

**HUD, LOCAL HOUSING AUTHORITIES, AND  
FAIR HOUSING ACT CLAIMS**

Scott Bounds  
OLSON & OLSON, L.L.P.  
Wortham Tower, Suite 600  
2727 Allen Parkway  
Houston, Texas 77007  
[sbounds@olsonolson.com](mailto:sbounds@olsonolson.com)

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## **I. Overview of public housing.**

The purpose of this paper is to provide a general overview of the Federal Fair Housing Act and its application to the activities of municipalities and public housing authorities. Special emphasis is given to a discussion of the types of claims that may be made against housing authorities by the U.S. Department of Housing and Urban Development (“HUD”) and the enforcement procedures used by HUD.

### **A. Public housing law generally.**

The beginnings of today's public housing law can be traced to the Wagner-Steagle Housing Act of 1937 that established the United States Housing Administration. That act required that the construction of new public housing units be matched by the removal of an equal number of substandard dwellings from the local housing supply. In 1965 Congress combined the Housing Administration and Home Financing Agency into one cabinet level agency called the Department of Housing and Urban Development (HUD). Three years later the Civil Rights Act of 1968 (the Fair Housing Act) directed HUD “to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601<sup>1</sup>. In short, HUD is responsible for enforcing laws prohibiting housing discrimination. 42 U.S.C. § 3604. HUD’s stated mission is to increase homeownership, support community development, and increase access to affordable housing free from discrimination. HUD serves as the primary administrator and first line enforcement agency of federal housing programs.

### **B. Texas housing authorities.**

Local governments in Texas engage in various activities that affect housing. For example, cities and counties enact and administer building, subdivision and zoning regulations that affect both single family and multi-family residential development; cities and special districts provide garbage, water and sewer services used by their residents; and cities and counties enact and administer programs that directly affect their residents ranging from construction/relocation of streets to home repair programs funded with community development block grant funds. HUD has issued guidance for local governments in some of these areas in order to encourage compliance with the Fair Housing Act. *See, e.g.*, “Joint Statement of the Department of Justice and the Department of Housing and Urban Development (on) Group Homes, Local Land Use, and the Fair Housing Act”, [http://www.usdoj.gov/crt/housing/final8\\_1.htm](http://www.usdoj.gov/crt/housing/final8_1.htm) (discussing group homes). Local governments are, however, most likely to encounter HUD enforcement actions through programs providing housing.

In response to the United States Housing Act of 1937, the Texas Legislature adopted the Texas Housing Authorities Law. *See* TexasHousing.org. TEXAS LOCAL GOVERNMENT CODE

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<sup>1</sup> The Civil Rights Act of 1866 (codified as 42 U.S.C. § 1982) provides that “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” Section 1982 was enacted to complement the Thirteenth Amendment and not to create a comprehensive open housing law.

chapter 392 (formerly TEX.REV.CIV.STAT. art. 1269k) permits cities and counties to create municipal, county and regional housing authorities (public housing agencies) qualified to participate in various federal housing programs. Few housing authorities ever exercise all the authority given to them by the Texas Legislature to condemn, own, hold and improve real or personal property. In fact, many housing authorities do not even provide public housing units because they were only created to participate in Farmers Home Administration (FmHA) programs<sup>2</sup>. The primary purpose of most traditional housing authorities, however, is to rent or lease housing only to persons of low income and only at rentals that persons of low income can afford. *Id.*, §§ 392.055 and 302.056.<sup>3</sup>

The Texas Legislature has declared that a housing authority is a “unit of government” and that all its functions are governmental not proprietary. *Id.*, § 392.006. Although some housing authorities are incorporated as non-profit corporations, many are not. Because housing authorities are governmental units, they generally have governmental immunity to suit and damages from common law claims. The Texas Legislature has, however, expressly waived that immunity with regard to all landlord obligations and tenant remedies under Chapters 24, 54, 91, 92 and 301 of the Texas Property Code other than a suit for personal injuries. *Id.*

A public housing authority may request needed legal services from the attorney representing the public entity that created the housing authority, or the housing authority may employ its own counsel and legal staff. *Id.*, § 392.040. The range of legal issues faced by housing authorities include their creation and taxation by their public entity, landlord tenant issues including tenancy and evictions, personnel management issues, contractual agreements including Section 8<sup>4</sup> contracts and leases, and federal grant compliance.

