



New Hampshire Housing  
*Bringing You Home*

# Fair Housing for Regional and Municipal Planning

*A Guidebook for New  
Hampshire Planners*

April 2014



**FAIR HOUSING**  
**for**  
**REGIONAL and MUNICIPAL**  
**PLANNING**

**A Guidebook for New Hampshire Planners**

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**The production of this guidebook was supported by HUD  
Community Challenge Planning Grant No. FR-5500-N-33.**

**April 2014**

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# Chapter 1

## Introduction

...places are becoming more unequal. Economic classes are becoming more spatially separate from each other, with the rich increasingly living with other rich people and the poor with other poor.

- Peter Dreir, *et al.*, *Place Matters: Metropolitcs for the Twenty-First Century* (2001)

### Guidebook Purpose

This Guidebook has been produced as a resource for local and regional planners, as well as for planning and zoning board members and other municipal officials who want to understand how Federal housing law impacts local planning efforts, and how Federal and state law interact on these issues. This Guidebook will also be useful for Regional Planning Commissions creating Fair Housing and Equity Assessments that may be required by the U.S. Department of Housing and Urban Development (HUD) under a regional planning grant. The goal of the Guidebook is to provide insight into fair housing law and to highlight the importance of incorporating its principles into planning work.

### Guidebook Overview

Chapter Two focuses on the federal Fair Housing Act, its purpose and key features and includes information about New Hampshire's housing discrimination laws, as well. The chapter includes a discussion of protected class categories and examples of zoning and land use cases by category. Chapter Three concentrates on one theory of fair housing law – disparate impact, or discriminatory effect – the area most relevant to planners and municipal officials since most disparate impact litigation involves challenges to zoning and land use laws. Chapter Four discusses the obligation of grantees of HUD funds to “affirmatively further fair housing,” a timely topic given recent litigation and HUD's issuance of proposed regulations in this area. Chapters Five and Six cover additional federal and state laws that are frequently implicated in zoning and land use litigation. Chapter 7 focuses on the Fair Housing and Equity Assessment, its purpose, requirements and approaches for creating the document. Chapter 8 contains a list of tools and resources, most of which are easily accessible over the Internet.

## **Guidebook Production**

The Guidebook was produced by New Hampshire Legal Assistance (NHLA) under contract with New Hampshire Housing through a HUD Community Challenge Planning Grant.

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Elliott Berry served as editor of the Guidebook. He is the managing attorney of New Hampshire Legal Assistance's Manchester office. Elliott has worked for NHLA for over thirty years and has gained prominence for his legal and legislative work, particularly in the areas of housing law and policy. He has been lead counsel on many groundbreaking cases, including *Britton v. Chester*, a landmark affordable housing decision codified under the RSA 674:58 et seq., the new

Workforce Housing Law referenced in Part III of this document. He also participated in the litigation of *Ossipee* and *Gilsum* cases cited in the Guidebook. Elliott wrote about local land use controls in both the 2010 and 2004 Updates to the Analysis of Impediments to Fair Housing in New Hampshire and also served as an editor.

Special acknowledgment goes to Ben Frost, Director of Public Affairs; and Bill Guinther, Program Policy Analyst; both of New Hampshire Housing, for their invaluable input and assistance in the production of the Guidebook.

# Chapter 2

## The Federal Fair Housing Act

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

- Federal Fair Housing Act, 42 U.S.C. §3601

### History of the Fair Housing Act

Forty-five years ago, at the height of the civil rights movement and in the wake of the assassination of Dr. Martin Luther King, Jr., Congress passed the federal Fair Housing Act (FHA). It was the final piece of modern civil rights laws begun with the Civil Rights Act of 1964 which was promulgated to address and suppress racial discrimination against Americans of African descent. The FHA initially prohibited discrimination based on race, color, national origin, and religion. It was amended in 1974 to include gender or sex and again in 1988 to cover familial status and disability.

### Purpose of the Fair Housing Act

The FHA has two major goals:

1. To stop discriminatory practices against protected class members in access to and receipt of housing and housing-related services; and
2. To promote integration and suppress segregation in housing.

“From its inception, the Fair Housing Act not only outlawed discrimination but also set out the steps that needed to be taken proactively to overcome the legacy of segregation.”<sup>1</sup> Today, fifty years after Martin Luther King’s March on Washington, his vision of a fully equal society remains an ideal, not a reality. Throughout the United States and even in New Hampshire, too many of our citizens remain in segregated communities with high concentrations of poverty.

### Enforcement of the Fair Housing Act

Along with the U.S. Department of Justice (DOJ), the U.S. Department of Housing and Urban Development (HUD) is charged with enforcing and promoting the FHA. HUD also funds state and local governmental units and private non-profit organizations to engage in enforcement activities. In New Hampshire, New Hampshire Legal Assistance has received Fair Housing Initiatives Program (FHIP) funding for over eighteen years to enforce federal fair housing laws. Because the State of New Hampshire’s laws against housing discrimination have not yet met the

requirement of “substantial equivalency” with the FHA, it does not receive any enforcement funds.<sup>2</sup> Lastly, private individuals harmed by discrimination and organizations engaged in fair housing work may file administrative complaints with HUD’s Office of Fair Housing and Equal Opportunity or initiate lawsuits in state or federal court.<sup>3</sup>

## **Key Features of the Fair Housing Act**

### **Protected Classes**

Recognition of pervasive discrimination in the daily lives of African Americans in the United States led to the enactment of the Civil Rights Acts of 1866 and 1964 and resulted in the development of the legal notion of “protected class.” Recognition that other groups of people also suffered unequal access to opportunities has expanded the number of groups protected under state and federal anti-discrimination and civil rights laws. The federal Fair Housing Act now includes seven protected classes: race, color, national origin, religion, sex, familial status and disability. New Hampshire’s anti-discrimination laws expand protection to three additional groups based on age, marital status or sexual orientation.

Over the years, many housing discrimination lawsuits based on land use laws have been brought by and/or on behalf of protected class members against governmental entities on theories of both intentional and direct discrimination and on disparate impact theories. Examples are listed below within each protected class category. We have included New Hampshire’s additional protected classes in this section as well as in the discussion on exemptions in fair housing law.

### **Race**

Although civil rights laws prohibiting racial discrimination were initially enacted to protect those of African American descent, the laws’ protections extend to persons of all races who have been harmed by discriminatory actions. Case law provides numerous examples of land use, municipal ordinances and zoning laws that have, intentionally or otherwise, promoted exclusion and segregation on the basis of race.

*Kennedy v. City of Zanesville* (2007): Coal Run, the only predominantly African American neighborhood in Zanesville and in all of Muskingum County in Ohio, did not receive government-provided public water infrastructure despite years of requests, even as water was piped past Coal Run to more distant white neighborhoods. Residents sued under the FHA and other civil rights laws and a jury returned a verdict of \$10.8 million to the residents.<sup>4</sup>

*Dews v. The Town of Sunnyvale, Texas* (2000): Twelve miles outside of Dallas, Texas, the Town of Sunnyvale had virtually no minority residents, a one acre residential zoning requirement, and an explicit ban on multifamily housing. After years of litigation, the federal court found that



“Sunnyvale’s ban on apartments and stubborn insistence on large lot, low density zoning also perpetuate racial segregation in Dallas County.”<sup>5</sup>

*Huntington Branch NAACP v. Town of Huntington* (1988): This is a disparate impact case in which the federal court found that the Town’s refusal to allow multifamily housing development outside of an “urban renewal area” where the majority of black residents lived constituted a violation of the FHA (75% of the black population was clustered in 6 census tracts: of the Town’s remaining 42 census tracts, 30 were at least 99% white).<sup>6</sup>

### Color

This distinct protected class category is most often used in conjunction with allegations of racial or national origin discrimination. Several contemporary studies have documented discriminatory treatment of individuals based on the lightness or darkness of their skin both by members of the same racial/ethnic group and by members of different racial/ethnic groups.<sup>7</sup> No examples of discrimination exclusively based on color involving land use, municipal ordinances or zoning cases could be found.

