

**Fair Housing Legal Toolkit for  
Permanent Supportive Housing Providers:  
Addressing Local Opposition to PSH Developments**



**Prepared by:**  
**The Community Development Clinic at the  
University of Texas School of Law**  
Heather K. Way, Director  
Allison Schmidt, UT Law Student  
Rachel Stone, UT Law Student

**May 2011**

## Table of Contents

I. INTRODUCTION .....	3
II. THE TOOLS.....	4
A. Be Informed: Understanding Fair Housing Laws.....	4
B. Take Action .....	7
III. FAIR HOUSING LAWS.....	12
A. Fair Housing Act: Overview .....	12
B. Protected Persons with Disabilities.....	12
C. Local Government Duties.....	13
D. Bar on Discriminatory Actions: Intent and Impact.....	14
E. Reasonable Accommodations .....	16
F. Affirmatively Furthering Fair Housing .....	19
APPENDIX A: CASE STUDY ON CLIFF MANOR.....	25
APPENDIX B: AFFIRMATIVELY FURTHERING FAIR HOUSING: RECENT LEGAL DEVELOPMENTS ....	28
A. Westchester County, New York .....	28
B. State of Texas.....	29

## I. INTRODUCTION

The Fair Housing Legal Toolkit was created for the Texas Supportive Housing Coalition to present ways in which fair housing laws can help coalition members confront opposition to the development of permanent supportive housing (“PSH”). Coalition members face persistent opposition from neighborhood residents who do not want PSH placed in their neighborhoods (also known as NIMBY opposition, or “Not in My Back Yard”). This opposition is typically based on discriminatory stereotypes and fears about the residents serviced by the housing. Local governments often respond to such political pressure by stopping the development from occurring through the: (1) denial of zoning variances, (2) denial of funding, or (3) imposition of onerous building conditions or special use permits.

Local neighborhoods also have the ability to block the development of permanent supportive housing that is reliant on funding through the Low Income Housing Tax Credit program. Given the way Texas law allocates points in the ranking of tax credit applications, the submission of a negative letter by a neighborhood association means the almost-certain denial of tax credit funding.

The Legal Toolkit highlights proactive legal measures that PSH providers can take to counteract local opposition to the development of housing. The Toolkit begins with an overview of fair housing laws and a list of legal and administrative tools available to PSH developers. The next section discusses in more depth how the federal Fair Housing Act impacts government decisions concerning PSH. The toolkit ends with two appendices that discuss: (1) a case study from Dallas highlighting how fair housing laws can be used to help overcome community opposition to a PSH project; and (2) two recent legal developments that have resulted in heightened enforcement of local governmental obligations to affirmatively further fair housing.

The Toolkit is meant to provide a legal overview of the Fair Housing Act and protections for supportive housing providers. It is meant to serve as a starting point to understand the legal rights and remedies available. **These materials are not to be used as a substitute for the advice of an attorney. Persons reviewing this guide should not act upon the information without seeking professional legal counsel.** The conclusions, findings, and opinions expressed in these materials do not necessarily reflect the views of the University of Texas at Austin.

## II. THE TOOLS

The Fair Housing Legal Toolkit covers how fair housing laws can be used to confront community and government opposition to the development of permanent supportive housing (PSH). Local opposition to PSH is often driven by discriminatory prejudices and fears about the residents to be served by the development. Fair housing laws provide important protections to help ensure that local governments do not deny PSH projects on the basis of these discriminatory prejudices.

### A. Be Informed: Understanding Fair Housing Laws<sup>1</sup>

#### Who is Protected?

The federal and Texas fair housing acts prohibit governmental entities from discriminating against tenants and prospective tenants based on disability, race, color, national origin, sex, religion, and familial status. A person with a disability is protected if he or she has a physical or mental impairment that substantially limits one or more major life activities or has a history of such impairment.<sup>2</sup>

#### Examples of Persons with Protected Disabilities:

- Homeless persons when the homelessness is related to a mental illness, recovery from addiction, or other covered disability.
- Recovering addicts participating in a supervised drug rehabilitation program.

#### But not:

- Someone currently using illegal substances.
- A person who presents a direct threat to others.

#### Local Government Duties

Local governments must comply with the Fair Housing Act when making decisions impacting the development of permanent supportive housing—this includes funding, zoning, and other land use decisions related to the development. Local governments have three key duties under fair housing laws pertaining to the funding, location, and operation of permanent supportive housing. These duties are discussed in more detail in Section III:

- ➔ Government decisions pertaining to the funding, location, and operation of housing must not have a **discriminatory intent or discriminatory impact** on persons with disabilities.

<sup>1</sup> See Section III for a more detailed discussion of fair housing laws.

<sup>2</sup> The Fair Housing Act's protections pertaining to persons with disabilities is the focus of this toolkit, given how so many permanent supportive housing providers serve persons with disabilities covered by the Act. Keep in mind that other protected classes (such as race) may be impacted as well by government decisions concerning PSH.

- Zoning and land use policies must have a **relationship to legitimate zoning** and cannot exclude or otherwise discriminate against individuals with disabilities.
- Governments **cannot make unfounded assumptions or speculations** about the problems posed by housing persons with disabilities. (e.g., cannot conclude there will be increased safety issues to address because the tenants will be persons with mental illnesses or persons who had previous drug addictions).
- Governments **cannot allow** neighbors' objections to influence the decision-making process when such **objections are based on discriminatory concerns** about tenants with disabilities.

#### Example of Discriminatory Intent

A PSH provider has found a site for the development of a new permanent supportive housing development for homeless persons with mental disabilities. The site is already zoned for multifamily housing, and the Alliance has approached the city for funding from the local housing trust fund. The project is approved by city staff and a citizen review committee and then goes to the city council for final approval. The local neighborhood association finds out about the project and issues flyers stating that the development will lead to an increase in crime and threaten property values. A public hearing is held, and statements at the hearing include: "What are you going to do when the residents rape and murder me?" "This is a dumping ground for the homeless"; "This is a real threat to our families' safety and property values." Council members vote against funding for the project, with members stating they share neighborhood concerns about the project impacting crime in the area and property values without evidence supporting these claims. Under these facts, a strong case could be made that the city has violated the state and federal fair housing acts.

- ➔ Local governments must grant requests for **reasonable accommodations** to modify land use laws and other policies when such policies lessen the ability of persons with disabilities to live in certain neighborhoods compared to persons without disabilities.
- A government entity does not have to grant the request if: (1) the request imposes an undue burden or expense on the local government; or (2) the proposed use creates a fundamental alteration in the zoning scheme or other program.

- Whether an accommodation is reasonable is decided on a case-by-case basis, looking at factors such as the scope and magnitude of the modification requested, and the features of the surrounding neighborhood.

#### **Court Ruling: Reasonable Accommodation**

In a case involving the City of Taylor, Michigan, the federal court found that the city had an obligation to grant an adult foster home operator's request for reasonable accommodation to operate a home for nine residents and waive the city's six-person occupancy limit. The home operator showed proof that service to nine residents was necessary to allow the home to generate an adequate rate of return for investors and that without the waiver the city's supply of homes for elderly disabled would remain in short supply. *Smith & Lee Associates v. City of Taylor*, 102 F.3d 781 (6<sup>th</sup> Cir. 1996).

#### **Court Ruling: No Reasonable Accommodation**

In a case involving the City of Lubbock, Texas, the federal court found that city was justified in denying a reasonable accommodation request from developer to build a 20-person group home for elderly persons with disabilities. The developer took no steps to prove that allowing for 20 residents was necessary to make the development feasible. *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175 (5<sup>th</sup> Cir. 1996).