### **C. Federal laws affecting the operation of local housing authorities.**

Since housing authorities were created in response to the 1937 federal housing program, the actions and programs of the housing authorities have always been affected by applicable federal legislation. In the Fair Housing Act (Title VIII of the Civil Rights Act of 1968), Congress gave HUD express authority to enforce many federal laws applicable to housing including Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq*) (prohibiting discrimination in programs receiving federal financial assistance), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 791 *et seq*) (nondiscrimination under federal programs related to disability), the Age Discrimination Act of 1975 (42 U.S.C. § 6101 *et seq*), Section 109 of the Housing and Community Development Act of 1974 (42 U.S.C. § 5301 *et seq*)(nondiscrimination in programs receiving housing funds), various Executive Orders and the

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<sup>2</sup> Now known as Rural Economic and Community Development.

<sup>3</sup> In 1974 Congress broadened the definition of “housing agencies” permitted to participate in certain federal housing programs permitting city, counties, community action agencies and councils of governments to participate in such programs without being an organized “housing authority”.

<sup>4</sup> The Housing Choice Voucher Program is known as “Section 8” in reference to the portion of U.S. Housing Act of 1937 under which the original subsidy program was authorized. It is now codified as 42 U.S.C. § 1437f(t).

rules of the Secretary of HUD published in the Federal Register. *See generally* 42 U.S.C. § 3608(f), complaint form attached.<sup>5</sup> Because several of these laws overlap in substance, one fact situation may give rise to HUD responding under more than one applicable federal law.

The Fair Housing Act was adopted to prevent discrimination in how housing is sold, rented, appraised, financed, and advertised. *See generally* 42 U.S.C. 3601 *et seq.* Fair housing laws are most commonly used to regulate the actions of property owners, landlords, lenders, realtors, and appraisers in the sale and rental of real estate. Municipalities and housing authorities must, however, also comply. The Fair Housing Act prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as housing authorities, municipalities, banks or other lending institutions and homeowners insurance companies whose discriminatory practices make housing unavailable to persons because of “race, color, religion, sex<sup>6</sup>, handicap, familial status<sup>7</sup>, or national origin.” 42 U.S.C. § 3604 *et seq.*

Title I of the Housing and Community Development Act of 1974 prohibits discrimination in programs and activities receiving financial assistance from HUD’s Community Development and Block Grant Program. Section 109 (42 U.S.C. § 5309) provides that no person in the United States shall, on the ground of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the bases of age (42 U.S.C. §§ 6101-6107) or disability (29 U.S.C. § 794 aka Section 504). Finally, a myriad of Presidential Executive Orders prohibit discrimination in housing facilities provided federal funds.<sup>8</sup>

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<sup>5</sup> Although local governments and their officials can be sued under 42 U.S.C. § 1983 for deprivations of federal constitutional rights and a variety of rights that arise under federal law, a 1983 claim does not lie if the federal statute involved 1) does not create an enforceable “right”; 2) expressly precludes a 1983 remedy, or 3) contains a “sufficiently comprehensive” remedial scheme. *See Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987). There is some conflict among the federal circuits regarding what “rights”, if any, provided by the Fair Housing Act may be used as the basis of a 1983 action. *See generally* D.Gelfand, *SUING AND DEFENDING CITIES FOR FEDERAL CONSTITUTIONAL VIOLATIONS* § 6.02[3] (2001).

<sup>6</sup> Pub.L. 93-383 (1974) added “sex” as proscribed basis for discrimination in housing.

<sup>7</sup> Pub.L. 100-430 (1988) added coverage for the disabled and familial discrimination.

