

# Emerging Issues: Accessibility & Fair Housing Best Practices



**NH&RA Annual Meeting  
February 29, 2020**

# Fair Housing Act

Unlawful to discriminate in housing based on the following protected classes:

- Race
- Color
- Religion
- Sex
- Familial Status
- National Origin
- Handicap
- Income Sources\*

\* Dependent on jurisdiction

# What Housing Practices Are Covered?

All based on a protected class:

- Refusal to sell or rent, or otherwise make unavailable or deny housing
- Different terms, conditions, privileges in sale or rental
- Preference, limitation, discrimination in any notice, statement or advertisement
- Falsely represent a dwelling is unavailable
- Refusal to accommodate or modify dwelling (reasonable accommodations or reasonable modifications)
- Refusal of service animals or emotional support animals

# Fair Housing Issues in Focus

- Disparate Impact Theory of Liability
- Duty to Affirmatively Further Fair Housing
- Dealing with Reasonable Accommodations

# Disparate Impact Theory

- Definition: a policy or practice which is neutral on its face but has a statistically significant disproportionate negative impact on a protected class
- HUD Discriminatory Effects Standard Final Rule effective March 18, 2013
- Supreme Court decision in *Texas Department of Housing and Community Affairs vs. Inclusive Communities*, 135 S. Ct. 2507 (2015)
- HUD Disparate Impact Proposed Rule issued August 19, 2019 with comments due October 18, 2019 – over 4,000 comments posted

<https://www.govinfo.gov/content/pkg/FR-2019-08-19/pdf/2019-17542.pdf>

# Disparate Impact Theory

(under current rule)

Three-Step Burden Shifting Approach:

1. The plaintiff/complainant must make a *prima facie* showing of either a disparate impact or a segregative effect.
2. If the discriminatory impact is shown, the burden of proof shifts to the respondent to show a “legally sufficient justification.”
3. If the respondent satisfies the burden, then the plaintiff/complainant may still establish liability by proving that these interests could be served by another practice that has a less discriminatory effect.

# Disparate Impact Theory

## (under proposed rule)

Plaintiff must sufficiently plead:

- 1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;
- 2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;

# Disparate Impact Theory

## (under proposed rule)

Plaintiff must sufficiently plead:

- 3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;
- 4) That the alleged disparity caused by the policy or practice is significant; and
- 5) That there is a direct link between the disparate impact and the complaining party's alleged injury.



# Affirmatively Furthering Fair Housing Rule

- HUD Affirmatively Furthering Fair Housing Rule effective August 17, 2015
  - › HUD AFFH Notice of Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants issued January 5, 2018
  - › HUD AFFH: Streamlining and Enhancements Advance Notice of Proposed Rulemaking issued August 16, 2018
  - › USDC for the District of Columbia decision in *National Fair Housing Alliance, et al. v. Carson, et al.*, 330 F.Supp.3d 14 (August 17, 2018)
- HUD's AFFH Proposed Rule issued January 14, 2020, with comments due March 16, 2020

<https://www.govinfo.gov/content/pkg/FR-2020-01-14/pdf/2020-00234.pdf>

# AFFH Proposed Rule

Proposed revision to definition of “affirmatively furthering fair housing” from “taking meaningful actions” to “advancing fair housing choice.” HUD defines “fair housing choice” in the proposed rule as consisting of 3 components:

- 1) Protected choice, meaning the absence of discrimination.
- 2) Actual choice, meaning not only that affordable housing options exists ... but that the information and resources are available to enable informed choices.
- 3) Quality choice, meaning that the available and affordable housing is decent, safe, and sanitary, and, for persons with disabilities, accessible as required under civil rights laws.”

# **Non-Exhaustive List of Obstacles as “Inherent Barriers” to “Fair Housing Choice”**

- a) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable.
- b) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities.
- c) Concentration of substandard housing stock in a particular area.
- d) Not in derogation of applicable federal law or regulations, inflexible or unduly rigorous design standards or other similar barriers which unreasonably increase the cost of the construction or rehabilitation of low-to-mid price housing or impede the development or implementation of innovative approaches to housing.