### **➔ Local governments that receive CDBG, ESG, HOME, or HOPWA funding must affirmatively further fair housing.**

- The state, as well as all local governments receiving CDBG, ESG, HOME, or HOPWA funding, must submit a Consolidated Plan to U.S. Department of Housing and Urban Development (HUD) every five years as a condition of receiving the funding. As part of the Consolidated Plan, each state and local government must certify it is affirmatively furthering fair housing. This means the governmental entity must (1) conduct an Analysis of Fair Housing Impediments ("AI"); (2) take appropriate affirmative actions to overcome the effects of any impediments identified in the AI; and (3) maintain records reflecting the analysis and actions.
- As part of the Analysis of Fair Housing Impediments, a local government should conduct a detailed evaluation of how local practices and policies restrict the availability of housing for persons with disabilities. The

government has an obligation to identify and then take “appropriate” actions to address these restrictions.

- There are severe penalties for government entities that violate their obligation to affirmatively further fair housing, including HUD’s revocation of a local government’s HOME and CDBG funding. See Section III and Appendix B for a more complete discussion of how recent legal developments have highlighted opportunities for PSH developers to address community opposition through the AI process.

#### **Example of Affirmatively Furthering Fair Housing**

A city has single member districts, and when funding or zoning decisions come to the City Council, each councilmember has the right to veto a zoning change or funding for any multifamily housing development in the councilmember’s district. This policy has resulted in the denial of 90% of supportive housing development projects that have come to the City Council. Under this set of facts, the city should identify this policy as an impediment to fair housing through the AI process and develop ways to offset the impact of this policy.

## **B. Take Action: Enforcing Fair Housing Rights**

There are several actions that permanent supportive housing providers can take to enforce their rights under fair housing laws and protect against illegal government actions that impede the development of PSH.

- **Educate.** Zoning commissioners and other public officials do not always understand how fair housing laws govern their decisions relating to permanent supportive housing. Educating public officials about fair housing laws can increase the likelihood that the officials will be more responsive to fair housing issues raised in zoning cases and other policy decisions impacting permanent supportive housing.

Public officials need to be aware of the significant risks and potential costs for local governments that violate fair housing laws, including:

- Denial of future federal funding and reimbursement of prior funding;
- False Claims Act lawsuits leading to potential civil penalties and treble damages;
- Investigation and involvement by federal agencies;

- Private lawsuits leading to potential monetary damages, punitive damages, and assessment of attorneys fees; and
- Court-ordered remedial action.

When there are fair housing issues implicated by the local opposition to a particular PSH development, a PSH should consider raising these issues in writing with the local government entity prior to the government entity reaching any final decision concerning the development. The government leaders may not have yet considered the fair housing legal issues, and may end up responding appropriately as a result of the PSH raising the issue. Raising the fair housing issues implicated by a government decision can also provide political cover for local officials who may otherwise find it difficult to counteract opposition from constituents.

#### **Example in the News: Oak Cliff Manor**

When neighbors opposed a PSH development in Dallas on the basis that the residents would “be a threat to public safety, children at nearby schools, property values, and commercial redevelopment of the area,”<sup>3</sup> an attorney sent a letter to the local officials raising concerns about the opposition being based on the future tenants’ mental disabilities in violation of fair housing law. The letter raised awareness that public intervention to prohibit the development would likely give rise to a Fair Housing lawsuit and, as a result, provided public officials with the political cover they needed to approve the development.

➔ **Document.** When facing neighborhood opposition, a PSH developer should document all discussions that take place in the decision making process concerning the development. PSH developers should pay especially close attention to documenting any reasons offered for opposing the development. Recording public meetings is a good idea. If the reasons for opposing the development are discriminatory, the recording helps lay the groundwork for a fair housing complaint or lawsuit. When a community raises objections with the city based on unsubstantiated claims of negative impacts from the development (for example, too much traffic or reduction in property values), a PSH developer should also consider presenting written proof to rebut each of the claims. This will help call out opposition that is, in fact, really based on discriminatory fears

---

<sup>3</sup> Kim Horner, *Neighbors uniting to fight housing plan*, The Dallas Morning News, Jul. 14, 2010, at B01; Kim Horner and Roy Appleton, *Supportive housing on shaky ground*, The Dallas Morning News, Jun. 13, 2010, at A01.



about the future residents.

→ **Request Accommodations.** When a government policy is impeding the development of PSH housing in a way that is not impacting other developments (i.e., those not serving persons with disabilities), then a PSH provider can make a written request for a reasonable accommodation and ask for waiver of the governmental policy. For zoning-related items, the request should be made utilizing existing procedures for waivers, such as the zoning variance process. When no such procedures exist, a written letter is appropriate. In making the request, the PSH should try and highlight how the request does not impose an undue burden or expense on the local government, and how the proposed use does not create a fundamental alteration in the zoning scheme. If the request is denied, then there may be grounds for the PSH provider to file an administrative complaint or lawsuit.

#### **Example of Reasonable Accommodation**

A PSH provider has found an old hotel to convert into a 75-room single room occupancy development for persons with disabilities. The zoning laws prohibit development of multifamily housing, although the site is still used as a hotel, and the surrounding uses include other hotels and commercial spaces. The PSH provider should ask the city for a reasonable accommodation by following the city's process for zoning changes. In the process, the PSH provider should pinpoint how the zoning does not create a fundamental alteration in the zoning scheme given the fact that hotels are already allowed in the area.

→ **File an Administrative Complaint or Lawsuit.** When a government entity violates the Fair Housing Act, a PSH provider has several avenues for bringing a formal complaint:

- **Administrative Enforcement:** A PSH can file a Form 903 administrative complaint with HUD. The complaint must be filed within one year of the discriminatory conduct. HUD will first attempt to reach a conciliation agreement between the parties. If an agreement cannot be reached, the agency will investigate the case and make a finding on whether there is "reasonable cause" for the complaint. When a finding of cause is made, HUD will issue a charge of discrimination and refer the case to an administrative law judge unless either party requests the case be heard in federal court, in which case the Department of Justice will prosecute the

case on behalf of the complainant. The remedies include orders for the government to stop its illegal activity and civil penalties of up to \$50,000. Discrimination charges by HUD are infrequent.

Administrative complaints should be completed by utilizing HUD's online form<sup>4</sup> or by sending a letter to HUD at: Fort Worth Regional Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 801 Cherry Street, Unit #45, Suite 2500, Fort Worth, Texas 76102. A PSH can also file a complaint with the Texas Workforce Commission, Civil Rights Division, 1117 Trinity, Rm. 144-T, Austin, Texas 78701.

When a complaint is not against a state or city and the discriminatory conduct happened in a jurisdiction with a local "substantially equivalent agency," the complaint should also be mailed to the equivalent agency to oversee the conciliation process and lead the investigation. The list of equivalent agencies is on HUD's website.<sup>5</sup> HUD will not be involved in the process if there is a substantially equivalent agency serving the area.

Fair housing advocates report that the administrative enforcement procedures are seldom utilized in cases involving siting of housing, due in part to the political nature of these cases, as well as the federal and local agencies' unwillingness or lack of resources to conduct a robust investigation. In 2010, HUD made less than 35 discrimination charges nationwide. However, there are some benefits in at least following the administrative process through the conciliation stage and then withdrawing the complaint before a cause finding is issued.