### National Origin

The U.S. Supreme Court has said that the term national origin refers “to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>8</sup> The FHA and other civil rights laws have interpreted the notion of national origin to include ethnicity such as being of Latino or Arabic heritage.<sup>9</sup>

*Hispanics United of DuPage County v. Village of Addison, Ill.* (1997): After the Village of Addison began a program of demolition of affordable housing in its two largest Latino communities, Latino residents and a fair housing organization brought suit under the FHA which was joined by the U.S. Department of Justice. The parties entered into a consent decree which included money damages to the plaintiffs and implementation of a redevelopment plan that addressed both parties’ concerns and interests.<sup>10</sup>

*Litton Intern. Development Corp. v. City of Simi Valley* (1985): The city was found not to have discriminated against Saudi Arabian student trainees when it denied developer permits to construct living facilities (first proposed as condominiums and then as a hotel) when the only potentially discriminatory statements were made by members of the public at public hearings.<sup>11</sup>

### Religion

Although complaints of religious discrimination in housing cases are relatively small in number compared to other class categories, there have been several land use, municipal ordinance and zoning cases brought under the FHA and other legal theories.

*The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch* (2005): This was a long-running battle between the City and a religious organization that sought to retain a particular site for services (including shelter) to the destitute in a particular location in the City. Lighthouse brought claims under the Establishment Clause and RLUIPA. The City changed its ordinance in a way which still prevented Lighthouse from carrying out its plans and the City prevailed against most claims. However, the Court ruled that more analysis was required in order to determine whether the City treated similarly situated secular institutions more favorably than Lighthouse.<sup>12</sup>

*Tenafly Eruv Ass'n v. Borough of Tenafly* (2002): Orthodox Jewish residents brought a lawsuit against the City when it selectively enforced its ordinance banning public attachments to utility poles. The Jewish residents were not permitted to affix “lechis” to the utility poles (postings which communicated zones where travel to Sabbath services would be religiously permitted) even though the city had not enforced its ordinance against other groups and individuals. Although the group’s Fair Housing and First Amendment speech claims failed, the Court, applying strict scrutiny, found that the City’s actions were unlawful under the Establishment Clause and remanded the case back to the trial court with instructions.<sup>13</sup>

*Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead by its Bd. of Trustees of Village of New Hempstead* (2000): Legal action for intentional discrimination brought by orthodox Jewish residents alleging violations of FHA and other federal laws after the Village selectively enforced zoning ordinances allegedly for the purpose of preventing an orthodox Jewish community from occupying and developing a property. The Court denied the Village’s motion for summary judgment, ruling that there were issues of fact as to whether the Village’s actions involved discriminatory motivations.<sup>14</sup>

*LeBlanc-Sternberg v. Fletcher* (1995): The appeals court upheld the jury verdict which found that the Village of Airmont violated the FHA when it engaged in intentional discrimination by enacting zoning ordinances aimed at repressing home religious observances for the purpose of keeping orthodox and Hasidic Jews from moving into the community.<sup>15</sup>

## Gender

Protections against housing discrimination based on gender or sex were added to the FHA in 1974 in recognition of the fact that women in American society had been disadvantaged in accessing housing opportunities as they have also been in employment and other arenas. Gender discrimination, stereotyping and sexual harassment have resulted in disparate treatment of women in home sales, rentals, lending and other aspects of the provision of housing and housing-related services.

*Sisemore v. Master Financial, Inc.* (2007): Lawsuit brought by a single mother and operator of a day care center against mortgage lender under California’s housing discrimination laws after she

was denied a mortgage. Lender had a policy not to lend to persons whose source of income was derived from childcare. The state appeals court found that this policy had a disparate impact on women and families with children.<sup>16</sup>

*Doe v. City of Butler, Pa.* (1989): Domestic violence victims brought class action to challenge constitutionality of the City's zoning regulation which limited transitional dwellings to six persons, including children. The appeals court held that the regulation did not violate due process, right to freedom of association, or the sex discrimination provision of Fair Housing Act but that remand to the trial court was necessary in order to determine the constitutionality of the regulation as applied to high density districts and residential office districts.<sup>17</sup>

### Familial Status

In 1988, the FHA was amended to prohibit discrimination in housing based on familial status, which refers to the presence of children under 18 years in the home. Included in the class are families of many configurations including parents expecting the birth of a child, adoptive parents, foster parents, grandparents and other relatives caring for children, and parents awaiting custody of a child and may include residential facilities for children.

*Gibson v. County of Riverside* (2002): Plaintiffs challenged the County's use of its zoning powers to impose age restrictions in particular areas of the County with the result that families with children were not permitted to reside within those areas. The federal court determined that the County was not entitled to impose such restrictions and had therefore violated the FHA's prohibitions against familial status discrimination and the State's prohibitions against age and familial status discrimination.<sup>18</sup>

*Fair Housing Ass'n v. City of Richmond Heights* (1998): A fair housing organization brought fair housing claims based on familial status discrimination against three cities asserting that their occupancy limits unlawfully limited access to housing by families with children. The trial court found that there was no violation because the ordinances fell within the exemptions of the FHA that permitted governments to impose reasonable occupancy limits.<sup>19</sup>

*Children's Alliance v. City of Bellevue* (1997): A group home for youth, some of whom were disabled, brought a challenge under the FHA alleging that the City imposed greater restrictions on youth homes than on other group homes. The trial court found that the City's ordinances violated the FHA based on familial status and disability.<sup>20</sup>

### Disability

The FHA's 1988 amendments also expanded protected class coverage to include persons with disabilities. They "were clearly intended to curb land-use restrictions on communal housing opportunities for disabled persons (sometimes called 'group homes')." <sup>21</sup> The FHA's definition

of a person with a disability is consistent with the definitions set forth in the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. “Handicap” is defined as “a physical or mental impairment which limits one or more of [a] person’s major life activities, a record of having such an impairment, or being regarded as having such an impairment.”<sup>22</sup> The FHA protections extend to those associated with a person with a disability such as family members and friends. The FHA provides enhanced protections to persons with disabilities in that they may request accommodations and/or modifications in order to be able to use and enjoy their dwelling and to access and use other housing related services.

*ASMR v. Town of Gilsum*, (complaints filed 2008 and 2011): These were New Hampshire cases involving a group home for persons with HIV and hepatitis C. ASMR initiated fair housing claims against the Town in superior court alleging that the Town’s use of zoning restrictions and other actions taken by the Town were intended to keep the program from operating, based on animus toward the program’s residents. ASMR introduced evidence that the Town treated ASMR differently than other nonprofit and religious institutions in similar situations. The cases were settled in ASMR’s favor.<sup>23</sup>

*Lakeside Enterprises, LP v. Bd. of Sup’s of Palmyra Tp.* (2006): After plaintiffs attempted to obtain permission to use property for a residential substance abuse program, the Town changed the ordinance to prohibit substance abuse programs in that area. Plaintiffs sued under the FHA and the appeals court found that the program covered under the FHA and remanded the case to the trial court on the issue of disability discrimination.<sup>24</sup>

*Tsombanidis v. West Haven Fire Dept.*(2003): Plaintiffs challenged City ordinances under the FHA and ADA claiming intentional discrimination against its substance abuse program. The appeals court found that the Town had engaged in intentional discrimination and failed to provide reasonable accommodations to a group home serving persons with disabilities.<sup>25</sup>

*Trovato v. City of Manchester* (1997): New Hampshire homeowners brought a lawsuit against the City when their request for a zoning variance to accommodate their disabilities was denied. The City’s zoning board of adjustment did not believe that it had the power to grant the variance under state law. The federal court ruled that the variance must be granted as an accommodation under the FHA, and that the variance did not run with the land, but with occupancy of the premises by the disabled owners.<sup>26</sup> State law was subsequently changed to codify this ruling.<sup>27</sup>

*City of Cleburne, Texas v. Cleburne Living Center* (1985): This is a U.S. Supreme Court equal protection case decided prior to inclusion of disability in the FHA, where the City sought to prevent the establishment of a group home for developmentally-delayed persons through the use of its zoning ordinances. The court ruled that the City’s basis for exclusion appeared to rest on “irrational prejudice” rather than in a legitimate governmental interest.<sup>28</sup>

### **New Hampshire's Three Additional Protected Classes**

State housing discrimination laws may offer more protections than federal law, including extension of protected class status to additional groups of people. New Hampshire has added three protected classes: age, marital status, and sexual orientation. Although the federal Fair Housing Act does not include these categories as protected classes, HUD does prohibit HUD-funded housing providers and FHA lenders from discrimination on the basis of sexual orientation and marital status.<sup>29</sup> In addition, the FHA carves out an exemption from familial status discrimination in allowing the provision of housing for older persons.<sup>30</sup> Cases from other states have been cited where no New Hampshire case law has been reported and where the circumstances may be relevant in New Hampshire.