# Non-Exhaustive List of Obstacles as “Inherent Barriers” to “Fair Housing Choice”

- e) Lack of effective, timely, and cost-effective means for clearing title issues, if such are prevalent in the community.
- f) Source of income restrictions on rental housing.
- g) Administrative procedures which have the effect of restricting or otherwise materially impeding the approval of affordable housing development.
- h) High rates of housing-related lead poisoning in housing.
- i) Artificial economic restrictions on the long-term creation of rental housing, such as certain types of rent control.

# Non-Exhaustive List of Obstacles as “Inherent Barriers” to “Fair Housing Choice”

- j) Unduly prescriptive or burdensome building and rehabilitation codes.
- k) Arbitrary or excessive energy and water efficiency mandates.
- l) Unduly burdensome wetland or environmental regulations.
- m) Unnecessary manufactured-housing regulations and restrictions.
- n) Cumbersome or time-consuming construction or rehabilitation permitting and review procedures.
- o) Tax policies which discourage investment or reinvestment.
- p) Arbitrary or unnecessary labor requirements.

# Reasonable Accommodations

One type of discrimination is the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.

# Reasonable Accommodations

For reasonable accommodations purposes, a “person with a disability” is an individual with a physical or mental impairment that substantially limits one or more major life activity.

- “Physical or mental impairments” include, but are not limited to, visual, speech, hearing, and mobility impairments, emotional illness, autism, cancer, diabetes, heart disease, and alcoholism.
- “Major life activity” means activities that are of central importance to daily life, e.g. seeing, hearing, speaking, walking, breathing, performing manual tasks, caring for one’s self.

# Reasonable Accommodations

If the disability or need for accommodation is not apparent, a housing provider may request reliable disability-related information that:

1. Is necessary to verify that the person meets the definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities);
2. Describes the needed accommodation; and
3. Shows the relationship between the person's disability and the need for the requested accommodation.



# The Reasonability Test

An accommodation is **NOT** reasonable if it would impose an undue financial or administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations.

# Denials Based on Financial Burden

The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident's disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative burden.

# Assistance Animals

- Reasonable accommodations standard applies
- Breed, size, and weight limitations may not apply
- Includes service animals and emotional support animals
- Training or certification not required

# Assistance Animals

A reasonable accommodation request for an assistance animal may be denied if:

1. The specific assistance animal in question poses a direct threat to the health and safety of others that cannot be reduced or eliminated by another reasonable accommodation; or
2. The specific assistance animal in question would cause substantial physical damage to the property that cannot be reduced or eliminated by another reasonable accommodation.

## **New HUD Guidance:**

# **“Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act.”**

Clarifies that there are two types of assistance animals:

- Service Animals – as defined under the Americans with Disabilities Act, “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”
- Support Animals – as defined by HUD, “animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities.”

# New HUD Guidance on Assistance Animals

Further distinguishes between common household animals and other animals:

- Common household animals include “a dog, cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure.”
- Animals not considered common household animals include “reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals.”\*

\*For such requests, the requestor “has the **substantial burden** of demonstrating a disability-related therapeutic need for the **specific** animal or the specific type of animal” (emphasis added).

# Examples of Fair Housing Issues in Focus

- Disparate Impact Theory of Liability
- Duty to Affirmatively Further Fair Housing
- Dealing with Reasonable Accommodations

Efrem Levy  
[elevy@renocavanaugh.com](mailto:elevy@renocavanaugh.com)  
202-349-2476

Jeffrey J. Woda  
[jwoda@wodagroup.com](mailto:jwoda@wodagroup.com)

Iyen A. Acosta  
[iacosta@renocavanaugh.com](mailto:iacosta@renocavanaugh.com)  
202-349-2470