- **Private Litigation:** With representation by an attorney, the PSH can pursue filing a lawsuit in state or federal court, although a lawsuit requires a large commitment of time and resources. The lawsuit must be filed within two years of the discriminatory conduct. A court can order the government to stop the illegal activity, take specific affirmative measures, and require the government to pay damages, including punitive damages, as well as attorney's fees. A lawsuit can also be brought under the False Claims Act for a government entity's failure to affirmatively further fair housing, leading to civil penalties and potential treble damages.<sup>6</sup>

---

<sup>4</sup> <http://www.hud.gov/offices/fheo/online-complaint.cfm>.

<sup>5</sup> [http://portal.hud.gov:80/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/partners/FHAP/agencies](http://portal.hud.gov:80/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP/agencies).

<sup>6</sup> See Appendix B and Section III.F.

- **Federal Enforcement:** The federal government can also bring its own lawsuit for actions that give rise to a "pattern or practice" of illegal activity or from conduct that "raises an issue of general public importance"<sup>7</sup>—although these cases are not as common as private actions. In actions filed by the federal government, the court may impose penalties of up to \$100,000.

→ **Participate in the AI Process.** PSH providers need to participate in their local government's process for developing and implementing an Analysis of Impediments to Fair Housing (AI), as well as the State's AI process. One key step is to participate in the formal hearings required prior to the adoption of the AI, which must be completed at least once every five years. Local PSH providers should present public testimony identifying any impediments—such as community opposition—to the development of permanent supportive housing.

In addition to the formal hearings, PSH providers should set up private meetings with local housing officials to review the role that community opposition plays in barring the development of PSH housing, along with any other barriers, and then identify specific action items for the local government entity to take to address the barriers. These items should be presented in writing and made part of the official record in the AI process. If the AI has already been completed and fails to address these issues, the PSH providers can request an amendment to the AI.

If a government entity fails to adequately identify and address the fair housing barriers, PSH providers should first raise this issue in writing with the local jurisdiction's elected officials (e.g., city council members). If the jurisdiction still fails to take appropriate actions, the PSH provider can file a complaint with the HUD Field Office. The complaint can be in the form of a letter highlighting the fair housing barriers and how the local governmental entity has failed to take affirmative actions to overcome the barriers.

---

<sup>7</sup> 42 U.S.C. § 3614.

### III. FAIR HOUSING LAWS

Local governmental entities are subject to federal and state fair housing laws when making decisions concerning permanent supportive housing. Government decisions such as whether to grant funding or a zoning change to a PSH development must be made in compliance with these laws.

#### A. Fair Housing Act: Overview

The federal Fair Housing Act has two primary goals: to end housing discrimination and to end housing segregation. In terms of combating discrimination, the Act makes it illegal to discriminate against persons in the sale or rental of a dwelling unit because of the person's disability, race, color, or national origin (as well as sex, religion, and familial status).<sup>8</sup> The Texas Fair Housing Act has a similar scope and offers no additional protections.<sup>9</sup>

Government decisions blocking the development of permanent supportive housing most often trigger the legal protections for persons with disabilities, given that many of the residents typically served by PSH providers have disabilities protected by the Act. While the fair housing protections for persons with disabilities are highlighted in this toolkit, a government's actions against a PHS development may also trigger the protections against discrimination based on race, familial status, or other protected categories.

#### B. Protected Persons with Disabilities

In 1998, Congress extended the coverage of the federal Fair Housing Act to include persons with disabilities (which the Act refers to as "handicaps"). As the House Judiciary Committee stated in adopting the amendments, the amendments were:

. . . a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations

---

<sup>8</sup> 42 USC §§ 3604(a), (b), (f)(1)-(2). Court decisions have construed the Fair Housing Act to "reach 'every practice which has the effect of making housing more difficult to obtain on prohibited grounds.'" *United States v. Yonkers Board of Education*, 624 F.Supp. 1276, 1291, n. 9. (S.D.N.Y. 1985).

<sup>9</sup> Tex. Prop. Code, Title 15, § 301, et. al.

about threats to safety are specifically rejected as grounds to justify exclusion.<sup>10</sup>

Persons with disabilities are protected by the Fair Housing Act to the extent they have a “handicap,” which is defined as a “physical or mental impairment which substantially limits one or more of such person's major life activities,” or a record of such impairment. Persons who present a direct threat to others are not covered, but the government cannot make general assumptions or speculations about people and the nature of a disability in making this determination.<sup>11</sup> Having “a record of an impairment” means having a history of a physical or mental impairment or being misclassified as having such impairment.

“Physical and mental” impairments include alcoholism, emotional illnesses, Human Immunodeficiency Virus, epilepsy, diabetes, and orthopedic impairments. Drug addiction is a covered disability, as long as the addiction is not caused by a current, illegal use of a controlled substance. Thus, participation in a “supervised drug rehabilitation program, coupled with non-use, meets the definition of handicapped.”<sup>12</sup> Homeless persons are protected when their homelessness is related to a mental illness, recovery from addiction, or other covered handicap.<sup>13</sup> Many PSH developments are serving a significant number of persons protected by the Fair Housing Act and, therefore, any government decisions impacting the PSH development would be subject to the Act.<sup>14</sup>

### C. Local Government Duties

The federal Fair Housing Act and related laws impose essentially three key duties on local government entities:

- ➔ Local government decisions pertaining to the funding, location, and operation of housing must not have a **discriminatory intent or discriminatory impact** on persons with disabilities.

---

<sup>10</sup> House Committee on the Judiciary, Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong. 2d Sess., at 18, 24.

<sup>11</sup> Joint Statement of the Department of Justice and the Department of Housing and Urban Development, “Group Homes, Local Land Use, and the Fair Housing Act” (updated July 25, 2008), available at [http://www.justice.gov/crt/housing/final8\\_1.php](http://www.justice.gov/crt/housing/final8_1.php).

<sup>12</sup> *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802 (9<sup>th</sup> Cir. 1994).

<sup>13</sup> 42 U.S.C. § 3602.

<sup>14</sup> See, e.g., *Turning Point, Inc. City of Caldwell*, 74 F.3d 941, 942 (9<sup>th</sup> Cir. 1996) (city acted illegally in its conditions for a special use permit for homeless shelter in which 75% of the shelter’s clients had a protected mental illness).

- ➔ Local governments must grant requests for **reasonable accommodation** to modify land use laws and other policies when such policies lessen the ability of ability of persons with disabilities to live in certain neighborhoods compared to person without disabilities.
- ➔ Local governments that receive CDBG, ESG, HOME, or HOPWA funding must **affirmatively further fair housing**.

Each of these duties is covered in the following sections.

#### **D. Bar on Discriminatory Actions: Intent and Impact**

The federal Fair Housing Act governs all actions that “otherwise make unavailable or deny” a dwelling to a member of a protected class.<sup>15</sup> A government action or policy can violate this provision of the Fair Housing Act in two ways: by having a discriminatory intent or effect.

“Discriminatory intent” means that the government action was based in part on a discriminatory motive. Discriminatory intent can also be established when an action treats a protected class of persons differently from other persons,<sup>16</sup> in which case it is unnecessary to prove the actual motive behind a government decision.<sup>17</sup>

An example of a policy with discriminatory intent is a city zoning requirement that group homes for mentally-impaired adults have 24-hour supervision and a community advisory panel to deal with complaints, when such requirements are not applied to other communal living arrangements.<sup>18</sup> In this vein, courts have also routinely struck down city requirements that developers of group homes for persons with disabilities first notify the neighbors.<sup>19</sup> A discriminatory intent action can also be based on a violation of the 14<sup>th</sup> Amendment of the U.S. Constitution, which is brought through a civil rights lawsuit called a Section 1983 action.

---

<sup>15</sup> 42 U.S.C. §§ 3604(a), (f)(1).