<sup>8</sup> Executive Order 11063 (11-20-1963) prohibits discrimination in the sale, leasing, rental, or other disposition of properties and facilities owned or operated by the federal government or provided with federal funds; Executive Order 11246 (09-24-1965) bars discrimination in federal employment because of race, color, religion, sex, or national origin; Executive Order 12892 (1-17-1994) requires federal agencies to affirmatively further fair housing in their programs and activities, and provides that the Secretary of HUD will be responsible for coordinating the effort and establishes the President’s Fair Housing Council, which will be chaired by the Secretary of HUD; Executive Order 12898 (2-11-1998) requires that each federal agency conduct its program, policies, and activities that substantially affect human health or the environment in a manner that does not exclude persons based on race, color, or national origin; Executive Order 13166 (8-16-2000) eliminates, to the extent possible, limited English proficiency as a barrier to full and meaningful participation by beneficiaries in all federally-assisted and federally conducted programs and activities; Executive Order 13217 (6-19-2001) requires federal agencies to evaluate their policies and programs to determine if any can be revised or modified to improve the availability of community-based living arrangements for persons with disabilities.

HUD enforces these laws to the extent that they relate to state and local public housing. In order to enforce these laws as they relate to housing, Congress authorized HUD to establish housing courts, appoint administrative law judges and establish education and conciliation processes. *See generally* 42 U.S.C. § 3608 (Administration), 42 U.S.C. § 3609 (Education and conciliation). This paper focuses on the administrative actions and litigation initiated by the federal government against a housing authority under the Fair Housing Act<sup>9</sup>.

#### **D. Examples of activities alleged or found to be in violation of the Act.**

Claims for violation of the Act may include discrimination based on race or color, religion, sex, handicap status, familial status, and national origin. The common element of claims is the allegation that the discriminatory act had the effect of making housing unavailable or less available to the victims of the discriminatory act.

##### **1. Race or Color**

The majority of claims under the Fair Housing Act involve race discrimination. Examples of activities alleged or found to be discriminatory based on race or color include:

- \* Exclusion of multifamily housing in residential zoning districts with predominantly white residents while permitting multifamily housing in residential zoning districts with predominantly minority residents. *U.S. v. Yonkers Bd. of Educ.*, 29 F.3d 40 (2<sup>nd</sup> Cir. N.Y. 1994).

- \* Termination of police protection to minority residents following acts of racial violence.

- \* "Steering" minority applicants for Section 8 housing vouchers to buildings with predominantly minority residents. *U.S. v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2<sup>nd</sup> Cir. N.Y. 1987).

- \* Use of federal Community Development Block Grant funds by a community for water and sewer projects only in areas with predominantly white residents, where areas with predominantly minority residents had a greater need for such projects.

- \* Providing misinformation and selectively disposing of applications for a residential rehabilitation and energy conservation program.

- \* Acquisition and demolition of housing occupied predominantly by minority residents as part of a downtown revitalization project where there was no provision of replacement housing.

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<sup>9</sup> Cities may also be subject to Fair Housing Claims arising out of land use regulations affecting housing. *See, e.g., Reinhart v. Lincoln County*, 482 F.3d 1225 (10<sup>th</sup> Cir. Wyo. 2007) (land use plan and subdivision requirements increasing lot size); (*NAACP et al v. City of Kyle*, 2006 W.L. 1751767 (W.D. Tex. 2006) (lot size, house size and façade requirements).

\* Use of “working family” preference in housing applications that favored white residents. *Davis v. New York City Housing Authority*, 166 F.3d 432 (2<sup>nd</sup> Cir. NY 1999).

\* Closing part of a street in a white neighborhood impacting blacks who live at one end of the street. *City of Memphis v. Greene*, 451 U.S. 100 (1981).

\* Failing to participate in housing program. *United States v. City of Parma*, 494 F.Supp. 1049 (N.D. Ohio 1980), *judgment affirmed*, 633 F.3d 218, *cert. denied* 456 U.S. 1012 (1982).

\* Having tenant selection policies that have adverse racial impact.

<http://www.hud.gov/utilities/intercept.cfm?/offices/fheo/enforcement/nha-conciliation.pdf>;  
tenant selection.  
<http://www.hud.gov/offices/oalj/cases/fha/pdf/halv.pdf>.

