

**AIMS Property Management Update  
NAA/NMHC Joint Legislative Program**

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**THE FAIR HOUSING ACT TURNS 40**

This year marks the 40th anniversary of the Fair Housing Act. The measure was signed into law one week after the assassination of Dr. Martin Luther King, Jr. This week's *Property Management Update* uses the anniversary as an opportunity to remind apartment firms of their responsibilities under the Act.

While NAA/NMHC recognize that our member firms conduct extensive fair housing training programs for their employees, the increased level of court activity in this area, including some involving non-traditional forms of discrimination such as sexual harassment and linguistic profiling, suggests that it may be useful for firms to review and update company programs. It is especially important that front-line staff are armed with the tools necessary to identify and address the many forms that housing discrimination can take.

**FAIR HOUSING ACT OVERVIEW**

On the surface, compliance with the Fair Housing Act appears straightforward. It makes it illegal to discriminate in the sale, rental and financing of dwellings, and in other housing-related transactions, based on one or more of the seven protected classes: (1) race; (2) color; (3) national origin; (4) religion; (5) sex; (6) familial status; and (7) disability. (Familial status and disability were added to the list of protected classes by the Fair Housing Amendments Act of 1988, which also added enforcement mechanisms via government and private action.)

While the law also covers transactions in the single-family for-sale sector, most complaints originate from the rental housing market. Common housing discrimination complaints include:

- Imposing more restrictive rules on minority residents than on others;
- Denying families with children or limiting number of children in units to less than two per-bedroom;
- Sexual harassment against residents; (the U.S. Department of Housing and Urban Development (HUD) reports that the Bush Administration has filed three times as many housing-related sexual harassment cases than the prior administration);
- Failing to make reasonable accommodations for disabled residents, such as amending parking space location, unit location and no-pets policies; and
- Failing to return telephone messages left by African-Americans.

### ***Accessibility***

Housing discrimination takes many forms, and is no longer dominated by instances of minorities being denied an apartment or steered to a less desirable location/unit. Although this may still occur, for the last several years, discrimination due to a disability has been the largest source of housing discrimination complaints. According to HUD, there were more than 10,000 housing discrimination complaints filed with HUD and its state and local government agencies in 2007. Of these, 43 percent alleged discrimination against persons with disabilities.

The apartment industry is well aware of the highly publicized cases filed against several large multifamily developers alleging violation of the Act's design and construction requirements for accessibility. The apartment industry scored an important victory in May when the U.S. Court of Appeals for the Ninth Circuit affirmed the statute of limitations governing when "aggrieved persons" can file private civil actions alleging violations of the Fair Housing accessibility regulations. According to this ruling, such cases must be filed within two years of when the last certificate of occupancy is issued (*Garcia v. Brockway*, 503 F. 3d 1092 (Sept. 20, 2007)). NAA/NMHC had submitted a "friend of the court" brief arguing in support of such a ruling.

The court rejected the plaintiffs' argument that private litigants could file civil actions within two years of "encountering" an accessibility design violation (e.g., within two years of leasing or trying to lease an apartment) under the "continuing violation" theory.

The ruling applies to the states and regions covered by the Ninth Circuit, which includes: Alaska, Arizona, Northern California, Central California, Eastern California, Southern California, Hawaii, Idaho, Montana, Nevada, Oregon, Eastern Washington, Western Washington, the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands. Apartment firms should note, however, that this decision does not affect the Department of Justice's ability to bring a civil action if a defendant has engaged in a "pattern or practice of resistance" to Fair Housing rights. There is no statute of limitations for those actions.

## **NON-TRADITIONAL FAIR HOUSING ACT DISCRIMINATION**

In addition to the traditional forms of discrimination involving minorities and disabled residents, plaintiff's attorneys are beginning to turn their attention to some other forms of discrimination. This is particularly the case at the local level, where laws have been enacted to expand the number of protected classes. Common additions include source of income, sexual identity and marital status. Attention is also being paid to victims of domestic violence, local zoning restrictions and local immigration ordinances as forms of discrimination. In addition, recent emphasis has been placed on what has been described by U.S. Department of Justice (DOJ) as "the more hidden forms of discrimination," such as a leasing consultant treating minority applicants politely but falsely telling them that no units are available.

- **"Source of Income" Discrimination**

Advocates seeking new ways to increase the amount of affordable housing are pushing for state laws that include "source of income" as a protected class, thus mandating that apartment owners accept Section 8 vouchers. Currently, 17 cities, including Los Angeles, New York, Philadelphia, Seattle, St. Louis and Washington, D.C. have "source of income" anti-discrimination laws. Thirteen states also have such laws: California; Connecticut; Maine; Maryland; Massachusetts; Minnesota; New Jersey; North Dakota; Oklahoma; Oregon; Utah; Vermont; and Wisconsin.