#### Age

New Hampshire law prohibits age and familial status discrimination in housing except in cases where the housing provider has met the federal and state standards required to provide housing for persons 55 and older or 62 and older.<sup>31</sup> The interplay between state and federal laws renders this area quite complex and easy to misconstrue. Many municipalities have ordinances governing housing for older persons in their communities. A brief survey of selected municipalities found that several ordinances appeared to run afoul of state law age protections.<sup>32</sup>

*Gibson by Gibson v. County of Riverside* (2002): See case description under Familial Status, above.<sup>33</sup>

#### Marital Status

Complaints of housing discrimination under New Hampshire law based upon marital status are rare but do arise occasionally. In the mid-2000s, in separate cases, New Hampshire Legal Assistance and a private attorney filed housing discrimination complaints against a town and a 55 and older condominium community based in part on the town's zoning ordinance that prohibited anyone under 55 years from residing in the community unless married to a person 55 years or older. As part of the resolution of the case, the town changed its ordinance.

*Loving v. City of Black Jack* (2006): An unmarried couple living with their three children, one of whom was the child of only one of the adults, was denied an occupancy permit based on the City's ordinance that prohibited more than three people from living together unless related by "blood, marriage or adoption." Although the planning and zoning commission recommended changing the ordinance to eliminate the adverse effects on such families, the City Council initially voted to maintain the ordinance, only relenting when a lawsuit was initiated against the City.<sup>34</sup>

### Sexual Orientation

Sexual orientation is the newest protected class under New Hampshire law having been added in 1997.<sup>35</sup> New Hampshire law also prohibits eviction of a tenant solely because the person has or is perceived to have AIDS, a once lethal health condition that disproportionately affected gay men in the U.S.<sup>36</sup> Because of this link, gay rights advocacy groups have often intervened in discriminatory actions against individuals with HIV/AIDS or groups and organizations providing services to them (as happened in the *Gilsum* cases where GLAD (Gay and Lesbian Advocates and Defenders) initiated the legal actions with New Hampshire Legal Assistance as local counsel).

*ASMR v. Town of Gilsum*, (2008 and 2011): See case description under Disability, above.<sup>37</sup>

### **Prohibited Activities under the Fair Housing Act**

The FHA's reach is very broad and it covers many activities and applies to many parties including individuals, corporations, sellers, landlords, insurance companies, appraisers, lenders, governmental entities and others. It prohibits entities from making a dwelling unavailable on the basis of protected class status including refusing to sell or rent a dwelling or to negotiate the sale or rental of a dwelling (42 U.S.C. §3604(a)). The FHA also bars discrimination in the terms and conditions of sale or rental of a dwelling or in the provision of connected services or facilities (42 U.S.C. §3604(b)). Statements, verbal or published, including advertising, that state a preference, limitation or that discriminate on the basis of protected class membership constitute unlawful conduct. In addition, the FHA requires the provision of reasonable accommodations and modifications in rules, policies, practices and services for persons with disabilities.

### Examples of Prohibited Conduct

1. Making housing unavailable (refusal to sell or rent or negotiate a sale or rental; making false representations of unavailability).
2. Steering: this practice involves limiting housing choices and opportunities for protected class members by guiding them toward or away from housing opportunities based on the protected class of the party.
3. Exclusionary zoning and land use restrictions: includes situations where the zoning and land use ordinances are intended to exclude members of certain protected classes as well as those where the ordinances have a disparate impact on members of a protected class.
4. Mortgage and insurance redlining, reverse redlining and discriminatory appraisals:
  - a. Redlining involves the practice of insurance companies or lenders refusing to provide services or providing markedly unfavorable terms and conditions in their products to persons in certain neighborhoods generally based on the racial and/or ethnic composition of the area.

- b. Reverse redlining is a more recent practice in which lenders, insurers, appraisers and others targeted communities of colors and offered products and services at predatory rates.
5. Discriminatory terms, conditions, services, and facilities (charging different rates, providing different levels of services, limiting use of facilities based on protected class status).
6. Discriminatory advertising, notices, and statements.
7. Blockbusting (involves the practice of manipulating sales for financial gain in a neighborhood or residential area through fear tactics of warning current residents that members of certain protected classes are moving into the area).
8. Coercion, intimidation, threats, interference (including retaliation against a protected class member because he/she filed a complaint of discrimination).
9. Harassment based on protected class status.
10. Failure or refusal to allow reasonable accommodations or modifications for persons with disabilities.

#### **Exemptions from the Fair Housing Act**

1. Sale or rental of single family homes if owner does not own more than **three** such homes at any one time and if no broker or advertising is involved in the transaction (further restrictions apply if the home was not occupied by the owner at the time of sale) (42 U.S.C. §3603(b)(1)). **NOTE:** New Hampshire law only permits sale of **one** home in such circumstances with prohibitions against use of broker and advertising (RSA 354-A:13).
2. Owner-occupied dwellings with **four** or fewer units (42 U.S.C. §3603(b)(2)). **NOTE:** New Hampshire law only permits the exemption for owner-occupied dwellings of **three** or fewer units.
3. Religious organizations or private clubs with some restrictions.
4. Housing for older persons if compliant with federal and state laws.

#### **Intent and the Fair Housing Act**

There are two theories of discriminatory conduct:

1. Intentional Discrimination: there is no requirement of malicious intent or animus toward the protected class. Even practices with “benign” intent trigger liability. For example, if a real estate agent showed a Latino client homes for sale only in neighborhoods heavily populated by Latinos, even if she sincerely assumed that this would be what the buyer would prefer, this would be unlawful steering, a prohibited practice.
2. Disparate Impact: seemingly neutral laws, regulations, policies or practices that have a negative impact on members of a protected class. Examples include municipal land use regulations that severely limit or exclude multifamily housing from the municipality;

limiting affordable housing developments to areas of high concentrations of poverty; disparate provision of infrastructure, municipal improvements, and other municipal services in ways that disadvantage neighborhoods with higher concentrations of poverty.

**Liability under the Fair Housing Act**

Actions brought under the FHA may be initiated in either federal or state court or filed as an administrative complaint with HUD's Office of Fair Housing and Equal Opportunity. DOJ may decide to intervene and play a role in the litigation.

In a case where fair housing violations are found, the court may order injunctive relief, requiring that the respondent refrain from certain actions and/or requiring the respondent to take certain actions to cure the violations. Relief may also include monitoring in order to assure compliance. The court may also award money damages and attorneys fees.



# Chapter 3

## Disparate Impact and Planning

[A] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group or persons or creates increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, [disability], familial status or national origin.

- HUD Regulations on Discriminatory Effects<sup>38</sup>

### Discriminatory Effects: Fair Housing Pitfalls for Planners

Disparate impact type fair housing violations are the most likely risk for planners. The vast majority of disparate impact cases have involved zoning and land use ordinances. Failure to incorporate fair housing analysis and failure to recognize structural barriers within the community that promote segregation and lack of access to opportunity are key pitfalls. Litigation in this area has had the effect of promoting inclusionary zoning and land use practices in communities throughout the nation. “Challenges to discriminatory zoning and land use practices of local jurisdictions pursuant to the Act have been one of the most important tools in seeking to promote residential integration.”<sup>39</sup>

### HUD’s Discriminatory Effects Regulation

On February 15, 2013, HUD issued regulations on the Discriminatory Effects Standard to be applied in HUD fair housing investigations.<sup>40</sup> The regulations clarify and formalize this theory of fair housing law commonly known as “disparate impact” liability. Although all of the federal appeals courts that have issued rulings in this area have acknowledged that a neutral policy or practice may be unlawful under the FHA because of its disparate impact, the courts have adopted different standards of analysis. The HUD regulations set a 3-pronged burden-shifting standard for analysis of a seemingly neutral law, policy or practice through the lens of disparate impact. Because the U.S. Supreme Court has never explicitly ruled on the viability of disparate impact and because courts generally tend to give HUD policies and regulations deference in fair housing jurisprudence, the regulations are expected to have significant impact going forward.

