

FAIR HOUSING COMPLIANCE: CONSIDERATIONS FOR LAND USE AND PLANNING DECISIONS TRAINING HANDOUT

2017

DEVELOPED BY THE METROWEST
HOME CONSORTIUM

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“Many Americans who believe they attained their suburban homes by pulling themselves up by their bootstraps, in fact received significant government help along the way from federally-backed loan programs, mortgage interest deductions, subsidies for freeway construction, and other government actions.”

Massey, Douglas S., *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb*, 2013.

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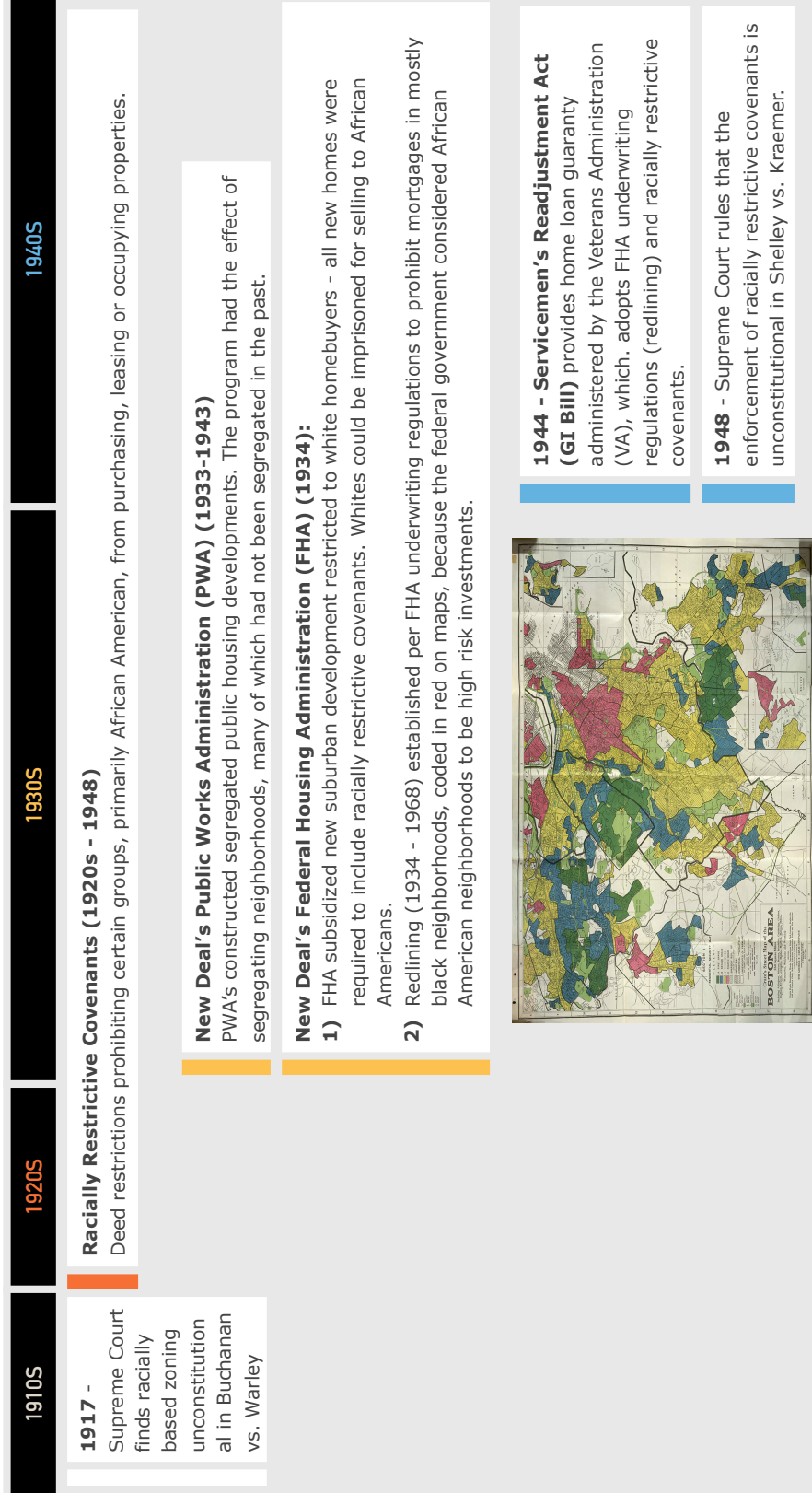
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WHAT IS FAIR HOUSING AND WHY DO WE NEED IT?

