

Metro Detroit Fair Housing News



An e-newsletter to you from the Fair Housing Center of Metropolitan Detroit

(Spring 2021)

Four Critical Fair Housing Issues

In commemoration of this year's Fair Housing Month, this special e-newsletter addresses four critical issues: Affirmative Furthering Fair Housing; affordable housing crisis; disparate impact liability; and source of income protection.



AFFIRMATIVELY FURTHERING FAIR HOUSING

1. AFFH. Section 808(e)(5) of the Fair Housing Act ("FHA"), enacted in 1968, requires HUD to "administer [housing] programs . . . in a manner affirmatively to further the policies of [the Fair Housing Act]". 42 USC §3608(e)(5). This provision, referred to as the "Affirmative Furthering Fair Housing" or "AFFH" requirement, "requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of open integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973).

The AFFH requirement is a critical component of the FHA. Surprisingly, the FHA in general does not directly address the problem of housing segregation. It *indirectly* addresses segregation by assuming that prohibiting discrimination will in time lessen or remedy segregation over time. The FHA has not fully achieved this goal. The AFFH requirement, however, is the only provision of the FHA that *directly* addresses segregation. Unfortunately, the 1968-1995 time period—almost 30 years—was marked by a general non-enforcement of the AFFH mandate.

In 1995, HUD adopted a regulation ("1995 AFFH Rule") requiring that municipalities receiving HUD funds prepare a 3- to 5-year consolidated plan, conduct an analysis of impediments to fair housing choice (or "AI"), adopt annual action plans, and issue consolidated annual performance and evaluation reports ("CAPERs"). For a variety of reasons, the 1995 AFFH Rule proved ineffective in combatting racial segregation and achieving the goal of open integrated residential housing.

In 2015, HUD adopted a new regulation ("2015 AFFH Rule"), which, among other things, replaced the AI requirement with a more detailed "Assessment of Fair Housing" or "AFH" requirement. In 2018, however, HUD issued notices suspending the 2015 AFFH Rule, requiring municipalities return to the 1995 AI Rule. In 2020, HUD issued a final rule, entitled "Preserving Community and Neighborhood Choice", finding that the 2015 AFFH Rule, among other things, was at odds with policies guiding federalism and local control over housing policies.

In January 2021, the President issued an Executive Order directing a study of the effects of the Preserving Community and Neighborhood Choice regulation. On April 12, 2021, HUD submitted to the Office of Management and Budget ("OMB") a proposed interim rule entitled "Affirmatively Furthering Fair Housing; Restoring Statutory Definitions and Certifications (FR-6249)". While the text of this AFFH interim rule will not be released until the OMB has completed its review, the rule is expected to reinstate much of the 2015 AFFH Rule and provide additional guidance. Hopefully, the new rule and guidance will finally move toward accomplishing what Congress intended 53 years ago by including the AFFH requirement in the FHA.

2. Affordable Housing Crisis. As of 2014, there were only 30.8 available units per 100 extremely low-income (ELI) renter households (0-30% of area median income) in Macomb County, 31.7 units in Oakland County, and 39.9 units in Wayne County. See *The Housing Affordability Gap for Extremely Low-Income [ELI] Renters in 2014* (April 2017)(https://www.urban.org/sites/default/files/publication/89921/2017.04.26_2016_gap_map_report_finalized.pdf).



A recent study by the National Low Income Housing Coalition shed further light on the affordable housing crisis (<https://reports.nlihc.org/gap/2019/mi>). The study defined rental households that spend more than 30% of their monthly income on housing costs and utilities as “cost burdened” and households that spend more than half of their monthly income as “severely cost burdened”. In 2019, 88% of ELI households were cost burdened, with 73% of ELI households being severely cost burdened. As to very low-income (VLI) households (31-50% of area median income), 75% were cost burdened, with 22% being extremely cost burdened.

This is a crisis. The affordable housing shortage fuels housing insecurity and evictions. During the 2014-2018 time period, the annual eviction filings per 100 households in Michigan totaled 24.4% for Macomb County, 23.5% for Wayne County, and 19.0% for Oakland County. *Michigan Evictions - Trends, Data Sources and Neighborhood Determinants*, at 15 (May 2020)(<https://poverty.umich.edu/files/2020/06/Michigan-Eviction-Project-working-paper-1.pdf>). In comparison, the nationwide average is 1 filing for every 17 rental households or an eviction filing rate of 6-7%. While many ELI and VLI renter households are forced into unaffordable or uninhabitable homes, others experience homelessness. This, in turn, leads to adverse health and loss of educational achievement. The end result of this cycle destabilizes families, neighborhoods, and communities.

Affordable housing must be considered an urgent priority at the local, state, and national level.