Three-Pronged Burden-Shifting Analysis\*

1. *Prima Facie Case*: As always, the plaintiff or complainant has the burden of establishing a legally justifiable claim. The plaintiff must prove that the challenged “practice caused, causes or predictably will cause a discriminatory effect on a group of persons or a community on the basis of race, color, religion, sex, disability, familial status, or national origin.”<sup>41</sup> The plaintiff must prove that the practice has a disparate impact on members of a protected class and that the harm is substantial or that the practice tends to reinforce patterns of segregation, or both. If the plaintiff is able to make this proof, the burden shifts to the defendant or respondent.
2. *Legally Sufficient Justification*: The defendant may then rebut the plaintiff’s assertion by proving that the practice is necessary to achieve one or more substantial, legitimate, and nondiscriminatory interests of the defendant.<sup>42</sup> The justification must be supported by evidence and may not be hypothetical or speculative.<sup>43</sup> The burden then shifts back to the plaintiff to overcome the defendant’s rebuttal.
3. *Less Discriminatory Practice Available*: The plaintiff still may prevail if able to show that the defendant’s substantial, legitimate and nondiscriminatory interests could be met with a different practice “that has a less discriminatory effect.”<sup>44</sup>

\*Note that this burden-shifting approach is not available in cases where intentional discrimination is alleged.<sup>45</sup>

**U.S. Supreme Court Review of Disparate Impact Claims Under the Fair Housing Act**

Although all of the federal courts that have been confronted with the issue have recognized disparate impact as a legitimate legal theory of discrimination under the FHA, the U.S. Supreme Court has never explicitly ruled on disparate impact theory. On two occasions, the Supreme Court has granted *certiorari* on this issue, clearly signaling its willingness to take this matter on. However in both cases, the parties settled the cases shortly before oral arguments were scheduled to take place.

In *Magner v. Gallagher*, property owners sued the City of St. Paul, Minnesota claiming that the City’s aggressive use of code enforcement tactics in its poorest neighborhoods had a disparate impact based on race because it reduced housing opportunities for African Americans.<sup>46</sup> The case was accepted by the Supreme Court on the sole issue of the viability of the disparate impact theory, but was dismissed in 2012 after the parties settled.<sup>47</sup>

On June 17, 2013, the U.S. Supreme Court granted a *writ of certiorari* to hear the appeal of *Mt. Holly, N.J. v. Mt. Holly Gardens Citizens*.<sup>48</sup> This disparate impact case involved the neighborhood of Mt. Holly Gardens in Mt. Holly, New Jersey which contains Mt. Holly's highest concentration of Black and Latino residents of mostly poor and working class income levels. Those residents, alleging various constitutional and civil rights violations, sued the Town after it entered into a redevelopment plan with a private developer which called for demolition of the neighborhood and replacement with mostly market rate housing with only a fraction of the housing set aside for low-income residents. After the federal appeals court ruled in the residents' favor, the Town appealed and the Supreme Court accepted the case on the sole issue of whether disparate impact claims are cognizable under the FHA. Oral arguments had been set for early December 2013, but the case was dismissed on November 15, 2013 after the parties reached a settlement.<sup>49</sup>

# Chapter 4

## Affirmatively Furthering Fair Housing

[S]egregation is due in part to a historical legacy of discrimination and continues to have adverse impacts, with the dual concentration of poverty and racial and ethnic populations still far too prevalent.

- HUD Proposed Rule on Affirmatively Furthering Fair Housing<sup>50</sup>

### The Duty to Affirmatively Further Fair Housing

The FHA directs the Secretary of HUD to “administer the programs and activities related to housing and urban development in a manner affirmatively to further the policies” of the Fair Housing Act.<sup>51</sup> Recipients of HUD funds are required to certify that the funds will be used in a manner that will affirmatively further fair housing principles. HUD subgrantees are also obligated under this contractual requirement. In 1994, President Clinton signed an Executive Order requiring “that all executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of the Act . . . .”<sup>52</sup>

### HUD’s Strategies for Affirmatively Furthering Fair Housing Focus on Regional Planning

HUD’s 2010 – 2015 Strategic Plan sets out its goal to “create strong, sustainable, inclusive communities and quality affordable housing for all.”<sup>53</sup> HUD defines inclusive communities as those “in which all people – regardless of race, ethnicity, socioeconomic status, age, disability, or sexual orientation – have access to the same housing, transportation, health, education, and employment opportunities.”<sup>54</sup>

The Strategic Plan’s priorities include creating more inclusive communities through regional planning; increasing the effectiveness of and compliance with Analyses of Impediments; and utilizing other strategies to affirmatively further fair housing through HUD programs.

### HUD’s Proposed Rule on Affirmatively Furthering Fair Housing

On July 19, 2013, HUD issued its long-awaited proposed rule on affirmatively furthering fair housing.<sup>55</sup> HUD states its purpose as follows:

The proposed rule involves refining the fair housing elements of the existing planning process that states, local governments, insular areas, and public housing agencies [program participants] now undertake. The process proposed by this rule assists program participants to assess fair housing determinants, prioritize fair housing issues for response, and take meaningful actions to affirmatively further fair housing.<sup>56</sup>

The proposed rule, if adopted, would allow accomplishment of several goals:

1. Provision of a more precise definition of the term “affirmatively furthering fair housing” (AFFH);
2. Clarification of the obligations of HUD recipients in their efforts to AFFH;
3. Creation of a new assessment and planning mechanism called an “Assessment of Fair Housing” (AFH) for state and local governments to utilize in place of the current Analysis of Impediments to Fair Housing (AI);
4. Provision by HUD of demographic data to HUD recipients in order to facilitate more effective and consistent analysis of their communities from a fair housing standpoint;
5. Elucidation of public housing authorities’ roles in the fair housing planning process; and
6. Creation of more vibrant and integrated communities and reduction of patterns of segregation.

#### Definition of Affirmatively Furthering Fair Housing

The proposed rule defines AFFH as follows:

*Affirmatively furthering fair housing* means taking steps beyond simply combating discrimination to foster more inclusive communities and access to community assets for all persons protected by the Fair Housing Act. More specifically, it means taking steps proactively to address significant disparities in access to community assets, to overcome segregated living patterns and support and promote integrated communities, to end racially and ethnically concentrated areas of poverty, and to foster and maintain compliance with civil rights and fair housing laws.<sup>57</sup>

This definition makes it clear that communities, and therefore planners, must take into consideration patterns of integration and segregation with a priority of eliminating racially and ethnically concentrated areas of poverty.

### Assessment of Fair Housing

HUD proposes to replace the Analysis of Impediments to Fair Housing (AI) currently required of states and entitlement communities<sup>58</sup> with an Assessment of Fair Housing (AFH).

Provision of Data: In order to make the AFH more effective and consistent, HUD proposes to supply data to its program participants including the following:

- Patterns of segregation/integration including dissimilarity index and isolation index
- Disproportionate housing needs of protected classes
- Existence of racially concentrated areas of poverty within a jurisdiction
- Poverty indexes
- Neighborhood school proficiency index
- Labor market engagement index
- Job access index
- Health hazards exposure index
- Transit index

While program participants are encouraged to supplement the data with other locally relevant statistics and information, a preliminary review of the current HUD data suggests that much of the information will not be useful in predominantly rural states such as New Hampshire. Therefore, supplemental data will be necessary.