<sup>16</sup> *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995).

<sup>17</sup> Robert H. Voelker, “A Developer’s Approach to Organized Opposition,” Housing Bond Report (June 2006), available at <http://www.prrac.org/pdf/Voelker.pdf>.

<sup>18</sup> *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995).

<sup>19</sup> Michael Mirra, “Group Homes and Zoning Under the Fair Housing Act,” available at <http://www.hudhre.info/documents/GroupHomesandZoning.pdf> (citing *Stewart B. McKinney v. Town Plan and Zoning Com’n*, 790 F.Supp. 1197 (D.Conn. 1992) & *Potomac Group Home Corp. v. Montgomery County, Maryland*, 823 F.Supp. 1285 (D. Md. 1993)).

“Discriminatory effect” may be proven by showing that a policy has an adverse impact on persons with disabilities or another protected class, or by showing that a policy harms a community by perpetuating segregation. Courts will weigh the discriminatory impact of the government action against the city’s justification for the action: whether the policy serves a legitimate government interest and whether there is an alternative that would serve that interest with less discriminatory effect.<sup>20</sup>

In general, the Fair Housing Act does not pre-empt local zoning laws and policies if the policies have a relationship to legitimate zoning needs and are applied in a nondiscriminatory manner. Thus, as a general rule, the Act does not require a city to waive nondiscriminatory laws limiting the size, use, and orientation of buildings. However, the Act does prohibit local government entities from making land use decisions that exclude or otherwise discriminate against persons with disabilities or other protected classes.

For example, while the Fair Housing Act would not typically limit a government entity’s exclusion of a 50-unit PSH in a neighborhood zoned for single-family housing, a municipality’s decision to bar all multi-family housing or limit multi-family zoning to areas of minority concentration can give rise to a fair housing violation given the impact such a policy has on protected classes or on the perpetuation of segregation.<sup>21</sup> Restrictions against smaller group homes serving persons with disabilities in single-family neighborhoods have also been routinely struck down. There are many other cases in which courts have found a government’s local zoning laws to violate the Fair Housing Act.

When confronting neighborhood opposition to the placement of housing, PSH providers should be aware that the Fair Housing Act clearly bars government actions based on “unfounded fears of difficulties about the problems” posed by housing persons with disabilities.<sup>22</sup> Even though neighbors have the First Amendment right to speak out against a development, a public decision maker “has a duty not to allow illegal prejudices of the majority to influence the decision making process.”<sup>23</sup> If city council members or other public decision makers respond to the neighbors’ objections AND the neighbors are motivated in substantial part by discriminatory concerns about

---

<sup>20</sup> *Dews v. Town of Sunnyvale*, 109 F.Supp.2d 526, 531 (N.D. Tex. 2000).

<sup>21</sup> See, e.g., *Dews v. Town of Sunnyvale*, 109 F.Supp.2d 526, 531 (N.D. Tex. 2000) (court found that municipality’s ban on multifamily housing had an illegal discriminatory impact on African-Americans).

<sup>22</sup> House Committee on the Judiciary, Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong. 2d Sess., at 18, 24.

<sup>23</sup> *Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 104 (D.P.R. 1990).

protected persons with disabilities, the governmental entity is likely violating the Fair Housing Act. Just as a local government cannot reject a PSH development based on neighborhood fears that the housing would be occupied by racial minorities, the local government likewise cannot reject a development based on neighborhood fears about persons with disabilities protected by the Act.

### Examples Where Courts Found Illegal Discriminatory Intent or Effect

- Denying a special use permit for housing for persons with disabilities, when denial was in response to political pressure from community members who did not want the persons with disabilities living among them "because they make non-handicapped people uncomfortable."<sup>24</sup>
- Selective enforcement of zoning regulations resulting in stricter application of the regulations to housing developments serving persons with disabilities.<sup>25</sup>
- Refusal to issue zoning change for affordable housing in a racially segregated city when neighboring property had the same zoning and the refusal was based on unsubstantiated claims that the development would result in overcrowding of the neighborhood, local schools, and recreational facilities and the overburdening of local fire fighting capabilities.<sup>26</sup>
- Granting city council members individual approval rights over affordable housing developments in their districts, when the developments served primarily African-Americans and the council members in predominantly Anglo districts routinely vetoed developments because of neighborhood opposition by Anglos.<sup>27</sup>

## E. Reasonable Accommodations

The Fair Housing Act and related federal laws also require governmental entities to grant reasonable accommodations in rules, policies, practices, and services to persons with disabilities, when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use or enjoy a dwelling.<sup>28</sup> These rules were enacted specifically to target land use regulations, which, while seemingly neutral, often have "a discriminatory effect on the housing choices available for the disabled."<sup>29</sup> Under this

<sup>24</sup> *Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 104 (D.P.R. 1990).

<sup>25</sup> *Id.*

<sup>26</sup> *Dailey v. Lawton*, 425 F.2d 1037 (10th Cir. Okla. 1970).

<sup>27</sup> *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907, 911-912 (N.D. Ill. 1969).

<sup>28</sup> 42 U.S.C. § 3604(f)(3).

<sup>29</sup> *Groome v. Jefferson Parish*, 234 F.3d 192, 201-202 (5<sup>th</sup> Cir. 2000).



requirement, local governments have a duty to respond to reasonable requests to modify land use laws and other policies when they would result in excluding persons with disabilities entirely from residential neighborhoods or would give them less opportunity to live in certain zoned areas compared to persons without disabilities.<sup>30</sup>

An accommodation request is “reasonable” and must be granted unless: (1) the request imposes an undue financial or administrative burden on the local government, or (2) the proposed use creates a fundamental alteration in the zoning scheme or other program.<sup>31</sup>

#### **Examples Where Courts Found Reasonable Accommodation Required**

- The City of Jackson, Mississippi, was required to grant a special use permit for an emergency children’s shelter in a suburban subdivision. The shelter’s use was compatible with the single family residential character of the neighborhood and the city already allowed more intensive uses by allowing the operation of child care facilities in neighborhoods. The city’s reasons for denying the permit were based on unsubstantiated and improper grounds that the shelter would lower property values, increase crime, and alter the nature of the community.<sup>32</sup>
- The City of Caldwell, Idaho, was required to grant a special use permit conditions for a 16-bed homeless shelter in a single-family zoning district. The city’s denial of the special use permit were improper; the city was requiring the shelter to provide additional parking spaces and resident staff requirements, which had no relationship to legitimate zoning needs.<sup>33</sup>
- The Borough of Tioga, Pennsylvania, was required to allow for the conversion of a motel into a single room occupancy development for persons with disabilities, when the development was consistent with the character of the surrounding neighborhood and would not fundamentally alter the area’s zoning scheme.<sup>34</sup>

If a PSH development needs an accommodation to a land use law or other government policy or decision impacting the PSH development, the PSH needs to make a request to the local governmental entity utilizing whatever existing procedures are available, such

<sup>30</sup> *Bryant Woods Inn, Inc. v. Howard County, Md.*, 911 F. Supp. 918, 946 (D. Md. 1996). John Foote, “The Fair Housing Act and Group Homes,” available at [www.halfwayhouses.com/article/the-fair-housing-act-and-group-homes.html](http://www.halfwayhouses.com/article/the-fair-housing-act-and-group-homes.html) (reprinted from the Journal of the Section on Local Government Law of the Virginia State Bar, Vol. III, No. 1, September 1997) (reasonable requests should be granted when they “stand in the way” of the location and operation of housing for persons with disabilities).

<sup>31</sup> *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7<sup>th</sup> Cir. 2002).

