adversary hearing, the temporary order may be treated as a preliminary injunction.

Speed is the key to success. Typically a motion for a temporary restraining order may be filed and served on one day and heard the next day at the court's motion call. Defendant's typical response will be to request additional time. Such a request should be resisted and plaintiff should press for entry of an order under 42 U.S.C. Section 3613. Even if opposing counsel gives his word to hold the unit available pending the hearing, the defendant is not an officer of the court and may not be bound by statements of counsel and a *bona fide* third party is not bound unless a court order is entered.

In the event that the defendant is willing to give the unit at the time of the hearing or before, the plaintiff should not hesitate to take it. The delivery of the unit does not moot the case nor waive any rights of the plaintiff to damages. *Cash v. Swifton*, 434 F.2d 569 (6th Cir. 1970).

The plaintiff may proceed with a preliminary hearing or seek to consolidate the preliminary hearing with a trial on the merits. However, the plaintiff need not make an election and accept the findings at the preliminary hearing without adequate preparation for trial and discovery. *Pughsley v. 3750 Lake Shore Drive Cooperative*, 463 F.2d 1955 (7th Cir. 1972).

C. EXPEDITED HEARING

The Fair Housing Act formerly provided for an expedited hearing, but this provision was repealed in 1984 through the passage of an omnibus bill amending 28 U.S.C. Section 1657. Section 1657 requires a federal court to expedite civil actions if "good cause" is shown. "Good cause" may be shown in cases involving constitutional and statutory rights.

Where it is necessary under Section 3613 to preserve the plaintiff's ability to rent or buy the property in question through a temporary restraining order or preliminary injunction, Section 1657 provides for expedition of the matter. If the ability to expedite a temporary restraining order or preliminary injunction proceeding is then coupled with the right to consolidate that proceeding with the trial on the merits under Rule 65(a)(2) of the Federal Rules of Civil Procedure, the plaintiff will have effectuated an expedition of the proceedings through the back door. See *Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977); *Williamson v. Hampton Management Co.*, 339 F.Supp. 1146 (N.D.Ill. 1972).

D. EMERGENCY APPEALS

If the district judge denies a motion for a preliminary injunction, an emergency appeal can be taken under 28 U.S.C. Section 1292(2)(1).

If a stay is desired while an appeal is pending, a motion must be made first in the district court under Rule 8 of the Federal Rules of Appellate Procedure. Plaintiff's counsel should also order a short record to be filed in the Court of Appeals. A short record will normally consist of the complaint and other relevant pleadings and motions, the order appealed from, and the notice of appeal. The appellant should also request the court of appeals pursuant to Rule 2 of the Federal Rules of Appellate Procedure to waive its formal rules so as to expedite matters.

E. DISCOVERY

The Federal Rules of Civil Procedure govern discovery in a fair housing case filed in federal court.

In most cases discovery should be sought of the defendant's practices and procedures, the ownership of the property, the nature of any principal-agent relationship, any past complaints of discrimination, statistical information about the composition of the building or the clientel of the defendant, the names and addresses of other applicants, and when punitive damages are sought, the net worth of the defendants. The plaintiff should also request production of all documents that may bear upon the unlawful acts, including sample leases or contracts, logs of phone calls or appointments, and notices or advertisements.

F. PRIMA FACIE CASE

In the typical housing discrimination case, the plaintiff has the burden of showing that there was discrimination based upon one of the factors prohibited by the statute. In some cases the discrimination is overt, as when a landlord says he will not allow children to use the recreational facilities. However, most often, plaintiffs are forced to prove discrimination from the circumstances. The court may use a *prima facie* case formula to test the facts. The question of what is sufficient proof to constitute a *prima facie* case becomes crucial in the typical "disparate treatment" case where members of one group are treated differently from members of another group.

Courts have held that a plaintiff may establish a *prima facie* case under the Fair Housing Act by showing:

- a. that the plaintiff is a member of a protected group, e.g., racial minority;
- b. that the plaintiff applied for and was qualified to rent or buy a certain property;
- c. that the plaintiff was rejected; and
- d. that the housing opportunity remained available thereafter.