Requirements: The AFH must address, analyze and report on factors that affect equal access to housing choice within the jurisdiction including:

- Patterns of segregation
- Concentrations of poverty
- Disparities in access to community assets
- Disproportionate housing needs based on protected class status
- Incidence of “fair housing issues” within jurisdiction including any findings or judgments related to fair housing or other civil rights laws
- Assessment of jurisdiction’s fair housing enforcement and outreach capacity
- Identification of primary determinants influencing conditions of segregation, concentrations of poverty, and disparities in access to community assets
- Determination of fair housing priorities and justification
- Creation of one or more goals to mitigate or addressing determinants that influence segregation, poverty, and access to community assets

HUD is Encouraging Regional Assessments and Planning: HUD's goal is to continue to encourage regional assessments in order to achieve a greater and more systemic impact and even envisions efforts reaching across state boundaries. This approach continues the philosophy of the Sustainable Communities Initiative with its regional Fair Housing and Equity Assessments (FHEA) or regional AIs. The proposed rule also clearly requires public housing authorities to create plans to reduce concentrations of poverty in their developments and to work more closely with local and state governments to develop an FHA.

While New Hampshire's regional planning commissions (RPCs) have been required to develop FHEAs as a result of receiving HUD funding for planning, the implications for most municipalities in New Hampshire are simpler. The RPCs' regional plans are not binding on the municipalities, even if the municipality participates in the planning process. But as advisory documents, the FHEAs can provide very useful guidance to municipalities as they seek to understand and comply with their obligations under the Federal Fair Housing Act.

Although the proposed rules do not yet have the force of law, they provide the most comprehensive view of HUD's vision to fully incorporate fair housing analysis and planning into a state's consolidated plan, public housing authority plans and other required planning documents.

# Chapter 5

## Federal Law

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

- Declaration of Independence, July 4, 1776

### Structure of Federal Law

The U.S. Constitution is the bedrock of American law and all laws passed by both Congress and state legislatures must pass constitutional muster. The U.S. Congress legislates federal statutes (which become law with the President's signature or after Congress overrides the President's veto). Federal regulations, which are controlled by the federal statutes, are issued by federal agencies (such as HUD) in order to explain and carry out the intent of the federal statutes. They carry the force of law. Executive orders, which also carry the force of law, are issued by the President to executive federal agencies often with the intent to carry out the policies and agenda of the Presidential Administration. Federal courts evaluate the constitutionality of federal laws and decide cases based upon their interpretations of constitutional and statutory law. U.S. Supreme Court decisions are binding throughout the United States. Other court decisions are binding only within their own jurisdictions but may be used as guidance or persuasion in other jurisdictions.

### Constitutional Protections

Due Process Clause of the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property without due process of law." Due Process violations may arise in situations in disparate impact cases involving redevelopment and razing of properties in neighborhoods disproportionately occupied by racial or ethnic minorities.

Thirteenth Amendment: "Neither slavery nor involuntary servitude . . . shall exist within the United States or any place subject to their jurisdiction." The Thirteenth Amendment's purpose "was to eradicate not only the physical incidence of slavery but its 'badges and incidents' as well." *Jones v. Alfred H. Mayer Co.*<sup>59</sup> Disparate treatment based on race and promotion of racial segregation may trigger claims of Thirteenth Amendment violations.



Equal Protection Clause of the Fourteen Amendment: “No State shall . . . deny to any within its jurisdiction equal protection of the laws.” Equal Protection claims are often raised in civil rights cases including housing discrimination cases and are also used when the party may not be a member of a federally protected class.<sup>60</sup>

## **Federal Statutes**

There are several federal laws that also offer remedies for discriminatory acts and may be raised in the context of a housing discrimination case. We have included several of the more frequently used statutes.

Civil Rights Act of 1866:<sup>61</sup> Congress’ first major legislation enacted specifically to ensure the rights of African Americans to “the full and equal benefit of all laws . . . as is enjoyed by white citizens.” Standing to bring suit under this Act has been permitted on the basis of national origin but does not extend to other protected classes. The exemptions of the Fair Housing Act do not apply.

Civil Rights Act of 1964:<sup>62</sup> Enacted during the modern civil rights period, the law accords equal rights on the basis of race, color, religion, gender and national origin in most aspects of American life including voting, education, employment, and public accommodations.

Section 504 of the Rehabilitation Act of 1973:<sup>63</sup> prohibits discrimination against persons with disabilities by federal agencies and entities receiving federal funds, including municipalities, public housing authorities and federally subsidized housing developments.

Americans with Disabilities Act:<sup>64</sup> prohibits discrimination against persons with disabilities and requires, where necessary, reasonable accommodations and modifications to allow equal access and treatment.

False Claims Act:<sup>65</sup> Allows actions against entities that defraud government programs and allows private citizens to initiate claims. Has been utilized in fair housing litigation, most prominently in the *Westchester* case (discussed below).

## **Case Law**

Since the enactment of the FHA, there have been a multitude of federal, state and administrative cases based on allegations of housing discrimination. Cases are mentioned in other sections of this Guidebook, including the section on protected classes.

*Trafficante v. Metropolitan Life Insurance:*<sup>66</sup> This is a U.S. Supreme Court case which permitted a white person to pursue a housing discrimination lawsuit against the landlord for racial discrimination against African Americans based on the harm of living in a community which did not permit integration (a “white ghetto”).

*Town of Huntington, New York v. Huntington Branch, NAACP:*<sup>67</sup> Through its zoning ordinance, the town restricted private multifamily development to the “urban renewal area” where most of the minority population was concentrated. The plaintiffs sought to overcome town’s refusal to allow development of a project in an area of single family homes where the population was 98% white. The Second Circuit Court of Appeals found that the town had violated the FHA on disparate impact theory. On appeal, the Supreme Court declined to rule on the adequacy of the “disparate impact test” but upheld the lower court’s decision declaring “[W]e are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima facie case was inadequate.”<sup>68</sup>

*United States ex rel. Anti-Discrimination Ctr. v. Westchester County, New York:*<sup>69</sup> A fair housing organization initiated a lawsuit against the County asserting violations of the False Claims Act for the County’s acceptance of millions of dollars of HUD funds while falsely certifying that it had affirmatively furthered fair housing. Westchester County is an “entitlement community,” meaning that it gets HUD funding directly through the Community Development Block Grant (CDBG) Program, which is used partly for the purpose of developing affordable housing. As an entitlement community, the County was required to develop an Analysis of Impediments to Fair Housing (AI), and to certify that it was “affirmatively furthering fair housing,” as required by the Fair Housing Act. While the AI requirement only applies to states and to entitlement communities, the AFFH requirement applies to all recipients of HUD funds, including indirect recipients of CDBG funding.

In *Westchester*, the court found that the county had not analyzed race as a factor when conducting its AI and further found that its development activities actually contributed to racial and ethnic segregation. The parties entered into a settlement agreement with multimillion dollar fines, the majority of which was to be credited to the county to develop housing in accordance with the settlement. A monitor was appointed by the court and the County agreed to engage in a number of activities to affirmatively further fair housing, including the development of model zoning codes for the municipalities in its area. The case remains active with many allegations that the County continues to thwart integration efforts.

### **State Law Case of National Significance**

*Southern Burlington County NAACP v. Mount Laurel Tp.:*<sup>70</sup> The Mount Laurel litigation culminated in this landmark decision known as *Mount Laurel II* in which the New Jersey Supreme Court held that municipalities in New Jersey had an affirmative duty to provide their “fair share” of affordable housing and forbade the use of zoning ordinances to prevent such development in affluent communities.

# Chapter 6

## New Hampshire Law

And so let freedom ring from the prodigious hilltops of New Hampshire.

- Dr. Martin Luther King, Jr.

Lincoln Memorial, August 28, 1963

### State Law Structure and Interplay with Federal Law

The structure of New Hampshire law follows that of federal law as described in the previous chapter. New Hampshire has a constitution which is the supreme law of the state subject only to the strictures of the U.S. Constitution. New Hampshire statutes, legislated by the New Hampshire legislature, known as the General Court, and made effective by the Governor's signature or by legislative overriding of a gubernatorial veto, are subject to scrutiny in light of both the state and federal constitutions. State agencies also engage in rule-making in order to carry out their statutory mandates. The New Hampshire governor possesses the authority to issue executive orders. New Hampshire courts interpret both state constitutional and statutory law and sometimes federal law. The Fair Housing Act explicitly permits fair housing claims to be litigated in state as well as federal courts.