<sup>32</sup> *U.S. v. City of Jackson*, 318 F. Supp.2d 395 (2002).

<sup>33</sup> *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9<sup>th</sup> Cir. 1996).

<sup>34</sup> *Judy B. v. Borough of Tioga*, 889 F. Supp. 792, 799-800 (M.D. Pa. 1995).

as the process for requesting variances. In the event no such procedures exist, the PSH should send a letter to the city requesting the accommodation.

Whether a request for accommodation related to zoning regulations is reasonable is determined on a case-by-case basis, looking at factors such as the scope and magnitude of the modification requested and the features of the surrounding neighborhood. For example, a request to place a 50-unit nursing home in a single-family neighborhood would not ordinarily be considered a reasonable accommodation, “for obvious reasons having nothing to do with the disabilities of its residents,” since the development would “likely create a fundamental change in the single-family character of the neighborhood.”<sup>35</sup> In contrast, the same development in a neighborhood zoned for multi-family housing might not create a fundamental change, and therefore the government likely would be required to allow for the development.<sup>36</sup>

#### **Examples Where Courts Found**

##### **Accommodation Request was Unreasonable**

- The Village of Chebanse, Illinois, acted legally in denying developer’s request for reasonable accommodation to allow for construction of a 2-story, 4-unit apartment in a residential district with a bottom floor unit to serve persons with mobility impairments.<sup>37</sup> Developer failed to show that the accommodation was necessary to allow persons with disabilities the ability to live in the community since they could live as easily in single family homes.
- The City of Fort Atkinson, Wisconsin, was not required to approve a conditional use application for a nursing home since the proposed cul-de-sac for the development was inconsistent with the city’s master zoning plan.<sup>38</sup>

One barrier PSH providers often face is the imposition of city rules requiring special use permits for the provision of on-site services. As a general rule, the City is required to grant an accommodation allowing for the on-services unless the services are also provided to non-residents on the premises or are otherwise not related to supporting the housing of the tenants with disabilities.<sup>39</sup>

<sup>35</sup> Joint Statement of the Department of Justice and the Department of Housing and Urban Development, “Group Homes, Local Land Use, and the Fair Housing Act,” available at [http://www.justice.gov/crt/about/hce/final8\\_1.php](http://www.justice.gov/crt/about/hce/final8_1.php).

<sup>36</sup> *Id.*

<sup>37</sup> *Brandt v Village of Chebanse*, 82 F.3d 172 (7<sup>th</sup> Cir. 1996).

<sup>38</sup> *Erdman v. City of Fort Atkinson*, 84 F.3d 960 (7<sup>th</sup> Cir. 1996).

<sup>39</sup> *Gamble v. City of Escondido*, 104 F.3d 300 (9<sup>th</sup> Cir. 1997) (proposed development included on-site adult day health care facility that was not required to support the housing of residents and therefore was not covered by the Fair Housing Act).

The requirement to grant reasonable accommodations also applies to government policies and rules governing funding for affordable housing. Take the example of a local government affordable housing program that requires a developer to obtain approval from the local neighborhood association as a condition of receiving funding. If the approval policy results in the denial of funding for housing that serves persons with disabilities and does not similarly impact other types of affordable housing, a PSH developer should consider requesting a reasonable accommodation for the waiver of the approval policy.

## F. Affirmatively Furthering Fair Housing

In addition to barring discrimination, the Fair Housing Act also imposes an affirmative duty on the U.S. Department of Housing and Urban Development (HUD) to further the fair housing choices of persons with disabilities and other protected classes.<sup>40</sup> If a state or local government entity receives qualified funding from HUD, the local entity has the same duty.<sup>41</sup> Qualified funding is funding from the following programs: Community Development Block Grant (CDBG), Emergency Shelter Grant (ESG), HOME Investment Partnerships (HOME), and Housing Opportunities for Persons with AIDS (HOPWA).

### → Certification

Each local government entity receiving funding from these programs must certify to HUD that the entity will work diligently to affirmatively further fair housing.<sup>42</sup> This certification is made as part of the government entity's five-year Consolidated Plan submitted to HUD. The duty to affirmatively further housing is not restricted to HUD-funded programs, but instead "extends to all housing and housing-related activities in the grantee's jurisdictional area whether publicly or privately funded."<sup>43</sup>

In order to affirmatively further fair housing, each local government entity is required to:

- conduct an analysis to identify impediments to fair housing choice within the entity's jurisdiction (also referred to as the Analysis of Impediments, or AI);

---

<sup>40</sup> 42 USC §3608(e)(5).

<sup>41</sup> The State must assure HUD "that units of local government funded by the State comply with their certifications to affirmatively further fair housing." 24 C.F.R. § 570.487(b)(4) (2010).

<sup>42</sup> 42 U.S.C. §5304(b); *Langlois v. Abington Housing Authority*, 234 F.Supp.2d 33, 73, 75 (D.Mass. 2002); HUD, "Promoting Fair Housing," [http://portal.hud.gov:80/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/promotingfh](http://portal.hud.gov:80/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/promotingfh).

<sup>43</sup> HUD Guide, at Ch. 1-3.

- take appropriate actions to overcome the effects of any impediments identified in the analysis; and
- maintain records reflecting the analysis and actions taken to address the impediments.<sup>44</sup>

The requirements also apply to the State of Texas as a recipient of qualified federal funds.

**Analysis of Impediments to Fair Housing.** In developing an Analysis of Impediments to Fair Housing, or AI, the local governmental entity is supposed to conduct a “comprehensive review of its laws, regulations and administrative policies, procedures, and practices” to determine how they affect the “location, availability, and accessibility of housing, and how local conditions, both private and public, affect fair housing choice.”<sup>45</sup> Impediments to fair housing choice include private and public actions and omissions that have the effect of restricting housing choices for persons with disabilities (or other protected classes). Impediments basically include anything that is counterproductive to fair housing choice, such as community resistance to permanent supportive housing.<sup>46</sup> The government entity should evaluate the impediments for their impact on each the covered protected classes, including persons with disabilities.<sup>47</sup>

HUD suggests that local jurisdictions include in their AIs a review of local planning/zoning and land use controls “for evidence of restrictions that impede fair housing choice.”<sup>48</sup> Local government entities should also examine whether housing in the jurisdiction is restricted and segregated by disability status (along with other protected classes) and, if so, then why that is the case.<sup>49</sup>

The AI should be completed at least every five years as part of the local jurisdiction’s Consolidated Plan. The AI must be updated more frequently if the Analysis fails to reflect current impediments or actions needed to overcome impediments arising out of new conditions, such as those caused by natural

---

<sup>44</sup> 24 C.F.R. § 570.601(a)(2); 24 CFR § 91.225(a).

<sup>45</sup> U.S. Dept. of Housing and Urban Development, Sept. 2, 2004 Memorandum on “Analysis of Impediments to Fair Housing Choice Reissuance,” available at <http://www.hud.gov/offices/fheo/library/finaljointletter.pdf>.

<sup>46</sup> U.S. Dept. of Housing and Urban Development, Fair Housing Planning Guide, Volume 1, Ch. 2-8, 2-16, 2-17 (March 1996), available at <http://www.hud.gov/offices/fheo/images/fhpg.pdf> [hereinafter “HUD Guide”].

<sup>47</sup> HUD Guide, at Ch. 2-7.

<sup>48</sup> HUD Guide, at Ch. 3-10.