Phillips v. Hunter Trails Community Association, 685 F.2d 184, 190 (7th Cir. 1982). Once the plaintiff establishes a *prima facie* case the burden then shifts to the defendant to articulate some non-discriminatory reason for refusing the plaintiff. The plaintiff may then show that this reason is a sham or pretext for discrimination. A court may infer discrimination from the falsity of the defendant's explanation. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000).

The maxims that in cases of racial discrimination "statistics often tell much and courts listen" and "nothing is as emphatic as zero" have been applied in Fair Housing cases. *Williams v. Matthews Co.*, 499 F.2d 819, 827 (8th Cir. 1974); *Newbern v. Lake Lorelei, Inc.*, 308 F.Supp. 407, 411 (S.D.Ohio 1968). Thus, proof of a landlord's rejection of the plaintiff, coupled with a disproportionately low number of minorities in the defendant's building or complex, should establish a *prima facie* case of discrimination as a matter of law, thereby shifting the burden to the defendant of justifying the refusal to deal. *Williams v. Matthews Co.*, *supra* at 826-827.

Courts have held that under the Fair Housing Act, a plaintiff need show only that race or other protected status played some part in the refusal to rent. In *Smith v. Sol D. Adler*

Realty Co., 436 F.2d 344, 349-350 (7th Cir. 1970), the Court of Appeals held that “race is an impermissible factor in an apartment rental decision and...it cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination.” In the Equal Employment area, the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), held that in a mixed motive case the burden shifts to the defendant to show a non-discriminatory reason for the decision. Congress overturned *Price Waterhouse* in 1991, but did not mention the Fair Housing Act. Some HUD ALJ opinions adopt the *Price Waterhouse* reasoning in Fair Housing cases, rather than adhering to *Smith v. Sol D. Adler*. See *HUD v. Denton*, FH/FL ¶125,014 (HUD ALJ 1991) and ¶125,024 (HUD ALJ 1992).

The United States Supreme Court has taken a very restrictive reading of the 1991 amendments to Title VII that overrule *Price Waterhouse* and it is likely that the Court will not extend those amendments to modify the burden in a mixed motive case under Title VIII. In *Smith v. City of Jackson*, 544 U.S. 228 (2005), in construing the Age Discrimination in Employment Act of 1967 (ADEA), the Supreme Court held that because the 1991 Act did not mention the ADEA, the Court’s previous interpretation of the law in *Price Waterhouse* would apply.

However, the Supreme Court has been even more restrictive in later cases. In *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), the Court held in an ADEA claim that the plaintiff had the burden of proving by direct or circumstantial evidence that age was the “but-for” cause of the employer’s decision. The Court further held that “The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”

The Court followed a similar approach in *University of Texas v. Nassar*, 133 S.Ct. 2517 (2013), holding that a retaliation claim under title VII is not covered by the 1991 Amendments Act and that the plaintiff must prove a retaliation claim according to traditional principles of “but-for” causation. The plaintiff must present proof “that the desire to retaliate was the but-for cause of the challenged employment action.”

The Supreme Court has held that the plaintiff need not present direct evidence of discrimination in order to prove a case of mixed-motive in an employment discrimination case, plaintiff need only show discrimination by a preponderance of either direct or circumstantial evidence. *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148 (2003). The same standard should apply under the Fair Housing Act.

The plaintiff in a suit filed under the Fair Housing Act is not required to prove that the defendant acted with the specific intent of violating the plaintiff’s rights; it may be enough to establish a *prima facie* case if the defendant’s practices or policies had the effect or impact of denying housing opportunities to a minority home-seeker in a discriminatory manner or perpetuated segregation. *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir. 1974); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.), *aff’d per curiam*, 488 U.S. 15 (1988). However, the impact test is not available if the proof consists of a mere incidence of discrimination rather than proof of a discriminatory policy or practice. See *Simms v. First Gibraltar Bank*, 83 F.3d 1546 (5th Cir. 1996).