\*City zoning ordinances establishing minimum lot and house size and requiring masonry façade alleged to have segregative effect. *NAACP et al v. City of Kyle*, 2006 W.L. 1751767 (W.D.Tex. 2006).

## **2. Religion.**

The Fair Housing Act prohibits discrimination in housing based upon religion. This prohibition covers instances of overt discrimination against members of a particular religion as well less direct actions, such as zoning ordinances designed to limit the use of private homes as a places of worship. The number of cases filed since 1968 alleging religious discrimination is small.<sup>10</sup> In *Waldman v. Village of Kiryas Joel*, 207 F.3d 105 (2<sup>nd</sup> Cir. 2000), a village resident sued his village and its officials under the Fair Housing Act and Section 1983 seeking the village’s dissolution because the village operated as a theocracy in violation of the establishment clause. The claim arose out of an internal schism within a Hasidic Jewish community that had incorporated in 1977. The suit was dismissed on res judicata grounds based upon a settlement agreement in a prior suit between the parties.

## **3. Sex.**

The Fair Housing Act makes it unlawful to discriminate in housing on the basis of sex. In recent years, the focus in this area has been to challenge sexual harassment in housing. *See, e.g., Claiborne v. Wisdom*, 414 F.3d 715 (7<sup>th</sup> Cir. Ind. 2005) (evicted after rejecting managers’ sexual advances). Women, particularly those who are poor, and with limited housing options, often have little recourse but to tolerate the humiliation and degradation of sexual harassment or risk having their families and themselves removed from their homes. Landlords create an untenable living environment by demanding sexual favors from tenants or by creating a sexually hostile

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<sup>10</sup> The Religious Land Use and Institutionalized Persons Act (RLUIPA) also prohibits local governments from adopting or enforcing land use regulations that discriminate against religious assemblies and institutions or which unjustifiably burden religious exercise. *See* 42 U.S.C. §§ 2000cc *et seq.*

environment for them. Males may also, however, be discriminated against. See <http://www.hud.gov/offices/oalj/cases/fha/pdf/yankee.pdf> (respondent stated that he did not wish to rent to males because males are more trouble and less desirable tenants than women, respondent rented apartments to women who signed the waiting list or presented themselves after Complainants did).

#### **4. Handicap (disability), including group homes.**

More recently, HUD's claims against housing authorities centered on accessibility. The Act defines persons with a disability to mean those individuals with mental or physical impairments that substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working. The Act also protects persons who have a record of such an impairment, or are regarded as having such an impairment. See e.g., *United States v. City of Chicago Heights*, 161 F.Supp.2d 819 (N.D.Ill. 2001)(residential group home for mentally ill); *United States v. Borough of Audubon*, 797 F.Supp. 343 (D.N.J. 1991) (residential group home for recovering alcoholics and drug users). Examples of failure to make "reasonable accommodations" for residences for people with disabilities (as required by the 1988 Amendments to the Act) would include disqualifying "mentally infirm" residents, unwed mothers, or residents dependent on guide dogs from public housing.

Current users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders are not considered disabled under the Fair Housing Act, by virtue of that status. The Act does not protect individuals with or without disabilities who present a direct threat to the persons or property of others. Determining whether someone poses such a direct threat must be made on an individualized basis, however, and cannot be based on general assumptions or speculation about the nature of a disability. Cf. *Gale Costa v. Fall River Housing Authority*, 71 Mass.App.Ct. 269 (2008) (housing authority has authority to terminate housing subsidy for tenant keeping house of ill fame in apartment).

HUD's enforcement of the Act related to disabilities has concentrated on two major areas. First, discouraging unnecessarily restricting communal, or congregate, residential arrangements, such as group homes. Second, insuring that newly constructed multifamily housing is built in accordance with the Act's accessibility requirements so that such projects are accessible to and usable by people with disabilities, and, in particular, those who use wheelchairs. To provide guidance on these issues, the Departments of Justice and Housing and Urban Development have issued a Joint Statement on Group Homes, Local Land Use and the Fair Housing Act. See [www.usdoj.govt/crt/housing/final8\\_1htm](http://www.usdoj.govt/crt/housing/final8_1htm). This summer HUD also published proposed new rules regarding accessibility. See 73 Fed.Reg. pp. 34465 *et seq* (June 17, 2008).