<sup>49</sup> Id. at Ch. 2-28.

disasters. Jurisdictions must maintain a copy of the final AI, which is available for public inspection.<sup>50</sup>

Governmental entities must allow for citizen participation and input in the development of the AI, including at least one public hearing and a 30-day period to receive comments.<sup>51</sup> The jurisdiction must take these comments—whether presented orally at a hearing or in writing—into consideration when writing the final Consolidated Plan.<sup>52</sup>

**Taking Action.** After identifying impediments to fair housing, government entities must then take the appropriate actions to overcome the impediments. HUD strongly recommends that government entities develop a plan of action setting out in writing what actions the entity plans to take to overcome the different impediments to fair housing, identifying the resources available, establishing the priorities, and establishing a methodology for an on-going review of progress.<sup>53</sup>

The entity should “consider all actions it might take to overcome impediments that might have been caused by actions, omissions, decisions, or lack thereof by the public and the private sector.”<sup>54</sup> Government entities should undertake actions to overcome identified impediments, regardless of whether the entity caused the impediment.

**Keeping Records.** Each government entity receiving qualified funding must demonstrate that it has met its obligations to affirmatively further fair housing.<sup>55</sup> The entity must retain a copy of its AI, in addition to records that show the actions actually taken to further fair housing and to overcome the impediments identified in the AI. HUD also recommends government entities retain a copy of its fair housing action plan, if developed; a summary or transcript of public meetings and citizen comments related to the AI process, a summary report of all activities related to the AI, and studies evaluating the effectiveness of actions taken.

---

<sup>50</sup> 24 C.F.R. § 91.225(a)(1).

<sup>51</sup> 24 C.F.R. § 91.105(a)(1).

<sup>52</sup> 24 C.F.R. § 91.105(b).

<sup>53</sup> HUD, “Affirmatively Furthering Fair Housing,”

<http://www.hud.gov/offices/cpd/about/conplan/fairhousingexs/fha200510.pdf>.

<sup>54</sup> HUD, “Affirmatively Furthering Fair Housing,”

<http://www.hud.gov/offices/cpd/about/conplan/fairhousingexs/fha200510.pdf>.

<sup>55</sup> HUD, “Affirmatively Furthering Fair Housing,”

<http://www.hud.gov/offices/cpd/about/conplan/fairhousingexs/fha200510.pdf>.

**Summary of Cities' Affirmative Fair Housing Duties  
(pertaining to housing for persons with disabilities)**

- Analyze both private and public impediments to fair housing and how they restrict fair housing choice.
- Take proactive steps to address the private and public impediments that restrict housing choices for persons with disabilities and other protected classes.
- Promote housing that is accessible for persons with disabilities.
- Provide opportunities for persons with disabilities and persons of color to live in desegregated communities.
- Maintain records to document actions carried out to further fair housing.

### ➔ Addressing Community Opposition as a Barrier to Fair Housing

The HUD Fair Housing Planning Guide identifies community opposition to housing for persons with disabilities as a potential impediment to fair housing choice. Where such opposition exists, jurisdictions must identify community opposition as a barrier, and then take affirmative actions to overcome the impediment and keep records of actions taken. Possible actions for local governments to consider adopting include, but are by no means limited to the following:

- educating residents about the benefits of supportive housing and rebutting common myths and stereotypes;
- providing technical assistance to supportive housing and other affordable housing providers facing community opposition;
- adopting a mediation program;<sup>56</sup>
- educating public officials about their responsibilities under the Act; and
- eliminating formal and informal “super majority” voting requirements that allow for just one or two elected representatives to have veto powers over a project.

### ➔ HUD Oversight

HUD must approve each Consolidated Plan but does not typically require jurisdictions to submit their AIs as part of the approval process. However, jurisdictions must submit a summary of their AIs with their Consolidated Plans, and HUD may request a full AI as part of a complaint or routine monitoring.<sup>57</sup> (The AIs are public documents; anyone can access a jurisdiction's AI via a Texas Public

---

<sup>56</sup> See, for example, Portland, Oregon's, former “Community Residential Siting Program,” which provides information, facilitates problem solving, and provides mediation services when the siting of a residential facility for persons with disabilities raises community opposition. Information available at <http://www.portlandonline.com/oni/index.cfm?c=32417>.

<sup>57</sup> HUD, at Ch. 2-25.

Information Act request.). In a government entity's Consolidated Annual Performance and Evaluation Report ("CAPER"), the entity is also supposed to describe for HUD all actions they took within the past year to overcome the impediments.

HUD can disapprove a Consolidated Plan if HUD finds a jurisdiction has submitted an inaccurate certification to affirmatively further fair housing. "Inaccurate" includes instances where:

- there is no AI,
- the AI is substantially incomplete,
- the actions taken to address the impediments were "plainly inappropriate," and
- the jurisdiction has not kept appropriate records.<sup>58</sup>

A jurisdiction cannot receive its federal HOME, CDBG, HOPWA, and ESG funds until HUD approves the Consolidated Plan.

If PSH providers find that the AI is inadequate or that the jurisdiction is not taking the appropriate actions to address the impediments, it is important to submit these concerns in writing to the jurisdiction and send a copy to the HUD Field Office.<sup>59</sup>

## → Recent Developments

Recent legal developments, discussed more fully in Appendix B, have dramatically raised the importance of AIs and resulted in heightened enforcement of governmental entities' obligations to affirmatively furthering fair housing. For example, in Texas, two advocacy groups filed an administrative complaint with HUD, challenging the State's failure to affirmatively further fair housing in the administration of CDBG funds for hurricane disaster recovery work. HUD responded favorably to the complaint and ended up holding back \$1.7 billion in federal funds, which led to a conciliation agreement and a series of new heightened efforts by the State to fulfill its affirmatively furthering fair housing duties.

In another case, fair housing advocates filed a lawsuit against Westchester County, New York, for falsely certifying to the federal government that it had affirmatively furthered fair housing. Threatened with having to pay back hundreds of millions in federal funding, the county ultimately agreed to contribute more than \$57 million

---

<sup>58</sup> U.S. Dept. of Housing and Urban Development, Sept. 2, 2004 Memorandum on "Analysis of Impediments to Fair Housing Choice Reissuance," available at <http://www.hud.gov/offices/ftheo/library/finaljointletter.pdf>.

<sup>59</sup> Ed Gramlich, "Analysis of Impediments to Fair Housing Choice," available at [http://www.nlihc.org/detail/article.cfm?article\\_id=6099](http://www.nlihc.org/detail/article.cfm?article_id=6099).

in remedies, including the earmarking of \$36 million in funds to over 7 years for affordable housing in predominantly Anglo neighborhoods and \$2.5 million in attorney's fees.

In light of these developments, permanent supportive housing providers should seriously consider becoming more engaged in the AI process. PSH providers have an important role to play in ensuring that local governmental entities seriously examine impediments to the development of permanent supportive housing and then spell out proactive actions to address these impediments. After an AI is completed, PSH providers should then engage in monitoring to ensure that the entities actually follow through with the promised actions.



## **APPENDIX A: CASE STUDY ON CLIFF MANOR**

### **A. City of Dallas Goal to End Chronic Homelessness**

On January 28, 2009, the Dallas City Council adopted Resolution 09-0344 with a goal of ending chronic homelessness in Dallas by 2014 through the creation of 700 units of permanent supportive housing (PSH). Neighborhood opposition has made that goal difficult to accomplish.<sup>60</sup> The Cliff Manor PSH development in Oak Cliff highlights some of the challenges facing PSH providers, as well as the importance of fair housing laws in overcoming these challenges. Prior to the Cliff Manor development, neighborhood opposition contributed to the downfall of at least two other PSH developments.<sup>61</sup>

### **B. Background on Cliff Manor**

Cliff Manor is a rental property owned by the Dallas Housing Authority, which had been used since 1974 as housing, primarily for low-income tenants who are elderly or have disabilities. In 2009, Metro Dallas Homeless Alliance (the Homeless Alliance) approached DHA about opening 100 PSH units within Cliff Manor, mostly for homeless persons over age 50. The PSH housing was to include services for the residents, including counseling and treatment for those with mental illnesses or who struggle with addictions.