NAA/NMHC and others recently asked the U.S. Supreme Court to weigh in on whether states and localities can force a property owner to participate in the federal Section 8 program by making it illegal to deny a voucher holder based on their "source of income."

NAA/NMHC have long argued that when Congress created the Section 8 program, it explicitly made the program voluntary because it recognized that there are costs and burdens imposed on property owners who choose to participate in it. We believe that by altering the voluntary nature of the program, local "source of income" laws contradict Congressional intent and impose an unconstitutional burden on property owners.

While we will continue to argue that federal law should preempt these state and local laws, some state court rulings have rejected the federal preemption argument in the context of the Section 8 program. The U.S. Supreme Court declined to hear the case, however. Therefore, apartment owners should be mindful of the likelihood of an increasing number of complaints from prospective residents or fair housing groups alleging discrimination based on this protected class.

- **Violence Against Women Act (VAWA)**

The VAWA protects domestic violence victims by prohibiting apartment firms that receive federal housing subsidies from evicting a resident because of criminal activity committed by a member of the victim's household. When the VAWA was reauthorized in 2005, NAA/NMHC successfully opposed Congressional efforts to create a new protected class under the Fair Housing Act for victims of domestic violence. As a result of our efforts, the final legislation instead allows rental providers to evict an abuser and leave the domestic violence victim in place.

Although the domestic violence victims are not a protected class, per se, the Disparate Impact theory of law has implications for apartment firms. Under this theory, if company policy appears neutral on the surface but affects a disproportionate number of people in a protected class, the practice can be considered discriminatory. Since victims of domestic violence are most often women, discriminating against domestic violence victims could be construed as violating the sex discrimination provisions of the Fair Housing Act.

In a widely cited 2005 case (*Bouley v. Young-Sabourin*), a federal court upheld that legal

theory and ruled for the first time that the Fair Housing Act does prohibit housing discrimination against domestic violence victims. The Americans Civil Liberties Union is actively pursuing cases of housing discrimination involving domestic violence victims. Importantly, they are going beyond the federally subsidized rental providers covered by the VAWA. (See <http://tinyurl.com/5hrubz> for more information.)

In February, the organization announced what it calls the first-ever domestic violence-related discrimination settlement against a private property management firm. The company involved managed 50 properties in Michigan and Ohio. The terms of the settlement go beyond the VAWA by not only prohibiting the firm from evicting domestic violence victims, but also requiring them to offer early lease termination and relocation to victims who need to leave their homes to ensure their safety. (See <http://tinyurl.com/6cuapp> for the settlement announcement.)

In addition, several states have enacted or are pursuing laws that go beyond the federal VAWA protections and allow domestic violence victims to end their rental leases early. A 2008 document by the National Law Center detailing state housing laws protecting victims of domestic and sexual violence is posted at <http://tinyurl.com/59yksd>.

- ***Linguistic Profiling***

Fair housing groups are also targeting their resources to identify apartment firms that engage in what is called “linguistic profiling,” or the practice of discriminating against someone based on how they sound over the phone. One lawsuit filed in 2001 alleges an apartment firm did not return calls from prospective applicants who “sounded African-American.” Such suits are being fueled by academic research, including a study by a Stanford linguistics professor who says he called 100 apartment firms and had twice as many calls returned when he used his “white voice” versus when he used his “African-American voice.” Another study found 80 percent of people can correctly infer someone’s race just from hearing them count to 20. Fair housing advocates say courts are taking linguistic profiling cases more seriously because of such research, and Harvard law professor Alan Dershowitz called the research the “nuclear weapon of plaintiffs’ discrimination lawsuits.” To hear an NPR story on the topic, visit <http://tinyurl.com/2ty2fc>.

- ***Exclusionary Zoning Ordinances***

In some cases, the Fair Housing Act can be more than just a compliance obligation. It can also be a resource for developers seeking to build affordable housing. In recent years, developers have employed the Fair Housing Act to overcome opposition to new affordable housing. While the Fair Housing Act does not preempt local zoning laws, it does prohibit municipalities and other local government entities from making zoning or land-use decisions or implementing land-use policies that exclude or otherwise discriminate against protected persons.