The United States' system of federalism, rooted in the Supremacy Clause of the U.S. Constitution, recognizes the supremacy of federal law as set forth in the U.S. Constitution but also the sovereignty of the states on matters not deemed to be controlled by federal law. Some matters, such as immigration law, are deemed to be within the exclusive control of the federal government. Other matters, such as family law, local government matters, and in-state commerce are within the powers reserved to the states (as long as they do not run afoul of constitutional protections or laws). In many cases, such as in civil rights jurisprudence, both the states and the federal government share the field. When a conflict arises, federal law controls. In the area of civil rights laws, states may provide more protections to their citizens than federal law does. Such is the case in New Hampshire's fair housing laws which provide more categories of protected classes and impose more limited exemptions from the law.

## State Constitution Protections

New Hampshire's constitutional protections may be raised in the context of a discrimination claim. Many of the substantive rights accorded by the New Hampshire Constitution have been difficult to parse out without further interpretation from the New Hampshire Supreme Court. The right to equal protection under the law derives from Part I, Articles 2 and 12. The New Hampshire Supreme Court has ruled that the entitlement to substantive due process of law is found in Part I, Article 15.

Article 2 of the New Hampshire Bill of Rights: “All men have certain natural, essential, and inherent rights among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights shall not be abridged by this state on account of race, creed, color, sex or national origin.”

Article 12 of the New Hampshire Bill of Rights: “Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property...”

Article 15 of the New Hampshire Bill of Rights: “No subject shall be ... deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.” In *State v. Veale*, 158 N.H. 632 (2009) the court articulated that “law of the land” refers to due process of law.

## State Statutes

Law Against Discrimination, RSA 354-A: Shortly after the passage of the Civil Rights Act of 1964, the New Hampshire General Court enacted its own Law Against Discrimination. The legislation created the Human Rights Commission and charged it with the authority to investigate and enforce its laws against discrimination in employment, housing and public accommodations. The section on housing discrimination provides protections to a broader range of protected classes and is more restrictive in the scope of exemptions from liability.

Workforce Housing Law, RSA 674:58 – 61: Requires every New Hampshire community to provide “reasonable and realistic opportunities” for the development of workforce housing and is a codification of the principles established in *Britton v. Chester* cited below.

Inclusionary Zoning Statute, RSA 674:21,I(k): is one of the articulated “innovative land use controls” permitted under New Hampshire law.

Regional Housing Needs Assessments, RSA 36:47, II: Requires Regional Planning Commissions to update the needs assessment every five years.

## State Case Law

*Britton v. Chester:*<sup>71</sup> New Hampshire's landmark affordable housing case which challenged the constitutionality of the Town of Chester's exclusionary zoning ordinances. The Supreme Court held that when exercising its authority to regulate the use of land through zoning, a power delegated to municipalities by the Legislature, every municipality must provide a reasonable and realistic opportunity for the development of affordable housing. The Court also reiterated that the regional needs surrounding communities are relevant and required communities in New Hampshire to provide a proportionate or "fair share" of affordable housing.

*Great Bridge Properties, LLC v. Town of Ossipee:*<sup>72</sup> This is a Superior Court case which found that the Town of Ossipee did not bear its "fair share" of affordable housing ruling that the Town's ordinances "operate to effectively preclude low- and moderate income households from residing in the Town." The case was initially brought under constitutional and fair housing law claims alleging disparate impact on based on familial status.

*Community Resources for Justice v. City of Manchester:*<sup>73</sup> Known as Community Resources for Justice II, a state equal protection case initiated by a non-profit organization that provides halfway houses for federal prisoners after the City of Manchester denied approval to operate based on the City's zoning ordinances. The Court found that the City was unable to meet its burden of proof that its denial was "substantially related to an important governmental objective" and affirmed the award of a builder's remedy.

## New Hampshire Federal District Court Case Law

*Trovato v. City of Manchester:*<sup>74</sup> The City's zoning board, believing it did not have statutory authority, denied plaintiffs' request to obtain a variance to permit them to install a paved parking area in front of their house to accommodate their mobility impairments. The federal court enjoined the City "from enforcing its zoning code in a manner that in any way restricts or impedes plaintiffs' ability to pave and maintain a parking space in their front yard." The court also clarified that the injunction would terminate "if and when the plaintiffs move from their present residence" signifying that the privilege did not run with the land. State law was subsequently changed to codify this ruling.<sup>75</sup>

# Chapter 7

## Creating a Fair Housing and Equity Assessment

Sustainability also means creating “geographies of opportunity,” places that effectively connect people to jobs, quality public schools, and other amenities.

- HUD Secretary Shaun Donovan  
Written Testimony Submitted to House Appropriations Subcommittee,  
February 23, 2010

### Sustainable Communities Initiative

The Sustainable Communities Initiative (SCI) is a joint program among HUD and the U.S. Department of Transportation and the federal Environmental Protection Agency. The goal of the program is aimed at improving “regional planning efforts that integrate housing and transportation decisions, and increase state, regional, and local capacity to incorporate livability, sustainability, and social equity values into land use planning and zoning” (emphasis added).<sup>76</sup> The focus on incorporating social equity values<sup>77</sup> into regional planning efforts brings challenges but offers possibilities that would increase the quality of life for many more people.

The goals of the SCI are to:

1. Foster the development of sustainable communities throughout the United States that are consistent with the following Livability Principles [citation omitted]:
  - a. Provision of more transportation choice;
  - b. Promotion of equitable, affordable housing;
  - c. Enhancement of economic competitiveness;
  - d. Support of existing communities;
  - e. Coordination of policies and leveraging of investment; and
  - f. Valuing communities and neighborhoods.
2. Support metropolitan areas and multijurisdictional partnerships that commit to adopt integrated plans, strategies, and management tools to become more sustainable.
3. Facilitate strong alliances of residents and regional interest groups that are able to maintain a long-term vision for a region over time and simultaneously support progress through incremental sustainable development practices.

4. Build greater transparency and accountability into planning and implementation efforts.
5. Expedite implementation of the Livability Principles through changes in local zoning and land use laws and regulations to remove barriers to sustainable development for housing, economic development, transportation, and related water, sewer, and other environmental quality issues.
6. Align local, state, and tribal capital improvement programs with Livability Principles.
7. Assist all regions to move toward sustainability and livability, and, for the regions that have shown a long-term commitment to sustainability and livability, prepare them for implementation and to demonstrate on-the-ground results.<sup>78</sup>

### **Requirements of SCI Grantees**

Grantees must undertake the following activities:

1. Adopt a housing plan that incorporates housing that is “affordable at all ranges of income;”
2. Incorporate fair housing analysis of housing choice into regional planning;
3. Address how the plan will further fair housing principles; and
4. Create a Fair Housing and Equity Assessment (FHEA) or Regional Analysis of Impediments to Fair Housing (Regional AI).

All RPCs in New Hampshire are required under state law to complete housing needs assessments every five years<sup>79</sup> and these should be reviewed in order to determine whether they may meet this requirement.

The second requirement of incorporating fair housing analysis into regional planning may be a newer concept for some RPCs. Undoubtedly, RPCs have engaged in analysis that incorporates equity and access principles but have not labeled it as fair housing analysis. Existing plans should be reviewed in order to determine whether some features of earlier evaluation actually translate into fair housing analysis.

What may be new, especially for RPCs in more rural regions of the state, is the requirement to evaluate patterns of integration, segregation and of areas of concentrated racial and ethnic poverty (RCAPs and ECAPs). All grantees are required to engage in this analysis and if there are areas of segregation or concentrated poverty, to conduct a review of factors, including zoning ordinances and other land use regulations that may contribute to those conditions.

Grantees must also address how their plans will further fair housing principles within their region. The recommendations must be realistic and designed to have an actual impact.