TIMELINE OF KEY EVENTS

TIMELINE OF KEY EVENTS LEADING TO FAIR HOUSING IN THE U.S.

MetroWest HOME Consortium and the Regional Housing Services Office
5/19/17



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TIMELINE OF KEY EVENTS LEADING TO FAIR HOUSING IN THE U.S.

MetroWest HOME Consortium and the Regional Housing Services Office
5/16/17

1950S

1954 - Housing Act

Urban renewal policies provide incentives for redevelopment of "slums," displacing many residents in primarily low-income neighborhoods, including African Americans.

1956 - Federal Highway Act

Further enables "white flight" from urban areas and major employers to relocate largely out of reach of many urban residents due to limited public transportation options. In addition, many highways located to also achieve "urban renewal" goals that destroyed many low-income neighborhoods.

Suburban Zoning (1950s - present)

Strict limitations on multifamily housing development and preference for large lot single family houses in suburban areas limits access for low-income and minority households.

1960S

July 1967 - Detroit Race Riots



July 1967 - Kerner Commission established to investigate causes of riots. The Commission's report cited white racism, discrimination, and poverty as among the causative factors of the riots and warned that "our nation is moving toward two societies, one black, one white - separate and unequal."

April 4, 1968 - Martin Luther King Assassinated

April 11, 1968 - Fair Housing Act prohibits discrimination in housing

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LEGISLATION

Massachusetts Fair Housing Law – Chapter 151B – Initially passed in 1946, twenty years before the Civil Right Act, Chapter 151B provides protection against discrimination based on race, color, national origin, religion, or sex. This legislation was later amended to include age (1950), marital status (1973), disability (1983), familial status (1983), sexual orientation (1989), gender identity (2000), veteran history/military status (2004), and source of income/public assistance (2006)

www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151B

Title VI of the Civil Rights Act of 1964 – Provides protection against discrimination based on race, color, or national origin in any programs and/or activities using federal funds. www.justice.gov/crt/fcs/TitleVI-Overview

Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) - Prohibits discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin.

www.portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8

Section 504 of the Rehabilitation Act of 1973 – The first legislation of its kind, this Act expanded the list of protected classes for federally funded programs to include persons with disabilities.

www.dol.gov/oasam/regs/statutes/sec504.htm

Age Discrimination Act – This Act also expands the list of protected classes for any federally funded programs to include age. www.dol.gov/oasam/regs/statutes/age_act.htm

Fair Housing Act of 1988 – Amended Title VIII to add disability and familial status to the list of protected classes in the sale, rental, and financing of any dwelling. www.justice.gov/crt/fair-housing-act-2

Housing for Older Persons Act of 1995 (HOPA) - Provides exemption from the Fair Housing Act for senior housing communities based on specific criteria.

www.portal.hud.gov/hudportal/documents/huddoc?id=DOC_7770.pdf

Americans with Disabilities Act (ADA) - Expands the protections against discrimination for persons with disabilities provided in Section 504 to include any state or local services, programs or activities. www.ada.gov/ada_intro.htm

Massachusetts Zoning Law, M.G.L Chapter 40A – Spells out those situations where zoning requirements may be suspended or ignored. Commonly referred to as the “Dover Amendment” and known for its religious and educational use exemptions, this chapter also provides protection to persons with disabilities (see paragraphs 4 and 8)

LIST OF FEDERAL AND STATE PROTECTED CLASSES

I. FEDERAL PROTECTED CLASSES

(Fair Housing Act: Title VIII of the Civil Rights Act of 1968, amended 1988)

- Race
- Color
- National Origin
- Religion
- Sex
- Familial Status (*including families with children*)
- Disability

2. STATE PROTECTED CLASSES

(Mass. Antidiscrimination Law – MGL c.151B as amended)

- Race
- Color
- National Origin
- Religion
- Sex
- Familial Status (*including pregnant women and families with children*)
- Disability
- Ancestry
- Age
- Marital Status
- Source of Income (*including Section 8*)
- Sexual Orientation
- Gender Identity and Expression
- Veteran/Military Status
- Genetic Information

DEFINITION OF DISABILITY UNDER THE FAIR HOUSING ACT

As established under Section 504 of the Rehabilitation Act of 1973 and expanded by the Americans with Disabilities Act of 1990, a person with a disability is defined as any person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. Examples of impairments include, but are not limited to, the following:

- Orthopedic
- Visual
- Speech
- Hearing
- Autism
- Epilepsy
- Multiple sclerosis
- Cancer
- Heart disease
- Diabetes
- HIV infection
- Developmental disabilities
- Mental illness
- Drug addiction (*other than addiction caused by current, illegal use of controlled substance*)
- Alcoholism
- Muscular Dystroph

FAIR HOUSING AND LOCAL LAND USE POLICIES AND PRACTICES

KEY CONCEPTS

I. DISCRIMINATORY INTENT VS. DISCRIMINATORY EFFECT

Discriminatory Intent involves an action which intentionally treats a person or group of persons differently because of protected characteristics. For example, housing ads which advertise that they are an “active adult community” or are perfect for “professional couples” may appear to exclude families with children. Another example is Steering, where a person of a protected class is shown a different set of available homes or units than another person.

A **Discriminatory Effect** occurs when a facially neutral practice, actually or predictably, results in a disparate impact on a group of persons, or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color,

religion, sex, handicap, familial status, or national origin. The courts have established the following test to determine if an action has or will have a Discriminatory Effect.

The Three-Part Burden Shifting Test to Avoid Discriminatory Effect

- 1) Is the policy/practice likely to negatively impact members of a protected class?
- 2) Does the policy/practice have a necessary and manifest relationship to legitimate, nondiscriminatory interests?
- 3) Is there a less discriminatory alternative that would meet the same interests?

Local Preference Policies Could Have a Discriminatory Effect

What is Local Preference?

Local Preference is a requirement that a certain portion of available housing in a development be set aside for households with a connection to the community.

Why is requiring Local Preference a Fair Housing issue?

Two issues can be raised when communities require that a large percentage of housing in a new development be set aside for people associated with the community (local preference). First, under Fair Housing law, communities cannot insert themselves into the resident selection process or impose any conditions on the marketing selection or criteria processes. These processes can only be overseen by the subsidizing agency. Second, requests for Local Preference can be interpreted as Coded Language discriminating against minority, immigrant, or other protected classes.

When is Local Preference allowed?

Local Preference is allowed if a community can prove the following to the state's satisfaction:

- 1) That there is a demonstrated need in the community for affordable housing (such as an existing waiting list for public housing and local residents likely to apply);
- 2) That the number of local preference units can be justified. Under no circumstances can the number of local preference units in a development exceed 70% of units; and,
- 3) That the local preference will not have a disparate impact on protected classes

If approved by the state, Local Preference still has limitations. It can only apply to:

- Current Residents
- Municipal Employees
- Local Business Employees
- Families with children already attending school in the community (i.e. Metco)

2. AFFIRMATIVELY FURTHERING FAIR HOUSING

Excerpt from HUD's AFFH Fact Sheet: <https://www.huduser.gov/portal/sites/default/files/pdf/AFFH-Fact-Sheet.pdf>

From its inception, the Fair Housing Act (and subsequent laws reaffirming its principles) not only prohibited discrimination in housing related activities and transactions but also imposed a duty to affirmatively further fair housing (AFFH). The AFFH rule sets out a framework for local governments, States, and public housing agencies (PHAs) to take meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination. The rule is designed to help program participants better understand what they are required to do to meet their AFFH duties and enables them to assess fair housing issues in their communities and then to make informed policy decisions.

For purposes of the rule, affirmatively furthering fair housing "means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to

affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.”

For purposes of the rule, meaningful actions “means significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.”

What can communities do to affirmatively further fair housing?

- Adopt a fair housing policy or bylaw/ordinance
- Designate a fair housing director and create a fair housing committee/human rights commission
- Implement an outreach program to provide fair housing related education and resources to residents and municipal employees
- Implement local initiatives to increase housing opportunities of minorities
- Support regional housing needs and goals, not just local needs
- Amend zoning that restrict or impede multi-family and affordable housing, including rental housing
- Eliminate preferential treatment for local residents
- Be open to affirmatively providing opportunities for persons who are not currently residents of the community
- Promote diverse housing types including housing for families and persons with disabilities

Limited English Proficiency

Limited English Proficiency (LEP) refers to persons with a limited ability to read, write, speak and understand English. The Fair Housing Act prohibits discrimination based on LEP and further requires that all communities which receive federal funding are required to take steps to address LEP concerns.

How are communities expected to address LEP?