Impact is generally shown by statistics. However, the statistics must be fine-tuned. See *Mountain Side Mobile Estates v. HUD*, 56 F.3d 1243 (10th Cir. 1995). Once a discriminatory impact is established, the burden shifts to the defendant to articulate that the policy or practice is required by business necessity. The courts are not in agreement about the standard to establish business necessity in a fair housing case.

In the Equal Employment area, the Supreme Court held in *Wards Cove v. Atonio*, 490 U.S. 642 (1989), that a court should not substitute its judgment for that of the employer as to what alternative is best in determining business necessity. Congress overturned this ruling in 1991 in Equal Employment cases without referring to the Fair Housing Act. The HUD Secretary has taken the position that the defendant must show a compelling reason for the policy or practice that has a discriminatory impact. The 10th Circuit Court of Appeals has held that the defendant need only show a manifest relationship between the policy and the practice and the housing in question. *Mountain Side Mobile Estates v. HUD*, 56 F.3d 1243 (10th Cir. 1995). In *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), the Court of Appeals held in an occupancy standard case that the reasonableness standard should be applied and not one of business necessity to rebut a showing of discriminatory effect.

The Seventh Circuit Court of Appeals in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), articulated a four factor test to determine if a policy or practice has the effect of perpetuating segregation under the Fair Housing Act:

1. The strength of the plaintiff's showing of discriminatory effect;
2. Evidence of the defendant's discriminatory intent (even though the evidence would be insufficient to establish a case of intentional discrimination);
3. The defendant's interest in taking the challenged action;
4. Whether the plaintiff seeks to compel the defendant affirmatively to provide housing or merely to refrain from interfering with others who wish to do so.

In a racial steering case, *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), the Court of Appeals for the Seventh Circuit discussed the relationship between proof of a discriminatory impact and a discriminatory motive in disparate treatment cases. Analogizing to Title VII employment discrimination cases, the Court held that proof of intentional discrimination was an important element in determining if the plaintiff is to ultimately prevail in a fair housing disparate treatment case. The Court did not disturb the traditional standard for determining a *prima facie* case in a fair housing case and acknowledged that "effect is probative of intent...so that an unexplained discriminatory effect may itself support an inference of discriminatory intent[.]" 895 F.2d at 1533. Similarly, in *NAACP v. American Family Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2335 (1993), the Court of Appeals cautioned that impact alone may not be sufficient to prove a case of insurance redlining. Once a plaintiff shows a discriminatory impact, the defendant must show some business necessity for the restriction although the burden to prove discrimination remains with the plaintiff at all times.

Finally in 2013, HUD promulgated a final rule to formalize a national standard for determining whether a housing practice violates the disparate impact standard. 78 Fed. Reg. 11460 (Feb. 15, 2013). The rule is helpful in putting HUD's imprimatur on the impact standard, especially if the issue ever goes to the United States Supreme Court. The rule provides that "A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of person or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."

“A legally sufficient justification exists where the challenged practice: (i) is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent...; and (ii) those interests could not be served by another practice that has a less discriminatory effect.” The rule explicitly states that “a legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.”

Under the rule a charging party has the burden of showing the discriminatory effect; this then shifts the burden to the respondent to prove that the challenged practice is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.” If the respondent satisfies this burden, the complainant may still prevail by “proving that the substantial, legitimate, non-discriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.” The rule also states that the shoring of a legally sufficient justification cannot be used as a defense against a claim of intentional discrimination. 24 CFR §100.500.

Proof of “purposeful” discrimination is required for violations of the 1866 Civil Rights Act, *General Building Contractors Ass’n. v. Pennsylvania*, 458 U.S. 375 (1982), as well as suits alleging a violation of the equal protection clause of the Fourteenth Amendment. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). However, “purposeful” discrimination can sometimes be established by a “clear pattern unexplainable on grounds other than race.” *Arlington Heights*, 429 U.S. at 266. The Supreme Court also indicated in *Arlington Heights* that in an equal protection case, proof that a decision was motivated in part by racial discrimination may not necessarily enable the plaintiff to obtain relief if the defendant can show that the same decision would have resulted without the discrimination. 429 U.S. at 270 n. 21.