Finally, grantees are required to create an FHEA or Regional AI. This Guidebook focuses on the FHEA. More information about creating an AI can be found in HUD's Fair Housing Planning Guide.<sup>80</sup>

## **Preparing a Fair Housing and Equity Assessment**

HUD has produced several documents that describe in detail its expectations for creation of an FHEA (See Chapter 8, Tools and Resources). In addition, it has created assessment tools for grantees. Unfortunately, for jurisdictions in less populated, less urban and less ethnically and racially diverse areas like New Hampshire, the data that may be obtained is not as helpful as it may be for more populated and urban states. HUD has been working to refine its assessment tools to produce more meaningful data for all grantees. Grantees are encouraged to use other assessment tools and data to create a comprehensive assessment.

### **FHEA Analysis**

The FHEA must include identification and assessment of the following factors:

1. Areas of racial/ethnic segregation;
2. Areas of increasing integration;
3. Areas of racially or ethnically concentrated poverty;
4. Areas of opportunity (access to jobs, high performing schools, quality health care, low crime neighborhoods).

Because grantees are required not only to identify such areas but also develop meaningful assessments of these factors, they will need to explore the roots of both positive and negative features within their communities and develop theories which should help inform plans to address how fair housing principles would be furthered in the region.



## **Recommendations for Creating an FHEA**

### Review relevant documents

1. New Hampshire Analysis of Impediments to Fair Housing (AI): One of the first places to begin is with a review of New Hampshire's AI, produced by New Hampshire Housing. The state AI is updated every five years and thus far, three have been created and can provide a framework from which to begin.
2. AIs from entitlement communities in grantee's region: New Hampshire has five entitlement communities, each of which is required to produce an AI: Manchester, Nashua, Portsmouth, Dover and Rochester.
3. Local zoning, land use and other laws, ordinances and regulations: Of particular importance are those that when viewed through a fair housing lens, have the intended or unintended consequence of negatively impacting members of protected class groups.
4. Other FHEA documents: Some communities have already created FHEAs which can provide examples of the different approaches that have been taken. *See* Chapter 8 on resources.

### Other potential sources of fair housing data

5. HUD's Boston Office of Fair Housing and Equal Opportunity (FHEO): the office can provide data on housing discrimination complaints filed by municipality and discrimination type.
6. New Hampshire Human Rights Commission (HRC): HRC maintains data on housing discrimination complaints filed under state law.
7. New Hampshire Legal Assistance (NHLA): NHLA receives HUD funding to enforce federal fair housing law and maintains data on cases it has handled.
8. New Hampshire Housing: maintains extensive data on state housing matters.

## **FHEA Activities**

In a Program Policy Guidance document on the FHEA, HUD enumerates the following required activities to be undertaken in the FHEA preparation:

Setting an approach to the FHEA: HUD encourages discussion with the HUD Government Technical Representative (GTR) in order to ensure the project is moving in the direction HUD has envisioned.

Data analysis: As discussed above, HUD has created tools for data analysis and encourages grantees to include other relevant data sources. The analysis of the data is crucial to forming the assessment.

FHEA Product: The FHEA may be produced as a “stand-alone” document or incorporated into other documents. The HUD GTR should be consulted for discussion and approval if the FHEA is to be incorporated into another document.

FHEA engagement: The results of the analysis should be discussed with stakeholders and requires engagement with the grantee’s consortium. HUD considers it “critical for regional leadership to understand the implications of the FHEA, particularly as it relates to decision-making on priorities and investment.”

The “Bridge”: This is the link from analysis and assessment to action. The results of the FHEA should be evident in decision-making and priority-setting. HUD recommends that grantees:

- Articulate guiding principles or commitments that “emerge from the FHEA findings and engagement.”
- Emphasize principles/commitments that are “clearly measurable.”<sup>81</sup>

## **FHEA Standard of Review**

Because there should be an interactive process with the HUD GTR in designing the approach to creating the FHEA, grantees should have some clarity about the soundness of their approach in creating the documents. Further HUD evaluation of the FHEA may include the following analysis:

1. Did the grantee analyze the HUD provided data completely and seriously? Did the grantee supplement the HUD data with locally or regionally relevant data in order to gain a full appreciation of the context of regional equity and access to opportunity?

2. Does the FHEA product(s) reflect meaningful consideration of the data and its implications for the region?
3. Did the grantee provide proof of serious engagement by the consortium and/or regional stakeholders on the FHEA findings and content?
4. Does the bridge to decision-making, prioritization, and investment provide a clear pathway toward holding the region accountable for its FHEA deliberations? To what extent is it clear that the FHEA activities will be meaningful and consequential for the region? <sup>82</sup>

### **Obtaining Stakeholder “Buy-in”**

Creating an FHEA and using it to set planning priorities is not an easy undertaking and the results and recommendations may create some controversy. Shifting analysis to detection of “invisible” barriers and revelations that an ordinance may have unintended discriminatory effects on members of a protected class will be challenging and perhaps upsetting to some. Deliberately investing fair housing principles into the planning process merely incorporates the law of the land and our national commitment to equal opportunity and justice for all (as embodied in our state and federal Constitutions and recited in our Pledge of Allegiance). Laws, policies and practices that have had the effect of creating barriers for protected class members limit access to opportunity. The SCI undertaking is aimed at confronting those barriers and broadening housing choice and access.

### **Fair Housing Law and the First Amendment**

The First Amendment to the U.S. Constitution protects, among other things, freedom of speech. This right allows members of the public to make and publish statements that others may find repugnant. This means that statements made by members of the public voicing their opinions cannot be held against them or a governmental body as evidence of discrimination against a certain class of people. However, if someone is acting in her or his official capacity, such as a member of a planning board or an elected official, his or her statements may be used as evidence of the municipality’s discriminatory intent. It should be noted that speech accompanied by threats or actual harm is not protected by the First Amendment. See also, HUD’s Guidance Memo “*Substantive and Procedural Limitations on Filing and Investigating Fair Housing Act Complaints That May Implicate the First Amendment.*”<sup>83</sup>

# Chapter 8

## Tools and Resources

### New Hampshire Housing Website

We have created links to numerous resources through the New Hampshire Housing website at [www.nhhfa.org/housing-data-cpg.cfm](http://www.nhhfa.org/housing-data-cpg.cfm). The following categories of information can be found at the site:

#### **HUD Materials**

Fair Housing Planning Guide

HUD Fair Housing and Equity Assessment Policy Guidance

HUD Fair Housing and Equity Assessment PowerPoint presentation

HUD Disparate Impact Regulation

Affirmatively Furthering Fair Housing: Proposed Rule

#### **New Hampshire Materials**

New Hampshire Analysis of Impediments to Fair Housing (AI) 2010 Update

Manchester Analysis of Impediments to Fair Housing

Nashua Analysis of Impediments to Fair Housing

Portsmouth Analysis of Impediments to Fair Housing

Workforce Housing Quick Reference Guide

New Hampshire Land Use Tools

State Certification to Affirmatively Further Fair Housing (from Consolidated Plan submission)

Fair Housing and Regional Planning PowerPoint presentation

#### **Legal References**

Selected federal and state statutes and cases

#### **FHEA Examples**

Examples of FHEAs from several regions

**Other Materials**

Fair Housing Toolkit – Fair Housing Alliance of Pennsylvania

Poverty & Race Research Action Council’s Report Cards on HUD’s efforts to AFFH

**Other Resources**

There are many resources available for access to additional information. Resources range from websites such as those operated by HUD, the National Fair Housing Alliance and those of other fair housing organizations. Many local and state governments post documents related to fair housing planning materials. There are scholarly articles and research studies on every aspect of fair housing law. The Poverty & Race Research Action Council not only maintains a website ([www.prrac.org](http://www.prrac.org)) but also sends out email alerts and a quarterly newsletter with information on many topics including housing and planning-related issues.

Robert Schwemm’s *Housing Discrimination: Law and Litigation* multivolume series is an authoritative resource on fair housing law and includes sections on land use laws.