3. Disparate Impact. In recent years, the most notable fair housing cases have been brought under the disparate impact (“DI”) theory of liability. In 2013, HUD promulgated its disparate impact rule (“2013 DI Rule”), grounding its rulemaking on the uniform rulings of the federal circuit courts of appeals upholding disparate impact as a theory of liability under the FHA. The 2013 DI Rule states that liability may be established under the FHA when a housing practice actually or predictably results in a disparate impact based on a protected class, or creates, increases, reinforces, or perpetuates segregated housing patterns. In 2015, the Supreme Court in *Texas Dep’t of Housing and Comm. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), upheld DI as a theory of liability under the FHA.



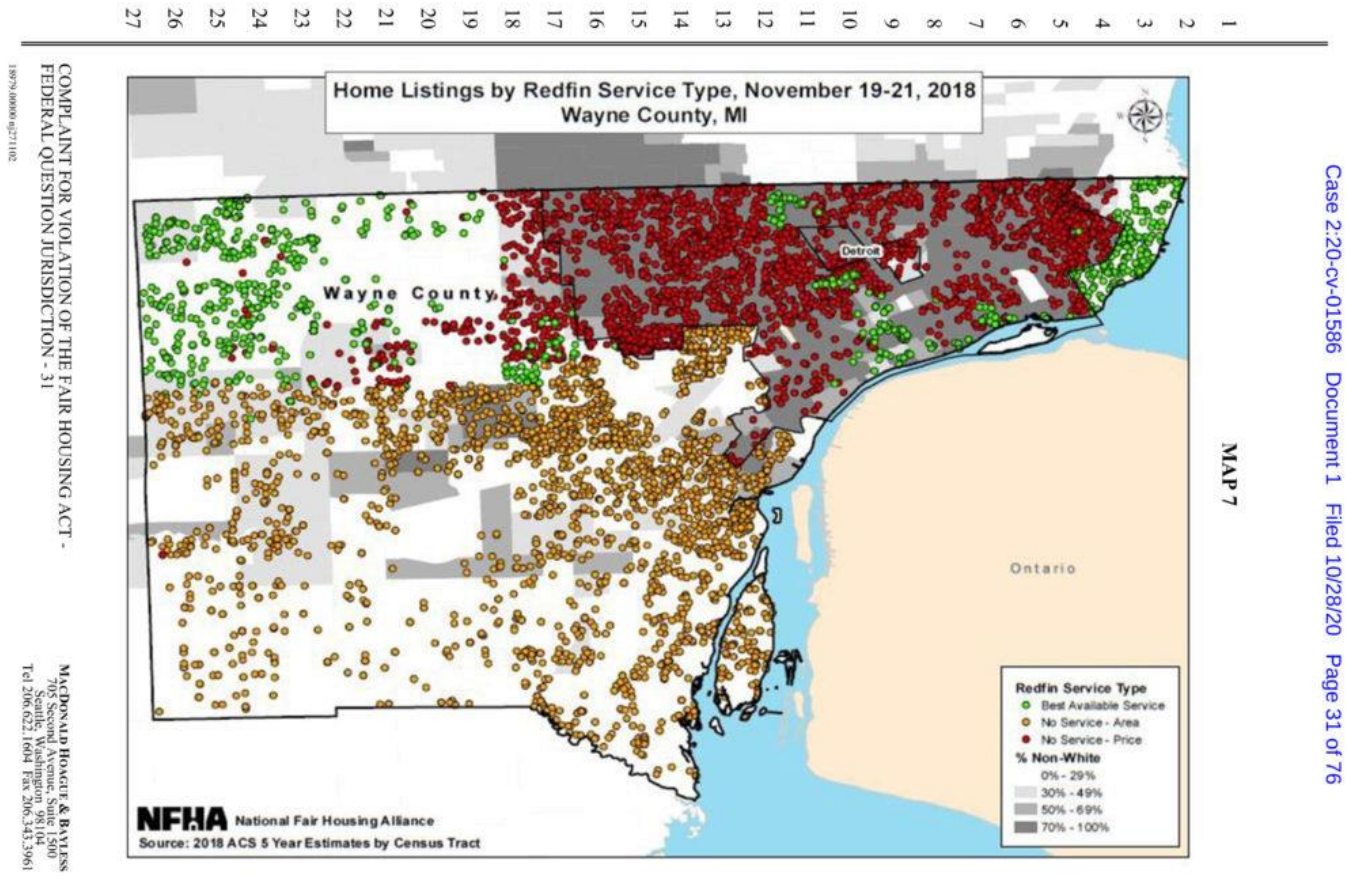
In August 2019 and September 2020, however, HUD issued interim and final rules making it very difficult to establish DI claims under the FHA. For example, the September 2020 DI rule required a plaintiff to “plead facts” showing that the “challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law”. In October 2020, however, an injunction was entered against the September 2020 DI rule.