IV. Remedies and Attorney's Fees

Section 3613(c) provides for broad remedies when a civil suit is filed to enforce the Fair Housing Act. A court may award the plaintiff actual and punitive damages and, when appropriate, “any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).” Under the 1866 Civil Rights Act, a court may “use any available remedy to make good the wrong done.” *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

A. INJUNCTIVE RELIEF

A court can order a seller or landlord to sell or lease housing or comparable housing when available. *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 350 (7th Cir. 1970).

In cases where a pattern and practice has been proved, the defendant may be required affirmatively to recruit minorities and, as a temporary measure, to establish a goal for minority-group occupants in order to achieve a proper racial or minority balance. *Jaimes v. Lucas Metropolitan Housing Authority*, 833 F.2d 1203 (6th Cir. 1987). In *Young v. Pierce*, 685 F.Supp. 975 (E.D.Tex. 1982), HUD was required to implement an affirmative action plan, including tenant assignments and elective transfers, to remedy past discrimination. In HUD (*Will Grundy Center for Independent Living v. Perland Corp.*, FH/FL ¶25,136 (HUD ALJ 1998), a HUD ALJ ordered a developer who failed to comply with the accessibility provisions for new multi-family housing to retrofit the buildings and units not yet sold and to establish an escrow account so that owners who already had purchased units could retrofit their units in the future if they desire.

Other affirmative remedies might include posting fair housing signs in real estate offices, requiring real estate salesmen to be trained in their obligations under the fair housing laws, or requiring firms to undergo periodic audits or inspections. The by-word in civil rights cases is that the remedy should fit the violation.

B. ACTUAL AND PUNITIVE DAMAGES

The purpose of compensatory damages is to place the plaintiff in the same position as if there had been no injury. *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970).

One element of compensation is the actual out-of-pocket financial loss suffered by a home-seeker as a direct result of the discriminatory treatment by the defendant. The “proper measure of damages is a comparison between what would have been obtained but for the discrimination...and a reasonably comparable dwelling.” *Morgan v. Secretary*, 985 F.2d 1451, 1458 (10th Cir. 1993). In cases where the housing sought has special amenities, location, or other characteristics that cannot be duplicated and are lost to the complainant, HUD ALJs have awarded damages for loss of housing opportunity. See *HUD v. Kelly*, FH/FL ¶25,034 (HUD ALJ 1992); *HUD v. Lashley*, FH/FL ¶25,039 (HUD ALJ 1992). With rare exceptions, such losses will not be substantial in private rental discrimination cases, where, for example, the time and transportation expenses required to find another home and the differences in rents or costs and convenience to work may well be *de minimis*. But see *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982); *Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101 (3d Cir. 1981).

Courts have recognized that actual damages assessable against a discriminating defendant should include not only the plaintiff's direct financial losses but also compensation for the humiliation and mental anguish suffered. See e.g., *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980); *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990).

However, the record must provide a sound basis for an award for humiliation and mental anguish. *Phillips v. Hunters Trails Comm. Ass'n.*, 685 F.2d 184 (7th Cir. 1982); *Douglas v. Metro Rental Services*, 827 F.2d 252 (7th Cir. 1987). Damages for humiliation will largely depend upon the effectiveness of the testimony of the victim of the discrimination. *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). Expert testimony, while it may be useful in some cases, is not required. *Human Rights Commission v. LaBrie*, FH/FL ¶18,173 (Vt. 1995); *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991); *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997). The victim must be carefully prepared to testify because victims of discrimination frequently mask their hurt when they are in public. In appropriate cases, counsel may want to consider using the expert testimony of a sociologist or psychologist to establish the trauma suffered by victims of discrimination. Expert testimony may be especially important to buttress a claim of damages to a professional tester, who might be assumed by laymen to have suffered no actual damage.