1. Conduct a four-factor analysis including an individualized assessment that considers the:
 - The number or proportion of LEP persons served or encountered in the eligible service population;
 - The frequency with which LEP persons encounter the program;
 - The nature and importance of the program, activity, or service provided by the program; and,
 - The resources available and the costs to the recipient.
2. Develop a Language Access Plan for the needs identified in the analysis. The Plan should include information on which forms, applications, information, etc. should be translated and when translator services may be necessary for meetings; and,
3. Provide appropriate language assistance. Examples include oral interpretive services, bilingual staff, phone line interpreter, written translation services, information on the availability of these services, and referrals to community liaisons proficient in the language or the LED person.

3. COMMUNITY SENTIMENT & CODED LANGUAGE

Excerpt below from the “Joint Statement of the Department of Housing and Urban Development and the Department of Justice State and Local Land Use Laws and Practices and the Application of the Fair Housing Act,” November 10, 2016.

A land use or zoning practice may be intentionally discriminatory even if there is no personal bias or animus on the part of individual government officials. For example, municipal zoning practices or decisions that reflect acquiescence to community bias may be intentionally discriminatory, even if the officials themselves do not personally share such bias. (See Q&A 5.) Intentional discrimination does not require that the decision-makers were hostile toward members of a particular protected class. Decisions motivated by a purported desire to benefit a particular group can also violate the Act if they result in differential treatment because of a protected characteristic.

Can a local government consider the fears or prejudices of neighbors in deciding whether a group home can be located in a particular neighborhood?

In the same way a local government would violate the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities, a local

government violates the law if it blocks a group home or denies a reasonable accommodation request because of stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers themselves do not have biases against persons with disabilities.

Not all community opposition to requests by group homes is necessarily discriminatory. For example, when a group home seeks a reasonable accommodation to operate in an area and the area has limited on-street parking to serve existing residents, it is not a violation of the Fair Housing Act for neighbors and local government officials to raise concerns that the group home may create more demand for on-street parking than would a typical family and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the requested accommodation, if a similar dwelling that is not a group home or similarly situated use would ordinarily be denied a permit because of such parking concerns. If, however, the group home shows that the home will not create a need for more parking spaces than other dwellings or similarly-situated uses located nearby, or submits a plan to provide any needed off-street parking, then parking concerns would not support a decision to deny the home a permit.

4. REASONABLE ACCOMMODATION

Reasonable Accommodation is a change, exception, or adjustment to a rule, policy, practice or service necessary for a person with a disability to have an equal opportunity to use and enjoy the dwelling or public space. Examples of Reasonable Accommodation in zoning include modifying setbacks for ramps, providing waivers for the number of unrelated people in a home. Reasonable Accommodation can include changes to zoning, policies, practices, or services provided by the state or local government. Reasonable Accommodation also applies when a property is rented or sold to a person with disabilities. Under the Federal Fair Housing Act, not allowing a reasonable accommodation in rules, policies, practices, or services is considered to be disability discrimination if the accommodation is necessary for an individual to use and enjoy a dwelling or public space.

Must every request for Reasonable Accommodation be approved?

Not necessarily. The key to this determination is whether the request is reasonable. Reasonable requests are defined as one which does not impose an undue financial and administrative burden on the locality or fundamentally alter the essential nature of the community's zoning plan.

Keep in Mind – that before a request is denied, the community has an obligation to look for alternative alterations which could be made to meet the disabled individual's needs without the undue financial or administrative burdens. Alternative solutions which meet the community's requirements can be a win/win situation so long as the disabled individual's needs are still met.

How does someone apply for Reasonable Accommodation?

Requests can be made by or on behalf of a person or persons with disabilities. For example, a person can request to have an additional handicap accessible space added on the street adjacent to their residence, or an organization can request accommodations that allow a group home to function in a neighborhood. A request for Reasonable Accommodation can be made at any time – there are no time limits or procedural requirements for when a request must be made.

Communities must consider these applications in a clear, consistent and timely matter. For this reason, communities are strongly encouraged to have clear procedures in place for receiving and reviewing these requests. Watertown is an example of a community with a clear process in place for Reasonable Accommodation reviews. A flow chart which explains Watertown's review process and copies of their Reasonable Accommodation Application are available online at www.watertown-ma.gov/index.aspx?NID=763.

ADDITIONAL INFORMATION

RELEVANT COURT CASES

County of Westchester v. United States Dept. of Housing and Urban Development

Summary: This is a landmark desegregation case for Fair Housing. Under the False Claims Act, the County of Westchester was taken to court over allegations that for many years it had misrepresented any efforts to desegregate its largely white communities and meet the AFFH requirements of its Community Development Block Grant (CDBG) and other federal funding. The courts found that the county was guilty of making no effort to create affordable housing in its communities and the settlement required the county to build or acquire 750 units for low and moderate income housing to be in communities with 3% or less minority populations.