The Act defines discrimination in housing against persons with disabilities to include a failure "to design and construct" certain new multi-family dwellings so that they are accessible to and usable by persons with disabilities, and particularly people who use wheelchairs. The Act requires all newly constructed multi-family dwellings of four or more units intended for first occupancy after March 13, 1991, to have certain features: an accessible entrance on an accessible route, accessible common and public use areas, doors sufficiently wide to accommodate wheelchairs, accessible routes into and through each dwelling, light switches, electrical outlets, and thermostats in accessible location, reinforcements in bathroom walls to accommodate grab bar installations, and usable kitchens and bathrooms configured so that a wheelchair can maneuver about the space.

In *Philadelphia Housing Authority v. United States Dept of Housing and Urban Development*, -- F.Supp.2d --, 2008 WL 839783 (E.D.Pa. March 31, 2008), the Housing Authority (PHA) sued to enjoin HUD from terminating \$40 million of its \$336,489,721 in federal aid because of PHA's failure to make its properties handicapped accessible. The district court refused PHA's request because it found HUD had broad discretion to administer the federal funds and HUD stated a rational basis for its funding decision.

HUD and the Department of Justice have brought many enforcement actions against those who fail to meet their accessibility guidelines. Most of the cases have been resolved by consent decrees providing a variety of types of relief, including: retrofitting to bring inaccessible features into compliance where feasible and where it is not -- alternatives (monetary funds or other construction requirements) that will provide for making other housing units accessible; training on the accessibility requirements for those involved in the construction process; a mandate that all new housing projects comply with the accessibility requirements, and monetary relief for those injured by the violations.

Other examples of HUD enforcement actions arising out of disability related issues include:

\* Despite possessing handicap license plates, complainant was unable to find available parking near his apartment. Respondent denied request that one of the handicap spaces be reserved. See <http://www.hud.gov/offices/oalj/cases/fha/pdf/dedham1.pdf>.

\* Voluntary Compliance Agreement between U.S. Dep't of Housing and Urban Development and Miami-Dade County by and through its Department Miami-Dade Housing Agency, 2005. (HUD's review revealed deficiencies related to the physical accessibility of the common areas and individual housing units, as well as deficiencies in MDHA's current policies and procedures), <http://www.hud.gov/offices/fheo/library/mdha-vca.pdf>.

\* Voluntary Compliance Agreement between HUD and the Seattle Housing Authority, November 12, 2007, <http://www.hud.gov/offices/fheo/library/Seattle-VCA.pdf>.

\* Voluntary Compliance Agreement between HUD and the Pittsburgh Housing Authority, <http://www.huud.gov/offices/fheo/library/HACP-FINALVCA.pdf>.

\* Voluntary Compliance Agreement between HUD and the Chicago Housing Authority, <http://www.hud.gov/offices/fheo/library/AHA-VCA.pdf>.

\* Voluntary Compliance Agreement between HUD and the Housing Authority of the City of Lafayette, <http://www.hud.gov/offices/fheo/enforcement/LHA-VCA.pdf>.

## **5. Familial status, including age.**

The Act, with some exceptions, prohibits discrimination in housing against families with children under 18. In addition to prohibiting an outright denial of housing to families with children, the Act also prevents housing providers from imposing any special requirements or conditions on tenants with custody of children. For example, landlords may not locate families with children in any single portion of a complex, place an unreasonable restriction on the total number of persons who may reside in a dwelling, or limit their access to recreational services provided to other tenants. In most instances, the amended Fair Housing Act prohibits a housing provider from refusing to rent or sell to families with children. However, some facilities may be designated as Housing for Older Persons (55 years of age). This type of housing, which meets the standards set forth in the Housing for Older Persons Act of 1995, may operate as "senior" housing. HUD has published regulations and additional guidance detailing these statutory requirements.

Example of cases of discrimination based on familial status include:

\* requiring the approval of neighboring property owners or residents as a condition for issuing a conditional use permit for a group home.