The President’s January 2021 Executive Order, referred to above, also directed an examination of HUD’s 2020 DI Rule. In February 2021, HUD withdrew its appeal of the injunction. On April 12, 2021, HUD submitted to the Office of Management and Budget (OMB) a proposed rule entitled “Reinstatement of HUD’s Discriminatory Effects Standard (FR-6251)”. While the text of the proposed rule, like the proposed AFFH interim rule, will not be released until the OMB completes its review, the rule is expected to reinstate the 2013 DI Rule.

A couple of examples illustrate the importance of DI claims. A mortgage lender’s \$400,000 minimum loan amount policy in its wholesale channel may cause a disparate or discriminatory impact on grounds of race and national origin. A “no felony rule” as to rental applicants, without an individualized review of whether an applicant years after a conviction continues to pose a threat, may result in a disparate or discriminatory impact against African American and Hispanic individuals, who are convicted at rates disproportionate to the share of the general

population. See HUD Office of General Counsel's Guidance, Application of Fair Housing Act Standards to the Use of Criminal Records (April 4, 2016).

As a final example, a nationwide real estate firm offers three tiers of service based on the listing price of the homes: full service provided by its real estate agents (its own employees) including eligibility for a commission refund; referral to a partner agent (non-employee) with no commission refund; and no service. As shown on the following Metropolitan Detroit area maps, setting three tiers of service based on the listing price of the homes has a negative impact on minority communities:



<https://fairhousingdetroit.org/fair-housing-center-joins-in-redlining-case-against-redfin-corporation/>

While DI claims would likely succeed in each of these situations under the 2013 DI Rule, it is unclear whether they would have succeeded under HUD's September 2020 DI rule. These illustrations show the importance of HUD's anticipated return to the 2013 DI Rule.

4. Source of Income Protection. Currently, approximately 1/2 of housing units are subject to source of income (SOI) protections. Schwemm, Source-of-Income Discrimination and the Fair Housing Act, 70 Case Western Reserve L. R. 573, 593 (2020). At the federal level, SOI is covered under the federal Equal Credit Opportunity Act, which prohibits discrimination in lending based on "[t]he applicant's receipt of income derived from any public assistance program". The FHA and other federal anti-discrimination laws, however, do not list SOI as a protected class.



While SOI is not yet protected under Michigan state law, SOI discrimination is prohibited under several local ordinances, including Ann Arbor, East Lansing, Grand Rapids, Holland, Jackson, Kentwood, Lansing, and Wyoming. While Detroit's Article VI - Real Estate, Insurance and Loan Practices ordinance does not list SOI, it includes "public benefit status" which provides the same, if not broader coverage as provided by SOI.

SOI protection has a broad reach. As to rental properties, many state statutes, local ordinances, and court decisions have interpreted SOI protection to require housing providers to participate in the HCV (Section 8) program. SOI protections may curb discrimination against individuals paying rent with non-traditional or non-employment income. With respect to home purchases and financing, SOI protection could require home sellers to accept purchasers financed through FHA or VA loans. SOI protections can help deconcentrate areas of poverty, leading to economically diverse and inclusive neighborhoods. SOI protections will particularly benefit racial and ethnic minorities.

While other important fair housing issues could be listed, these four issues stand out in terms of their wide-ranging impact.

Fair Housing Brochures



The Fair Housing Center distributes brochures on a variety of fair housing topics. The most common non-English languages in the Center's Wayne, Oakland, and Macomb Counties service area are Arabic and Spanish. The Center's fair housing brochures are available in English, Arabic, and Spanish. Please contact our office if you would like to receive brochures.

The Center recently uploaded its fair housing brochures in each language to its website, which can be downloaded and printed free of charge from the Center's website at <https://fairhousingdetroit.org/wp-content/uploads/2021/04/Fair-Housing-Brochures-table-for-website-1.pdf>.

Seven Days Documentary

Finally, looking back on the 50th Anniversary of the passage of the 1968 Fair Housing Act, the National Fair Housing Alliance and Nationwide in January 2018 released a short, 9-minute documentary entitled "Seven Days." The short film highlights the 7 tumultuous days from the assassination of Dr. Martin Luther King Jr. to the passage of the Fair Housing Act (FHA). <https://nationalfairhousing.org/seven-days-documentary/>



For those who have never seen the film, or may not have viewed it recently, the parallels are striking between the 1966-1968 period giving rise to the enactment of the FHA and our nation's recent unrest and protests. The film is more relevant today than it was upon its release in 2018. This is a great film to watch and share during this year's Fair Housing Month.

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