Mount Laurel I (1975) and II (1983) (Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel)

Summary: The decisions in Mount Laurel I and Mount Laurel II represent the first time a state Supreme Court held that zoning ordinances, which make it physically and economically impossible to provide low and moderate income housing, were unconstitutional, per the state constitution. The decisions also established requirements for the state of New Jersey and its municipalities to provide affordable housing opportunities.

Additional Resource: <http://landuselaw.wustl.edu/mtlaurel.html> – From the Washington University in St. Louis Law School, this is a very detailed legal analysis of the case. This one focuses on Laurel II but includes a summary of I as well.

Court Reporter for Mt. Laurel II – www.njlegallib.rutgers.edu/mtlaurel/docs/92nj158.pdf

Village of Arlington Heights v. Metro Housing Development Corporation (1977)

Summary: A request from the MHDC to rezone a parcel from single to multi-family to construct low and moderate income housing was denied and the MHDC filed suit, alleging that the denial of the rezoning was racially discriminatory and that it violated both the Fourteenth Amendment and the Fair Housing Act of 1968. The U.S. Supreme Court established a test to determine the presence of discriminatory intent under the Fourteenth Amendment's equal protection clause. On remand the Seventh Circuit Court of Appeals held that at least under certain circumstances, a discriminatory effect alone can establish a Fair Housing violation.

Town of Huntington v. Huntington Branch (1989)

Summary: The court found that a municipality's restrictive zoning for multi-family housing had an unjustified disparate impact on African Americans in addition to perpetuating segregation. It was on these bases that the court determined the municipality had violated the Fair Housing Act.

NAACP Boston Chapter v. HUD (1989)

Summary: The NAACP charged that HUD had violated the "affirmative duty" provision of the Fair Housing Act by disregarding conditions of race discrimination in housing, residential racial segregation and containment, and a shortage of low-income housing that could serve black households in white neighborhoods. Through a series of court decisions, a national standard of what it means to affirmatively further fair housing was established, a requirement that is applicable to HUD and HUD grantees.

Olmstead, Commissioner, Georgia Department of Human Resources, et al v. L.C. (1999)

Summary: Important case determining that persons with disabilities have the right to live in integrated communities. A woman with a mental disability, was voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where she was treated in a psychiatric unit. Despite the professional recommendation that she could be treated in a community-based program, she remained institutionalized due to state regulations and filed suit. The court's ruling required states to eliminate unnecessary segregation of persons with disabilities and established the principle that people with disabilities should receive benefits, services, and housing in the most integrated community setting appropriate to their individual needs.

Langlois v. Abington Housing Authority (2002)

Summary: The local preference policy instituted by a group of Massachusetts housing authorities was found to have an unlawful disparate impact when four extremely low-income women of color, that were either homeless or had serious housing problems, brought suit against the Public Housing Authorities (PHAs) of Avon, Abington, Bridgewater, Halifax, Holbrook, Middleborough, Pembroke and Rockland, after experiencing barriers in their attempt to participate in the PHAs' lottery system for Section 8 Vouchers. The communities where the PHAs were located were characterized as predominantly white, with a low overall rate of poverty. The plaintiffs asserted that the housing authorities' implementation of residency preferences in the lottery system was discriminatory and the courts agreed.

Zoning Board of Appeals of Amesbury v. Housing Appeals Committee (2010)

Summary: The court established that the scope of local zoning boards to issue conditions on comprehensive 40B applications is limited to matters related to the siting and design of the development.

South Middlesex Opportunity Council (SMOC) v. the Town of Framingham: 2010

Summary: The case involved a local residential substance abuse program (SMOC) with multiple locations in the community. SMOC filed suit claiming that the community had discriminated against the population served by the agency by targeting three of its properties. One was subjected to continued evaluations of its application which resulted in a delay of the approval of permits necessary to move the project forward; a second was recommended to be closed since it no longer qualified for an exemption under the Dover Amendment; and the third was denied a request for an exemption from the Town's zoning requirements under the Dover. The court found that discrimination under the Fair Housing Act includes delays in issuing permits that are caused in part by discriminatory intent, even if the permits are ultimately granted.

Additional Resource: Judge Woodlock Court Order – decision that sent case to mediation and settlement spells out all of the legal issues in great detail.