\* Respondent stated he preferred renters without children. <http://www.hud.gov/offices/oalj/cases/fha/pdf/wooten080107.pdf>.

\* Respondent said he did not want to rent to anyone with "too many children, because they would ruin" his property and that he would "rather see the apartment vacant than to rent to someone with too many children who would destroy the property. *See* <http://www.hud.gov/offices/oalj/cases/fha/pdf/cubello.pdf>.

## **6. National origin.**

The Act prohibits discrimination based upon national origin. Such discrimination can be based either upon the country of an individual's birth or where his or her ancestors originated. Census data indicate that the Hispanic population is the fastest growing segment of our nation's population. The Justice Department has taken enforcement action against municipal governments that have tried to reduce or limit the number of Hispanic families that may live in their communities. In Case No. 01-06-0526-8, HUD entered into a conciliation agreement with the Nashua Housing Authority and its tenants arising out of a national origin claim in which the agreement provided, among other things, that the housing authority draft a Limited English

Proficiency (LEP) plan to ensure meaningful access to its programs and activities by LEP persons. See <http://www.hud.gov/offices/fheo/enforcement/nha-conciliation.pdf>.

## **E. Potential remedies.**

The costs to a municipality or housing authority when it must defend against a complaint based on the Act include its own attorney's fees, its court costs, the costs of diverting staff and officials from their regular duties to assist in the preparation of a defense, and the loss of community prestige through adverse publicity.

The additional costs to a municipality or housing authority if it is found to have violated the Act may include nominal or compensatory damages to the complainant (including those for pain and suffering, mental anguish and emotional distress, and humiliation), punitive damages to the complainant (which may be imposed by a court for intentional and willful violations), civil penalties to injured individuals and/or the federal government (up to \$10,000 if it is the violator's first violation, up to \$25,000 if the violator has had a previous violation in the past five years, or up to \$50,000 if the violator has had two or more violations in the past seven years; and up to \$50,000 if a "pattern and practice" is shown or up to \$100,000 if the violator has been previously found to have engaged in a "pattern and practice"), the complainant's attorney's fees and share of court costs, the loss of eligibility for federal funding of municipal projects and programs, court-supervised or HUD-supervised oversight of municipal services, and court-ordered or HUD-ordered municipal expenditures for projects and programs to accomplish specific objectives (including record keeping and reporting of municipal activities).

## **II. Federal Fair Housing Act enforcement procedures – statutory and administrative remedies.**

### **A. HUD enforcement procedures.**

The Department of Housing and Urban Development (HUD) investigates individual (as opposed to pattern or practice)<sup>11</sup> cases of discrimination in housing. Under the Act, a person who believes that he or she is a victim of housing discrimination may file either a complaint with HUD (see exhibit A) or a lawsuit in federal or state court. 42 U.S.C. § 3610(a)(1)(A)(i) and (ii). HUD may sua sponte also investigate housing practices to determine whether a complaint should be brought. 42 U.S.C. § 3610(a)(1)(A)(iii).

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<sup>11</sup> Under the Act, the Department of Justice may bring lawsuits where there is reason to believe that a person or entity is engaged in a "pattern or practice" of (as opposed to individual) discrimination or where a denial of rights to a group of persons raises an issue of general public importance. The Department of Justice operates a Fair Housing Testing Program to uncover hidden discrimination. Where force or threat of force is used to deny or interfere with fair housing rights, the Department of Justice may also institute criminal proceedings. See, e.g., *United States v. Village of Island Park*, 888 F.Supp. 419 (E.D. N.Y. 1995) (suit against city, its officials and HUD employee alleging abuse of CDBG Program under Fair Housing Act and False Claims Act (31 U.S.C. 3729) and various tort and equitable theories).

