An Introduction to Fair Housing
Topics for Today

- Fair Housing Act
- Theories of Liability Under the FHA
  - Disparate Treatment
  - Discriminatory Effects (known as “disparate impact”)
- Discriminatory Effects Final Rule (2013)
- Obligation to Affirmatively Further Fair Housing
The Fair Housing Act
Fair Housing Act: What Does it Do?

- 42 U.S.C. § 3601 \textit{et seq.}
- Prohibits discrimination in housing-related transactions, including the sale, rental, or financing of dwellings.
- Discrimination includes refusing to rent to someone, steering someone away to a particular type of housing or neighborhood, enacting zoning measures to exclude particular groups etc., because of membership in a protected class.
The FHA, as amended, explicitly prohibits discrimination based on:

- Race
- Color
- Religion
- Sex
- Familial status (includes families with minor children; pregnant women)
- National origin
- Disability
Note: FHA and Other Historically Underserved Groups

- The FHA explicitly protects the groups on the previous slide.
- Additional groups *may* enjoy FHA protections based on a historical relationship or association with a named protected class.
- Examples:
  - LGBT individuals
  - Persons with limited English proficiency
  - Survivors of domestic violence
The FHA applies to “dwellings.”
The FHA covers most housing, including federally-subsidized and private housing, with few specific exceptions.
“Dwellings” are defined as “any building, structure, or portion thereof” that is “occupied as, or designed or intended for occupancy as, a residence by one or more families.” 42 U.S.C. § 3602(b).
Examples of dwellings: houses, apartments, university student housing, farmworker housing, AIDS hospice, nursing homes, homeless shelters*
Not dwellings: motels, jails, bed & breakfasts
Fair Housing Act: How is it Enforced?

- **Judicially**
  - Individuals (or, under certain circumstances federal government) can file a case in court. 42 U.S.C. §§ 3613, 3614

- **Administratively**
  - Individuals (or HUD itself) can file a HUD complaint. 42 U.S.C. § 3610.

- Under the FHA, an individual does not have to get a “right to sue” letter from HUD; instead, that person can go to court directly and file his or her claims. See 42 U.S.C. § 3613.
FHA Theories of Liability
Disparate Treatment

- Treating someone differently because he or she is a member of a protected class

Examples:
- A landlord refuses to rent to a family because the family is African American.
- A landlord refuses to rent to a family with children because he considers children to be too disruptive to the other tenants.
- A real estate agent only shows a prospective Hispanic homebuyer homes in Hispanic neighborhoods because the agent believes this is where the purchaser would feel most “comfortable.”
Disparate Treatment (cont.)

- To prove disparate treatment under the FHA, a plaintiff must provide evidence of the defendant’s discriminatory intent.

- Plaintiff can accomplish this by:
  - Providing direct evidence of discrimination or
  - Demonstrating a prima facie case of discrimination

  *See generally Pacific Shores v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013).*

- If the plaintiff shows a prima facie case, then defendant must provide legitimate, nondiscriminatory reason for the action. If defendant does so, plaintiff must then show that defendant’s reason was pretextual.
Discriminatory Effects

- Does not require demonstration of discriminatory intent
- Types of claims:
  - Disparate impact
  - Perpetuation of segregation
Disparate Impact

- Arises when there is a neutral practice or policy that disproportionately impacts a protected class. Plaintiffs who allege discriminatory effects do not have to show discriminatory intent.
Perpetuation of Segregation

- Applies when a decision or action reinforces segregation
- Example: A town’s “refusal to amend the restrictive zoning ordinance to permit privately-built multi-family housing outside the [majority minority] area significantly perpetuated segregation in the Town.” Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988).
HUD Discriminatory Effects Rule

- HUD issued the Final Rule in February 2013
- Available at: 78 Fed. Reg. 11,460-11,482
- The Final Rule aimed to formalize HUD’s interpretation of discriminatory effects standard under the Fair Housing Act. The Final Rule also affirms “discriminatory effects” as a viable theory of liability under the FHA.
- In the Final Rule, HUD set out burden-shifting test for discriminatory effects liability.
- Previously, different standards for discriminatory effects liability existed among federal courts of appeals.
Burden shifting test operates as follows:

- **Step 1:** Plaintiff (charging party) has the burden of showing that a defendant’s practice or action has a discriminatory effect on the plaintiff.

- **Step 2:** If plaintiff accomplishes step 1, defendant (respondent) has the burden of providing a justification for the action or practice. In doing so, the defendant must show that the action/practice was necessary to achieve a legitimate, non-discriminatory purpose.

- **Step 3:** If defendant accomplishes step 3, plaintiff has the burden of showing that defendant could have reached the same objective with a less discriminatory alternative.
Affirmatively Furthering Fair Housing
The FHA requires HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” policies outlined in the FHA. See 42 U.S.C. § 3608 (e)(5).

Federal funding recipients with an AFFH obligation must be proactive in combatting segregation; it is not sufficient to merely prohibit discrimination.

Previously, funding recipients have certified that they have analyzed impediments to fair housing choice (AI) and have taken steps to address impediments.
AFFH Final Rule

- Issued in July 2015
  - Effective date: August 17, 2015
- Amends a series of HUD regulations to create a new fair housing analysis framework
- Two HUD AFFH websites:
  - Website for general public
  - Website aimed at HUD grantees, but still has useful information for advocates (fact sheets, FAQs, etc.)
- Implementation will be staggered.
AFFH Final Rule – Key Features

- Stresses a balanced approach
  - Place-based AND mobility strategies
- Replaces the AI with the Assessment of Fair Housing (AFH)
  - Structured process with HUD review for all AFHs
- Incorporates fair housing planning into broader planning processes (e.g., PHA Plan, Consolidated Plan)
- Encourages (and relies upon) community participation
- Seeks more meaningful and effective fair housing planning through the provision of data
  - Includes data on education, transportation, employment, and the environment
- Encourages collaboration among HUD grantees
- Requires local AND regional thinking and data analysis
Resources

- Provided background for today’s presentation:
  - Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (West)

- Additional resources:
  - HUD FHEO website