[/www.smoc.org/pdf/judge%20woodlock%20summary%20judgement%20decision%209%209%2010.pdf](http://www.smoc.org/pdf/judge%20woodlock%20summary%20judgement%20decision%209%209%2010.pdf)

MHANY Management v. County of Nassau (2016)

Summary: The district court found a community is liable under the Fair Housing Act for intentional discrimination if it changes its zoning decisions based on community objections. The community had planned to rezone a public parcel for multifamily development but changed the zoning to mostly single family homes after residents objected.

Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project (2015)

Summary: Inclusive Communities Project, a nonprofit outfit, had successfully sued Texas for allocating federal tax credits for lower-income housing in mostly poorer, mostly minority neighborhoods in cities and suburbs around Dallas, which had the effect of keeping low-income housing out of wealthier, whiter neighborhoods. Texas then countersued, arguing that the Fair Housing Act did not prohibit implicit discrimination, only explicit discrimination. The case went all the way to the Supreme Court, where it was used to establish that Disparate Impact is recognizable as racial discrimination under the law.

Avenue 6E Investments v. City of Yuma (2016)

Summary: A developer sued the city after it refused to rezone an area for higher density development, even though these zoning changes were common within the community. The developer charged that the refusal was based on the objections of the largely white surrounding community to a new development which was anticipated to bring in Hispanic households. In one of the first cases to find for Disparate Impact, the courts found that the plaintiffs had presented plausible claims of disparate treatment under both the Fair Housing Act and the Equal Protection Clause.

Additional Resources: Ninth Circuit Decision – This includes some of the more inflammatory letters/statements on neighborhood concerns <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/03/25/13-16159.pdf>

Citylab Article on case - <https://www.citylab.com/equity/2016/04/court-decision-on-disparate-impact-and-density-in-yuma-arizona/476232/>

City of Edmonds v. Oxford House, Inc. (1995)

Summary: Oxford House (Respondent), opened a group home for 10-12 adults recovering from drug or alcohol addiction. The City of Edmonds (Petitioner), promulgated a definition of family, for purposes of single-family zoning. The definition only allowed fewer than five unrelated persons to live together, while any number of related persons could live together. The Respondent charged the city with failing to give reasonable accommodation under the Fair Housing Act (FHA). The Code governed family living and not living space per occupant as the exemption under the FHA. The purpose of a maximum occupancy is to protect health and safety by preventing overcrowding. To achieve such a purpose, it would need to apply uniformly. The provision here places absolutely no cap on the number of related persons who could cohabitate. (Source: <http://www.casebriefs.com>)

ADDITIONAL RESOURCES

- 1). Affirmatively Furthering Fair Housing Final Rule – This rule sets out the framework to be used by local and state government in meeting their AFFH duties of preventing discrimination, promoting fair housing choice, and fostering inclusive communities free of discrimination. www.hudexchange.info/programs/affh
- 2). Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice – State and Local Land Use Laws and Practices and the Application of the Fair Housing Act – Issued Nov. 10, 2016, this document provides clear guidance on how the Fair Housing Act applies to cases of local zoning and project review. www.justice.gov/crt/page/file/909956/download
- 3). Fair Housing Center of Greater Boston – A local nonprofit focused on eliminating housing discrimination and promoting open communities throughout the region. The organization offers community assistance programs to prevent housing discrimination and has a website with a great deal of general information. www.bostonfairhousing.org
- 4). National Housing Law Project (NHLP) - A nonprofit national housing and legal advocacy center with affirmatively furthering fair housing guidance and case law information. <http://nhlp.org/AFFH>
- 5). Johnston, Katie. "Around Boston, Racial Divides Persist" Boston Globe, April 17, 2017. www.bostonglobe.com/business/2017/04/17/around-massachusetts-racial-divides-persist/HqQrm3TcHIod1j2qQ2F44/story.html
- 6). Massey, Douglas S., Len Albright, Rebecca Casciano, Elizabeth Derickson & David N. Kinsey. *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb*. Princeton University Press. 2013. Study of how affordable housing can be built in high opportunity areas without negative effects to the community and the benefits to adults which affordable housing in these areas provides.
- 7). WBUR Interview with James Campen, author of the Massachusetts Community and Banking Council's Changing Patterns XXIII report which looked at mortgage lending to traditionally underserved populations. <http://www.wbur.org/radioboston/2017/05/01/racial-disparities-home-loans>
- 8). NPR Freshair's Terry Gross interview with Richard Rothstein "A forgotten History of How the US Government Segregated America." May 3, 2017. <http://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>
- 9) Massey, Douglas, et al., *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb*. 2013.