When a complaint is filed with HUD, the Department may interview the complainant for clarification or information about the complaint necessary to determine whether HUD has jurisdiction of the matter. <http://www.hud.gov/offices/fheo/complaint-process.cfm>. If HUD determines it is without jurisdiction, it dismisses the case. *Id.* If, however, HUD establishes that it has jurisdiction, then HUD notifies the alleged violator of the complaint and permits that person to answer the complaint. 42 U.S.C. § 3610(a)(1)(B)(i). A respondent may file, not later than ten (10) days after receipt of notice from the Secretary, an answer to the complaint. 42 U.S.C. § 3610(a)(1)(B)(iii)<sup>12</sup>. The Act directs that HUD shall complete its investigation of a complaint within 100 days, “unless it is impracticable to do so.” 42 U.S.C. § 3610 (a)(1)(B)(iv).

The Fair Housing Act directs that “during the period beginning with the filing of (the) complaint and ending with the filing of a charge or a dismissal....(HUD) shall, to the extent feasible, engage in conciliation with respect to such complaint.” 42 U.S.C. § 3610(b)(1). If the complainant and alleged violator do not reach an agreement, HUD then investigates and determines whether there is reasonable cause to believe that the Act has been violated. During the investigation process, HUD will try to reach an agreement between the parties. See generally 42 U.S.C. § 3610(b)(2)-(5) (investigative report and conciliation); 42 U.S.C. § 3610(c) (Failure to comply with conciliation agreement).

If the complaint is not resolved by agreement, then HUD will generally complete its investigation of the complaint<sup>13</sup> and, except in matters involving zoning and land use, make a cause or no-cause determination. See 42 U.S.C. § 3610(g)(Reasonable Cause Determination and Effect). If HUD issues a no-cause determination, then the case is closed and the complainant may appeal to either an administrative law judge or federal court. 42 U.S.C. § 3610(g)(2)(B)(3).

In matters involving zoning and land use, HUD does not issue a charge of discrimination. 42 U.S.C. § 3610(g)(2)(C). Instead, HUD refers matters it believes may be meritorious to the Department of Justice which, in its discretion, may decide to bring suit against the respondent in such a case under 42 U.S.C. § 3614 (Enforcement by Attorney General). *Id.*

Otherwise, if HUD finds there is reasonable cause to believe that there has been a violation of the Act and is unable to reach a conciliation agreement with the alleged violator, HUD will issue a charge on behalf of the aggrieved person and continue proceedings under 42 U.S.C. § 3612 (Enforcement by Secretary). See 42 U.S.C. § 3610(g)(2)(A). Under Section 3612, HUD attorneys will litigate the complaint before an Administrative Law Judge. See generally 24 C.F.R. Part 180 (Consolidated HUD Hearing Procedures for Civil Rights Matters).

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<sup>12</sup> In practice, HUD may grant extension of time upon request in writing.

<sup>13</sup> The Act also makes provisions for immediate judicial action with regard to some complaints (42 U.S.C. § 3610(e)) and referral of certain complaints to a State or local public agency (42 U.S.C. § 3610(f)).

If the complainant or alleged violator wishes, the case may be decided by (or appealed to) federal court.<sup>14</sup> If HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, then either the complainant or the respondent (the person against whom the complaint was filed) may elect within 20 days after service of the charge to have the case heard in federal court. 42 U.S.C. § 3612(a). In the absence of a timely election, the charge goes to Housing Court. *Id.* In those instances in which a complainant or respondent elect out of Housing Court to a federal district court, the Department of Justice will bring the case on behalf of the individual complainant. 42 U.S.C. § 3612(o). The Act also provides for judicial review of a decision from the Housing Court. 42 U.S.C. § 3612(i).

## **B. Burden of proof.**

A fair housing violation does not require a discriminatory intent: A violation can be found even if only a discriminatory impact or burden results. In many cases, a violation is found simply because municipal officials carried out regular activities in a routine way and failed to recognize their special fair housing responsibilities.

## **C. Attorney's fees.**

The fair housing act permits the court, in its discretion, to allow the prevailing party (other than the United States) a reasonable attorney's fee and costs. 42 U.S.C. § 3612(p).