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## End Notes

- <sup>1</sup> HUD Statement of Regulatory Priorities for FY 13, [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201210/Statement\\_2500.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201210/Statement_2500.html).
- <sup>2</sup> See 42 U.S.C. § 3610(f) and 3616.
- <sup>3</sup> In New Hampshire, the Commission for Human Rights has primary jurisdiction over housing discrimination complaints brought pursuant to RSA 354-A although claims may be removed to state court with the Commission's assent.
- <sup>4</sup> *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007).
- <sup>5</sup> *Dews v. The Town of Sunnyvale, Texas*, 109 F. Supp. 2d 526, 567 (N.D. Tex. 2000).
- <sup>6</sup> *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir. 1988), *aff'd*, 488 U.S. 15, 109 S.Ct. 276 (1988), *reh'g denied*, 488 U.S. 1023, 109 S.Ct. 824 (1989) (U.S. Supreme Court upheld Second Circuit decision and although not adopting its disparate impact analysis, found its finding sustainable.).
- <sup>7</sup> See, e.g., Hersch, Joni, *Skin Color Discrimination and Immigrant Pay*, 58 Emory L.J. 358 (2009), *Shades of Difference: Why Skin Color Matters* (Evelyn Nakano Glenn ed., 2008).
- <sup>8</sup> *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88 (1973).
- <sup>9</sup> Robert G. Schwemm, *Housing Discrimination: Law and Litigation*, 11A-3 (2009).
- <sup>10</sup> *Hispanics United of DuPage County v. Village of Addison, Ill.*, 958 F. Supp. 1320 (N.D. Ill.1997).
- <sup>11</sup> *Litton Intern. Development Corp. v. City of Simi Valley*, 616 F. Supp. 275 (C.D. Cal. 1985).
- <sup>12</sup> *The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007).
- <sup>13</sup> *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002).
- <sup>14</sup> *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead by its Bd. Of Trustees of Village of New Hempstead*, 98 F. Supp. 2d 347 (S.D.N.Y. 2000).
- <sup>15</sup> *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995).
- <sup>16</sup> *Sisemore v. Master Financial, Inc.*, 151 Cal. App. 4<sup>th</sup> 1386 (6<sup>th</sup> Dist. 2007).
- <sup>17</sup> *Doe v. City of Butler, Pa.*, 892 F.2d 315 (3d Cir. 1989).
- <sup>18</sup> *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057 (C.D. Cal. 2002).
- <sup>19</sup> *Fair Housing Ass'n v. City of Richmond Heights*, 998 F. Supp. 825 (N.D. Ohio 1998).
- <sup>20</sup> *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wash. 1997).
- <sup>21</sup> Schwemm, *supra* at endnote ix, 11D:5, 11D-27 (2009).
- <sup>22</sup> 42 U.S.C.A. § 3602(h).
- <sup>23</sup> *ASMR v. Town of Gilsum*, Cheshire County Superior Court (complaints filed 2008 and 2011).
- <sup>24</sup> *Lakeside Enterprises, LP v. Bd. of Sup'rs of Palmyra Tp.*, 455 F.3d 154 (3d Cir. 2006).
- <sup>25</sup> *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565 (2d Cir. 2003).
- <sup>26</sup> *Trovato v. City of Manchester, N.H.*, 992 F. Supp. 493 (D.N.H. 1997).
- <sup>27</sup> See RSA 674:33, V.
- <sup>28</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).
- <sup>29</sup> 24 C.F.R. § 5.105(a)(2) Equal access to HUD-assisted or insured housing. (i) Eligibility for HUD-assisted or insured housing. A determination of eligibility for housing that is assisted by HUD or subject to a mortgage insured by the Federal Housing Administration shall be made in accordance with the eligibility requirements provided for such program by HUD, and such housing shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status.
- <sup>30</sup> 42 U.S.C. § 3607 (b).
- <sup>31</sup> 42 U.S.C §.3607(b): RSA 354-A:15.
- <sup>32</sup> Examples include creation of elderly housing districts and imposition of age restrictions that exceed those permitted by state and federal law. None of the municipalities surveyed appeared to require a developer to

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provide “significant facilities and services specifically designed to meet the physical or social needs of older persons” as required under RSA 354-A:15, IV(a).

<sup>33</sup>*Gibson, supra*, Endnote 18.

<sup>34</sup>*Loving v. City of Black Jack*, No. 06CC-003157 (Mo. Cir. Ct. 2006).

<sup>35</sup>RSA 354-A.

<sup>36</sup>RSA 354-A:10, VI.

<sup>37</sup>*ASMR, supra*, Endnote 23.

<sup>38</sup>78 Fed. Reg. at 11482

<sup>39</sup>*HUD’s New Discriminatory Effects Regulation Adding Strength and Clarity to Efforts to End Residential Segregation*, Lawyers’ Committee for Civil Rights Under the Law (2013) at 2.

<sup>40</sup>*Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11460 *et seq.* (Feb. 15, 2013).

<sup>41</sup>*Id.* at 11479-80.

<sup>42</sup>*Id.* at 11480. The Federal Register comments are extensive as to the meaning of “legally sufficient justification.”

<sup>43</sup>*HUD’s New Discriminatory Effects Regulation Adding Strength and Clarity to Efforts to End Residential Segregation* at 6.

<sup>44</sup>*Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, at 11480.

<sup>45</sup>*Id.* at 11479.

<sup>46</sup>*Gallagher v. Magner*, 619 F.3d 823 (8<sup>th</sup> Cir. 2010).

<sup>47</sup>*Magner v. Gallagher*, 132 S.Ct. 1306 (2012)

<sup>48</sup>11-507 U.S. Sup. Ct. 6/17/13.

<sup>49</sup>11-507 U.S. Sup. Ct. 11/15/13.

<sup>50</sup>78 Fed. Reg. 43710 *et seq.* (July 19, 2013)

<sup>51</sup>42 U.S.C. § 3608(e)(5)

<sup>52</sup>Executive Order 12892, *Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing* (January 17, 1994).

<sup>53</sup>*Id.*

<sup>54</sup>*HUD Management Plan*.

<sup>55</sup>*Affirmatively Furthering Fair Housing: Proposed Rule*, 78 Fed. Reg. 43710 *et seq.* (July 19, 2013).

<sup>56</sup>*Id.* at 43710.

<sup>57</sup>*Id.* at 43729.

<sup>58</sup>New Hampshire’s entitlement communities are Manchester, Nashua, Portsmouth, Rochester, and Dover.

<sup>59</sup>392 U.S. 409, 440 (1968)

<sup>60</sup>See *Cleburne, supra* p. 446 and *Community Resources for Justice v. City of Manchester*, 157 N.H. 152, 155 (2008) (“*CRJ II*”).

<sup>61</sup>42 U.S.C. §§ 1981, 1982

<sup>62</sup>42 U.S.C. § 2000d *et seq.*

<sup>63</sup>42 U.S.C. §794

<sup>64</sup>42 U.S.C. §12117

<sup>65</sup>31 U.S.C. §3729 *et seq.*

<sup>66</sup>409 U.S. 206 (1972)

<sup>67</sup>488 U.S. 15 (1988)

<sup>68</sup>*Id.* at 18.

<sup>69</sup>668 F. Supp.2d 548 (S.D.N.Y. 2009)

<sup>70</sup>92 N.J. 158 (1983)

<sup>71</sup>134 N.H. 434 (1991)

<sup>72</sup>*Strafford County Superior Court*, Docket No. 04-E-110 (2005)

<sup>73</sup>154 N.H. 152 (2008)

<sup>74</sup>992 F.Supp. 493 (D.N.H. 1997)

<sup>75</sup>See RSA 674:33, V.

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<sup>76</sup> Notice of Funding Availability (NOFA) for HUD’s Fiscal year 2010 Sustainable Communities Regional Planning Grant Program (June 23, 2010) at 1.

<sup>77</sup>“Social equity values” is defined as: fair and equal access to livelihood, education, and resources; full participation in the political and cultural life of the community; and self-determination in meeting fundamental needs. *Id.* at 13.

<sup>78</sup>*Id.* at 7-8.

<sup>79</sup> RSA 36:47, II.

<sup>80</sup> Fair Housing Planning Guide, Vol. 1, ch. 2-5 (March 1996).

<sup>81</sup> HUD Program Policy Guidance OSCH-2012-03, *Fair Housing and Equity Assessment (FHEA)*, (Feb. 17, 2012).

<sup>82</sup>*Id.*

<sup>83</sup> Achtenberg Memo, HUD Notice FHEO 96-2 (April 2, 1996).