The partnership with DHA was especially appealing to the Homeless Alliance because it allowed the Alliance to obtain PSH units without going through the state's cumbersome tax credit application process for funding. Obtaining federal Low Income Housing Tax Credits for a PSH development can be extremely challenging for PSH developments, given the way the state's point system for awarding credits relies on neighborhood support. This policy had resulted in the blockage of several prior housing developments.

### **C. Neighborhood Opposition**

In May 2010, a reporter with the Dallas Morning News wrote an article on the PSH plan for Cliff Manor. The neighbors' adverse reactions following publication of the article were fairly typical. Neighbors quickly organized to oppose the plan at city hall and in the press.<sup>62</sup>

---

<sup>60</sup> Kim Horner, *Neighbors uniting to fight housing plan*, The Dallas Morning News, Jul. 14, 2010, at B01.

<sup>61</sup> Kim Horner and Roy Appleton, *Supportive housing on shaky ground*, The Dallas Morning News, Jun. 13, 2010, at A01.

<sup>62</sup> Telephone Interview with Charles Gulley, Housing Specialist, Metro Dallas Homeless Alliance (Nov. 22, 2010).

Neighborhood residents; their city councilman, David Neumann; and the Fort Worth Avenue Development Group all complained about the plan: that they had not been informed about the plan sooner, that the City of Dallas was not distributing PSH units equitably throughout the city, and that Oak Cliff in particular was getting more than its fair share of PSH units.<sup>63</sup> Some feared that the new PSH residents “could be a threat to public safety, children at nearby schools, property values and commercial redevelopment of the area.”<sup>64</sup> The Fort Worth Avenue Development Group argued that the City Council should require a specific-use permit for Cliff Manor, since it would be providing “medical and ‘social/psychological’” services to residents.<sup>65</sup> Since the building was already being used for affordable housing, supporters raised concerns that the objections were based largely on the types of residents who would be moving into Oak Cliff—homeless persons with mental illnesses and recovering from substance abuse.

#### **D. Leveraging the Fair Housing Amendments Act**

In response to the neighborhood objections, Michael Daniel, partner of Daniel & Beshara, P.C., sent a letter to the director of the Dallas Housing Authority threatening suit against any party who impeded the Cliff Manor PSH project from moving forward. Daniel asserted that the “neighborhood’s and elected officials’ opposition to these person’s tenancy at Cliff Manor is clearly and overtly based on the future tenants’ perceived status as having or having had a mental impairment.” Daniel cited the Fair Housing Amendments Act (FHAA), which “protects handicapped persons from housing discrimination.” He explained that the FHAA protection includes “homeless people or others who are recovering from substance abuse.”<sup>66</sup>

Citing the threat of a lawsuit, DHA moved forward with its partnership with the Homeless Alliance to provide PSH units at Cliff Manor. DHA also wanted to make a good faith effort to address the neighbors’ concerns about over-concentration, and so decided to reduce the number of proposed PSH residents from 100 to 50. DHA started

---

<sup>63</sup> Kim Horner, *Housing balance debated*, The Dallas Morning News, Jul. 31, 2010, at A01; Kim Horner and Roy Appleton, *Supportive housing on shaky ground*, The Dallas Morning News, Jun. 13, 2010, at A01.

<sup>64</sup> Kim Horner and Roy Appleton, *Supportive housing on shaky ground*, The Dallas Morning News, Jun. 13, 2010, at A01.

<sup>65</sup> Roy Appleton, *Group tries to stop apartments for homeless*, The Dallas Morning News, Jun. 3, 2010, at B04.

<sup>66</sup> Letter from Michael M. Daniel, Partner, Daniel & Beshara, P.C., to Mary Ann M. Russ, President and CEO, Housing Authority of the City of Dallas (June 23, 2010), available at <http://www.scribd.com/doc/33679824/Cliff-Manor-Letter>.

moving the first PSH residents into Cliff Manor in August 2010 and proceeded to slowly move residents in each month.<sup>67</sup>

## E. Lessons Learned

DHA's and the Homeless Alliance's experiences with the Cliff Manor development resulted in two key lessons for the agencies. First, in response to the misconceptions and misinformation about PSH residents, the agencies now see education and outreach as two of their most important tools. Since City Council members are especially well-suited to communicate with their constituents, the Homeless Alliance is working to educate the council members about the residents served by PSH.<sup>68</sup> The Homeless Alliance and DHA have also teamed up with area churches to educate the community about PSH. In particular, they have been working with the Greater Dallas Justice Revival, an organization that includes 1,000 area churches.<sup>69</sup>

In response to criticisms from neighbors that DHA and the Homeless Alliance excluded them from the planning process, the two agencies also plan to start working with neighborhood groups earlier in the planning process. As part of working with the neighborhood groups, DHA and the Homeless Alliance are writing "good neighbor agreements" that outline performance standards for the housing.<sup>70</sup> The Homeless Alliance also responded to criticisms that the PSH units are not equitably distributed throughout the city with a map showing the units spread across each council district.<sup>71</sup>

The second lesson is the importance of leveraging fair housing laws when appropriate. The neighborhood reactions to the Cliff Manor development were fairly typical of opposition to permanent supportive housing going into a neighborhood. The attorney's letter threatening a suit under the Fair Housing Act highlighted the legal risk to DHA and the city if the entities gave into the neighborhood opposition and opposed the project, and thus presented both entities with solid legal buffers in allowing the project to move forward.

---

<sup>67</sup> Telephone Interview with Charles Gulley, Housing Specialist, Metro Dallas Homeless Alliance (Nov. 22, 2010).

<sup>68</sup> Telephone Interview with Charles Gulley, Housing Specialist, Metro Dallas Homeless Alliance (Nov. 22, 2010).

<sup>69</sup> Kim Horner, *Struggling to win over neighbors*, The Dallas Morning News, Jul. 25, 2010, at B01.

<sup>70</sup> Kim Horner, *Struggling to win over neighbors*, The Dallas Morning News, Jul. 25, 2010, at B01.

<sup>71</sup> Kim Horner, *Housing balance debated*, The Dallas Morning News, Jul. 31, 2010, at A01.

## **APPENDIX B: AFFIRMATIVELY FURTHERING FAIR HOUSING: RECENT LEGAL DEVELOPMENTS**

Outcomes from two recent legal actions demonstrate that courts and HUD are turning a more critical eye to government obligations to affirmatively further fair housing and the contents of analyses of impediments to fair housing. HUD has made clear it intends to more aggressively pursue enforcement of these obligations. In the words of the deputy secretary of housing and urban development: “Until now, we tended to lay dormant. This is historic, because we are going to hold people’s feet to the fire.”<sup>72</sup> Governments who ignore these obligations do so at the risk of enormous expense. Risks include losing federal funding for housing and community development programs, having to reimburse the federal government for prior funding, and having to pay damages to the federal government of three times the amount of funding received.

### **A. Westchester County, New York**

In 2006, the Anti-Discrimination Center of Metro New York brought suit against Westchester County, New York, for violating the False Claims Act (FCA).<sup>73</sup> The False Claims Act is a federal law imposing liability for making knowingly false or fraudulent claims to the U.S. government when seeking payment from the federal treasury. A claim includes any contract or request for money. A claim is legally false under the FCA when a party certifies compliance with a regulation as a condition of governmental payment.