## **III. Federal Housing and Community Development Act enforcement procedures.**

HUD has also adopted rules to implement the provisions of Title I of the Housing and Community Development Act of 1974 prohibiting discrimination in the provision of housing programs funded with Federal financial assistance. *See* 42 U.S.C. § 3535(d), 42 U.S.C. § 5309, 24 C.F.R. Part 6 (Nondiscrimination in Programs and Activities Receiving Assistance Under Title I). Under Section 109, a person may complain about alleged discrimination related to a HUD financed program to HUD within 180 days of the alleged discriminatory act. 24 C.F.R. § 6.11(a)(1)-(6)<sup>15</sup>. After initial intake, HUD will notify the respondent (recipient) within ten (10) days of the complaint. 24 C.F.R. § 6.11(a)(7). The respondent then has twenty (20) days to answer the complaint. *Id.* As in a complaint under the fair housing act, HUD will attempt resolution of the complaint. 24 C.F.R. § 6.11(a)(8); 24 C.F.R. § 6.11(e). If the complaint is not resolved within 180 days, then HUD will issue finding of fact and a finding of compliance or non-compliance. 24 C.F.R. § 6.11(a)(8)(i)– (iii). As in complaint under Fair Housing Act, the complainant has right to file private civil action. 24 C.F.R. § 6.11(e)(3). If HUD determines that a respondent has violated Section 109 and “voluntary compliance efforts have failed”, then HUD may refer the matter to the Attorney General for civil action or limit the availability of federal funds to respondent. *See generally* 24 C.F.R. § 6.12 (Procedure for effecting compliance). A

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<sup>14</sup> A complainant may commence an action in federal district court not later than two (2) years after an alleged discriminatory housing practice unless the complaint arises out of a prior conciliation agreement. *See generally* 42 U.S.C. § 3613 (Enforcement by Private Persons). 28 AM.JUR. TRIALS 1 *Housing Discrimination Litigation* (2008).

<sup>15</sup> HUD may also periodically conduct its own compliance reviews. 24 C.F.R. § 6.11(b).

respondent may request opportunity for hearing before HUD and/or seek judicial review of HUD's action. 24 C.F.R. § 6.13; *see also* 24 C.F.R. part 180.

#### **IV. Mitigation: Action to affirmatively further fair housing.**

A local government that receives a HUD grant must certify that it affirmatively furthers fair housing. HUD has identified actions that a local government can take to demonstrate that it has complied with this certification. Technically, these actions do not insulate a community from liability under the Act (for example, specific acts of intentional discrimination by municipal officials are not excused by a pattern of previous municipal actions that further fair housing). However, a municipality that demonstrates that it has undertaken such actions may persuade a HUD official or court that is investigating a fair housing complaint that the municipal actions that are the basis of the complaint should not be regarded as violations of the Act or should not be regarded as "intentional and willful" violations of the Act.

Current HUD regulations identify the following actions as affirmatively furthering fair housing: 1) Enactment and enforcement of an ordinance providing for fair housing consistent with federal fair housing law; 2) Support in the administration of state fair housing laws; 3) Participation in voluntary partnerships developed with public and private organizations to promote the goal of fair housing choice; 4) Contracting with private organizations, including fair housing organizations, to address fair housing impediments; 5) Activities that assist in remedying findings or determinations of unlawful segregation or other discrimination involving assisted housing within a recipient's jurisdiction and other actions in response to fair housing impediments; and 6) Conducting neighborhood meetings or similar mechanisms for educating and sharing information with residents of areas aimed at overcoming opposition to acceptance into the area of persons in the categories covered under the Act. 24 C.F.R. § 570.904.

#### **V. Summary**

Local housing authorities were created in response to federal programs financing public housing, and local housing authorities remain dependent on federal policies for their continuing operation. HUD has broad, discretionary powers to enforce federal housing laws and to administer housing programs receiving federal financial assistance.

Congress has, within the Fair Housing Act, created a broad remedial tool to permit private individuals and HUD to prohibit housing discrimination. The Act may be used by plaintiffs to push a broader mission of increasing "homeownership" by attempting to undermine local government policies that indirectly increase the cost of home ownership even in the absence of racial animus.

Most actions involving HUD will, at least initially, center around the conciliation process. It is important to evaluate any complaint made and carefully consider crafting a potential conciliation agreement to address any complaint made under the public housing laws.