In a growing number of lawsuits, non-profit fair housing groups have sued local governments under the Fair Housing Act, arguing that exclusionary zoning exacerbates the residential segregation patterns the Fair Housing Act was designed to combat. Some examples of state and local policies that have been challenged as violating the Fair Housing Act include one city’s attempt to condemn and rezone a 40-year-old, privately owned Section 8 apartment property that is largely populated by African-American residents and one locality’s efforts to withhold regulatory approvals and delay construction for certain properties because they were sold to minorities.

NAA/NMHC actually filed a “friend of the court” brief in one case where a city refused to issue a building permit for a proposed affordable housing community, even though the developer’s plan met all of the city’s zoning regulations. In this case, there was evidence that the city opposed the new apartment property because the property would house a

disproportionate number of minorities and families with children. (*City of Cuyahoga Falls v. Buckeye Community Hope Foundation* (No. 01-1269; 263 F.3d 627, August 31, 2001)). These cases are often difficult to win, however, because it can be challenging to prove the connection between discriminatory statements by local residents opposed to a project and the actions taken by local planning, zoning or elected officials.

One pending federal lawsuit filed in January 2007 is taking a slightly different approach. Instead of suing under the Fair Housing Act, plaintiffs have sued Westchester County, NY, under the False Claims Act of 1963. The case argues that the county accepted federal money, granted to them on the condition that they affirmatively advance fair housing, but then failed to make progress in reducing segregated housing or providing affordable housing. (*United States ex rel, Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, No. 06 Civ. 2860.) The outcome of this new approach, and whether multifamily developers might also be able to use it to overcome restrictive zoning ordinances, is unknown at this time; however, NAA/NMHC will continue to monitor these and related cases.

### **FEDERAL ENFORCEMENT ACTIVITY**

The Fair Housing Act is enforced by both HUD and the Department of Justice (DOJ). HUD handles the majority of the fair housing complaints filed each year. However, the Department of Justice may bring lawsuits in two instances: (1) where there is reason to believe that a person or entity is engaged in a "pattern or practice" of discrimination; i.e., the actions were the regular practice and not an isolated case; or (2) where a denial of rights to a group of persons raises an issue of general public interest. In most cases the DOJ alleges both.

The DOJ also brings cases when a housing discrimination complaint has been investigated by HUD and a charge of discrimination has been issued, and one of the parties to the case has "elected" to go to federal court. In these cases, DOJ can obtain injunctive relief, including affirmative requirements for training and policy changes, monetary damages and, in pattern or practice cases, civil penalties.

#### *HUD Enforcement*

HUD has the authority to initiate action against individuals or entities considered in violation of the Act and to investigate, conciliate and adjudicate fair housing complaints filed by individuals. It also funds fair housing organizations and state and local government agencies to provide education and/or enforcement services through its Fair Housing Initiatives Program (FHIP) and the Fair Housing Assistance Program (FHAP).

In the case of individual/fair housing group complaints, the Department investigates the complaint and attempts to resolve it. It is important to note that the Fair Housing Act, and substantially equivalent laws, require the agencies to attempt to resolve every case through conciliation, regardless of evidence against the respondent. If that fails and the Department feels there is enough evidence of discrimination, it will issue a charge and the case goes to an Administrative Law Judge. (Alternatively, either party can elect to have the case heard in federal court.) HUD

also initiates its own cases. In 2007, HUD initiated 16 such cases. Several of them were against large apartment companies in cases alleging racial discrimination and refusal to rent to families with children.

### *DOJ Enforcement*

Over the past 16 years, DOJ has filed 85 pattern and practice cases using evidence generated from its fair housing testing program, which conducts multiple paired tests at a property to see if applicants are treated differently based on their protected class status. In 2007, the DOJ dedicated additional resources to the program and conducted a record number of housing discrimination investigations under an initiative dubbed "Operation Home Sweet Home." In all, the DOJ filed 30 lawsuits alleging unlawful housing practices and obtained settlements and judgments requiring the payment of over \$5 million in monetary damages to victims of discrimination, as well as civil penalties.

### *Congressional Action*

In a recent Congressional hearing before the House Judiciary Committee, both HUD and DOJ came under intense scrutiny with lawmakers calling the current state of fair housing horrendous and getting worse. While much of this criticism was fueled by the subprime crisis and data suggesting that minorities were disproportionately affected by the lending mess, one non-profit civil rights organization blasted DOJ for placing greater emphasis on disability-based housing discrimination at the expense of other forms of discrimination. The group is seeking a more balanced approach to fair housing enforcement that could have implications for apartment firms.

Fair housing advocates are expected to continue to seek more resources to combat housing discrimination, and they will find a friendly audience in the Democratic-controlled Congress. NAA/NMHC will continue to monitor these initiatives and encourage reasonable solutions that include strong education components to encourage compliance.

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