As a condition of receiving CDBG and other HUD funding, Westchester had certified with HUD that it would affirmatively further fair housing. The court ruled that the county had presented false claims to the federal government in violation of the False Claims Act because it had not complied with its certification to affirmatively further fair housing. The county had failed to engage in a proper analysis of impediments to fair housing and had failed to take appropriate actions to overcome the effects of the impediments. The key issue was the county’s failure to consider race-based impediments to fair housing choice in its analysis of impediments. Westchester County had also failed to consider community opposition to integration based on race and national origin as an impediment to fair housing choice.

Despite Westchester County’s knowledge of segregation and minority concentrations as identified in its consolidated plans, the county did not reference race or racial segregation in its Analysis of Impediments to Fair Housing (AI). Instead, the AI focused

---

<sup>72</sup> Sam Roberts, “Westchester Adds Housing to Desegregation Pact,” NY Times, Aug 10, 2009.

<sup>73</sup> 31 U.S.C. §3729, et seq.

on impediments to affordable housing as experienced by general low-income populations. HUD guidelines distinctly separate these categories, stating that undertaking action to develop housing for low-income groups is not sufficient in and of itself to affirmatively further fair housing. Only when steps are taken to assure that housing is available to people of all races, color, national origin, gender, handicap, or family status, is fair housing affirmatively furthered.

The parties eventually settled. The county was required to:<sup>74</sup>

- Return \$30 million to the federal government for the violations
  - \$21 million for development of desegregated housing opportunities
  - \$7.5 million to the Anti-Discrimination Center
- Earmark an additional \$30 million for affordable units in desegregated neighborhoods
- Pay \$2.5 million in attorney's fees
- Ensure the integrated development of 750 affordable housing units within 7 years.

#### **Legal Implications from Westchester Case**

- HUD funding is conditioned on governmental entities submitting a legally compliant Analysis of Impediments to Fair Housing (AI) and taking appropriate action to overcome impediments to fair housing.
- Governments who certify a non-compliant AI are in violation of the False Claims Act.
- If governments accept federal funds without affirmatively furthering fair housing, they risk having to pay extremely high fines and penalties.

## **B. State of Texas**

The second large development related to enforcement of affirmatively furthering fair housing laws comes out of a recent Texas legal action. In 2009, advocates in Texas brought a successful administrative action with HUD for the State of Texas's failure to affirmatively further fair housing in conjunction with federal disaster funding following hurricanes Ike and Dolly. Specifically, in December 2009, the Texas Low Income Housing

---

<sup>74</sup> Michael Allen and Reed Colfax, "Affirmatively Furthering Fair Housing: Overview of National Legal Developments, Power point presentation for Race, Place and Fair Housing conference at the University of Texas School of Law (Oct. 15, 2010), available at, [http://www.utexas.edu/law/centers/publicinterest/activities/fhdocs/Affirmatively\\_Furthering\\_Allen\\_Col\\_fax.pdf](http://www.utexas.edu/law/centers/publicinterest/activities/fhdocs/Affirmatively_Furthering_Allen_Col_fax.pdf); Sam Roberts, "Westchester Adds Housing to Desegregation Pact," NY Times, Aug. 10, 2009.

Information Services (“TxLIHIS”) filed an administrative complaint with HUD claiming that the state’s Amended Action Plan to utilize \$1.7 billion in disaster funding violated fair housing laws and that the State failed to affirmatively further housing.<sup>75</sup> Texas Appleseed joined the complaint in early 2010. The advocates also raised issues with the State’s method of allocating funds to local governments.<sup>76</sup>

HUD responded by withholding \$1.7 billion in CDBG funds from the State. In a letter to the State, HUD noted its concerns with the State’s analysis of impediments to fair housing, which was out of date and “likely” did not adequately address fair housing impediments.<sup>77</sup> The reaction by HUD led to lengthy negotiations between the State and the advocates, and eventually resulted in a conciliation agreement and release of the federal funds, with many additional conditions attached to the funds.

At the time of the advocate’s complaint in 2009, the State’s Analysis of Impediments to Fair Housing (AI) had not been updated since 2003. The advocates also informed HUD that the 2003 AI failed to address fair housing issues raised by recent conditions and events, including the foreclosure crisis and series of hurricanes that had destroyed a disproportionate number of homes of minorities, low-income persons, and persons with disabilities.

According to the advocates’ complaint, the existing State AI was also inadequate because it failed to analyze race as an impediment to fair housing and proposed no actions to overcome the impediments. Despite mandatory reports compiled by the Texas Department of Housing and Community Affairs (TDHCA) demonstrating segregation across the state, the State AI did not identify segregation as an impediment. The AI also failed to analyze the public policies within the state that limit fair housing choice. Similar to Westchester County, the State AI analyzed the lack of affordable housing as opposed to fair housing impediments, disregarding the required analysis of how to make housing less segregated as opposed to simply assuring more affordable housing is developed.

The advocates also reported to HUD that Texas had failed to ensure that its disaster funding sub-recipients would affirmatively further fair housing. The complaint stated that many of the communities had not dealt with persistent housing segregation, and

---

<sup>75</sup> “Fair Housing Complaint Against the State of Texas,” letter submitted by Texas Low Income Housing Information Service to the U.S. Dept. of HUD (Dec. 1, 2009).

<sup>76</sup> See the Texas Appleseed website for additional background about the administrative complaint and for copies of relevant documents from the case.

[http://www.texasappleseed.net/index.php?option=com\\_content&view=article&id=103:disaster-recovery-project-timeline&catid=19:disaster-recovery&Itemid=263](http://www.texasappleseed.net/index.php?option=com_content&view=article&id=103:disaster-recovery-project-timeline&catid=19:disaster-recovery&Itemid=263).

<sup>77</sup> Letter from Mercedes Márquez, Assistant Secretary for Community Planning and Development, U.S. Dept. of HUD, to Texas Governor Rick Perry, Nov. 10, 2009.

the State had not taken actions to help communities address housing segregation. Many of the sub-recipients did not have AIs or had AIs that were inadequate or outdated.

As part of the settlement, the State was required to complete an interim AI covering the disaster areas and that conformed to HUD requirements.<sup>78</sup> In 2011, the State is also required to produce a new State AI covering the rest of Texas and likewise conforming to HUD requirements. TDHCA and the Texas Department of Rural Affairs (TDRA) are required to actively monitor the expenditure of disaster funds covered by the settlement to ensure that they affirmatively further fair housing. The agencies agreed to impose progressive sanctions on sub-recipients not in compliance, including termination of funding.

#### **Legal Implications from Texas Case**

- HUD has a heightened interest in enforcement of AI requirements at both local and state levels.
- HUD may withhold funding if a local or state AI is outdated or in non-compliance.
- The State is also responsible for ensuring that sub-recipients affirmatively further fair housing and should withhold funding if they do not.

Under the settlement, TDHCA and TDRA also agreed to:

- provide mandatory fair housing training to recipients;
- collect and analyze data on how federal funds are spent to ensure compliance;
- increase transparency for reporting by posting relevant updates, documents, program applications and modes of distribution of funding on their website; and
- respond to public inquiries for information within 10 days.

---

<sup>78</sup> Conciliation Agreement between Texas Low Income Housing Information Service, Texas Appleseed and The State of Texas, May 25, 2010, available at <http://www.tdhca.state.tx.us/cdbg/ike-and-dolly/docs/ConciliationAgreement.pdf>.