If a fair housing organization has been joined as a plaintiff in the suit, it can receive damages because the discrimination frustrated its counseling and referral services, drained its resources, and hindered its mission. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Davis v. Mansards*, 597 F.Supp. 334, 343 (N.D.Ind. 1984). The fair housing organization will have to produce evidence of its costs and expert testimony on the operations of fair housing organizations to provide the basis for a substantial award. *Chicago v. Matchmaker Real Estate*, 982 F.2d 1086 (7th Cir. 1992), cert. denied, 113 S.Ct. 2961 (1993). Similarly, community residents and municipalities that sue for damages due to blockbusting, steering, or other similar activities will have to introduce expert testimony on the social and economic damage to communities caused by discrimination. *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

The 1988 Amendments to the Fair Housing Act removed the cap in private civil suits which formerly existed for the awarding of punitive damages. The Act does not articulate what the standards are for awarding punitive damages. In *Smith v. Wade*, 461 U.S. 30 (1983), the Supreme Court held in an action filed under 42 U.S.C. Section 1983 that punitive damages could be awarded upon a finding of reckless or callous disregard of or indifference to the plaintiff's rights. In *Kolstad v. American Dental Ass'n*, 119 S.Ct. 2118 (1999), the Supreme Court held in an employment discrimination suit under Title VII that the standard is not the "egregious" conduct of the defendant, but whether the defendant acted with knowledge that the action violated the law or with reckless indifference to the plaintiff's rights. This standard has been applied under the Fair Housing Act. *Badami v. Terry Flood*, 214 F.3d 994 (8th Cir. 2000).

Traditionally damage awards in fair housing cases have been low compared to damage awards in comparable areas of tort law. This is now changing and counsel in fair housing cases should pay careful attention to developing a good record to support a large damage award. It is no longer exceptional to have an award or settlement in six figures and a number of awards and settlements have now greatly exceeded one million dollars. Courts and juries need to be educated about the real damage and trauma caused by acts of discrimination so that injured parties can be adequately

compensated. Large damage awards send a message to those who discriminate that this type of conduct is no longer legally or socially acceptable and that it must cease.

C. ATTORNEY'S FEES

The prevailing party in a fair housing suit is allowed, in the court's discretion, a reasonable attorney's fee under Section 3613(c). Also, if the action is brought under the Civil Rights Acts of 1866, the prevailing party may recover an attorney's fee under the 1976 Civil Rights Attorney's Fees Act. 42 U.S.C. §1988. The Supreme Court has held that absent special circumstances, a prevailing plaintiff should be awarded attorney's fees, but that a prevailing defendant is entitled to attorney's fees only if the suit was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Hensley v. Eckerhart*, 461 U.S. 424 (1983). A considerable body of law has been developed regarding the awarding of attorney's fees under the 1976 Civil Rights Attorney's Fees Act and this law is applicable in fair housing cases. The attorney seeking fees should review cases in the jurisdiction regarding such petitions. Provided that good time records have been maintained, a full recovery of fees for time expended can be expected.

D. CIVIL PENALTIES

Civil penalties can be imposed upon a respondent in a HUD ALJ proceeding or in a federal action prosecuted by the United States Department of Justice. 42 U.S.C. §§3612(g) and 3614(d). In accessing a civil penalty, the judge will look to the following five factors:

1. Whether the respondent has previously been adjudged to have committed unlawful housing discrimination;
2. Respondent's financial resources;
3. The degree of respondent's culpability;
4. The nature and circumstance of the violation;
5. The goal of deterrence.

See *HUD v. Colclasure*, FH/FL ¶125,134 (HUD ALJ 1998).

Conclusion

This *Primer on Fair Housing Law* provides the keys to further access to fair housing law. The John Marshall Law School Fair Housing Legal Support Center & Clinic stands ready to assist you in further study and in particular cases with pleadings, briefs, and assistance in planning and preparing cases.

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The John Marshall Law School Fair Housing Legal Support Center & Clinic

The John Marshall Law School Fair Housing Legal Support Center was established in 1992. The Center educates and trains the public on fair housing law and provides legal assistance to those private and public organizations and persons seeking to eliminate discriminatory housing practices.

The Clinic is devoted exclusively to fair housing training and enforcement. Its unique nature allows it to assist persons in receiving and retaining the housing of their choice, thereby building and strengthening neighborhoods and communities.

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